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NOWHERE TO RUN, NOWHERE TO HIDE: AUGUSTO PINOCHET, UNIVERSAL JURISDICTION, THE ICC, AND A WAKE-UP CALL FOR FORMER HEADS OF STATE

"We have lived in a golden age of impunity, where a person stands a much better chance of being tried for taking a single life than for killing ten thousand or a million."¹

INTRODUCTION

Santiago, Chile, 1973. A bedraggled family of four is herded along with hundreds of others into the bleachers of the Chilean National Stadium at gunpoint. Huddled together, the family's false sense of security evaporates as hair-raising screams and blood-curdling yells pierce the night. These sounds do not emanate from the bleachers—the soccer balls having long since been abandoned—rather, they echo through the lower levels of the stadium, near the bathrooms and ticket booths.² Suddenly, each family member is jerked upright and prodded along the descending ramps toward an unimaginable hell. As they reach the lower level, the parents are quickly bound and thrust beneath a metal table known as the "grill."³ Their children are laid naked on the table while their extremities are tied to each end. Electric shocks are administered, and the parents are forced to gaze upward helplessly as their children writhe in agony.⁴ A short burst of gunfire rings out as another detainee fails to cooperate with the guards. Having survived this round of torture, the parents carry their little ones out of lower levels, out of the smell of burning flesh,

¹ Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int'l Operations of the Comm. on Foreign Relations, 105th Cong. 72, 72 (1998) [hereinafter Scharf Testimony] (testimony of Michael P. Scharf, Professor, New England School of Law) (arguing in favor of an international criminal court).

² See Pamela Constable, *Pinochet's Arrest Rouses Bitter Tensions Among D.C. Area Chileans*, WASH. POST, Dec. 23, 1998, at A11.

³ T.R. Reid, *Pinochet's Lawyers Ask Court to Reconsider Immunity Ruling*, WASH. POST, Dec. 11, 1998, at A50.

⁴ See *id.*

out of the rooms lined with bodies, and out of the blood-stained hallways, thankful that for now, they will not be added to the growing lists of the disappeared.

The above account is an all too familiar narrative for many Chileans and other countries' nationals swept up in Chile's 1973 coup d'état. While fictional as a whole, it is a compilation of numerous true stories, and is representative of the varying atrocities that were committed with the approval of the insurgent Augusto Pinochet against left-leaning and Marxist supporters of Salvador Allende's overthrown government.⁵ Although a haunting reminder for those survivors and relatives of the unfortunate, this account of large-scale repression, torture, persecution, disappearances, and murder at the hands of a despotic head of state represents to the world a frequent violation of international human rights law and the repeated commission of punishable crimes against humanity. In *Death by Government*, Professor Rudi Rummel documents such abuses throughout the past century and delivers a staggering estimate that nearly 170 million civilians have been subjected to genocide, war crimes, and crimes against humanity during this period.⁶ Yet, in nearly every case, the dictator, head of state, president, or military ruler responsible for the infliction of these atrocities has escaped censure, punishment, or justice.

These despots' concerns about being held accountable for their actions are typified by Adolf Hitler's response when queried about possible punishment for his acts of genocide and war crimes: "Who after all is today speaking about the destruction of the Armenians."⁷ Yet, although the world community expressed outrage over the genocidal extermination of nearly six million Jews and pledged that such crimes would "never again" occur, this pledge soon became "again and again" following the Great War.⁸ Within the last fifty years, 30,000 have disappeared in Argentina's Dirty War, two million were slaughtered in Cambodia, 750,000 were massacred in Uganda, 200,000 were killed in East Timor, 100,000 Kurds were gassed in Iraq, and 75,000 civilians were butchered in El Salvador.⁹ Despite these appalling numbers, many of the now former despots responsible

⁵ For additional accounts, see *Full Charges Against Pinochet Laid Out for First Time*, AGENCE FRANCE PRESSE, Jan. 19, 1999, available in LEXIS, News Library, Agence France Presse File; Joyce Wadler, *Years After Torture, a Cry Against Pinochet*, N.Y. TIMES, Feb. 3, 1999, at B2.

⁶ See Scharf Testimony, *supra* note 1, at 72.

⁷ *Id.* Hitler was referring to the amnesty granted to Turkish leaders following World War I for the systematic murder of one million Armenians.

⁸ *Id.*

⁹ See *id.*

for the crimes currently live comfortably around the world, free from their countries' own laws, and free from justice. For instance, Haiti's "Baby Doc" Duvalier currently bounces between homes of France's Haitian community in the Riviera; Paraguay's Alfredo Stroessner keeps a mansion outside of Brasilia, Brazil; and Uganda's Idi Amin can be seen venturing to markets in Jeddah, Saudi Arabia.¹⁰ Other despots, however, have retained their power and continue to commit crimes against humanity: Slobodan Milosevic, known for leading Serbian forces in the massacre of tens of thousands of Muslims, recently committed further human rights abuses in Kosovo, and Saddam Hussein continues to rule Iraq with an iron fist.¹¹ Whether it is a result of these leaders' self-proclaimed amnesties, proclamations of their continuing immunities as current or former heads of state, or a general apathy and unwillingness to spend the time and effort in pursuing these despots around the globe, the world community's failure to bring such former despots to justice has indirectly encouraged the likes of Radovan Karadzic and Radko Mladic to continue their egregious actions. Thus, as the new millennium this next generation of Pol Pots, Kim Jong IIs, and Mengistu Haile Mariams continue to commit unbridled acts of crimes against humanity.¹²

Notwithstanding the world's failure to bring such leaders to justice and the continuing commission of large scale crimes against humanity in the last fifty years, an indication that international human rights law is heading in the right direction is the increasing acceptance of the universality principle as a means of transcending national borders and gaining jurisdiction over those responsible for administering or supervising crimes against humanity. Although this principle first emerged in the 1945 Nuremberg Charter, the veil of states' sovereignty, political considerations, a "passively enforced extradition process," and the Cold War all contributed to the world community's reluctance to concertedly condemn these atrocities and resulted in "sporadic attempts to develop and adjudicate international criminal law" as each crisis presented itself.¹³ Following the Cold War, however, the frequency with which "regional and ethnic wars" appeared mandated some semblance of justice, and "nations freed from binary superpower conflict have been impelled to organize themselves in

¹⁰ See Daniela Deane, *Former Dictators May Find Exile Not Quite As Safe*, USA TODAY, Oct. 28, 1998, at 14A.

¹¹ See *id.*

¹² See Scharf Testimony, *supra* note 1, at 72.

¹³ Bradley E. Berg, *The 1994 I.L.C. Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure*, 28 CASE W. RES. J. INT'L L. 221, 230 (1996). For a discussion of the universality principle in full, see *infra* Part II.

new ways to act in concert.”¹⁴ Yet, despite the globalization of the world, in which nations currently assist each other in “such matters as drug trafficking, money laundering and tax evasion,” individual countries have rarely acted on their words or legislation calling for the punishment of grave crimes against humanity, and the architects of these crimes continue to roam the globe today.¹⁵

The reasons for countries’ inaction, apathy, or acquiescence in allowing despots a safe haven vary. Some, like Brazil, choose to leave the “ghosts of authoritarianism” undisturbed.¹⁶ Others, like Argentina, take a middle ground by exposing the atrocities of its leaders, but pardoning a great majority of them.¹⁷ Still others question “going to the trouble of hauling doddering old war criminals and architects of genocide before prosecutors.”¹⁸ Many of these countries feel that the attempted prosecution of a Saddam Hussein-type ruler would be viewed “as a mockery of civilized international relations” since no verdict could ever purport to bestow justice for the most egregious of crimes.¹⁹ The end result is either that extra-judicial means of punishment, such as assassination, occur or the crimes are left unpunished. Finally, a number of countries trade amnesty for the despot’s resignation and abdication of his position, a remedy that allows a peaceable transfer of power.²⁰

On October 16, 1998, however, Spain shocked the international community by requesting the arrest and eventual extradition of the former Chilean head of state, Augusto Pinochet, from Britain, where he was recovering from back surgery. Based initially on claims that Pinochet’s regime had murdered Spanish citizens in Chile during his brutal seventeen-year rule, the arrest warrant and extradition claim quickly shifted to center on the universality of the crimes of torture, terrorism, and murder.²¹ In making this claim, Spain exhibited a precedential willingness to bring a notorious human rights violator to justice “regardless of national jurisdictions or the passage of time.”²²

¹⁴ Charles Trueheart, *Pinochet Case Signifies Cries for Retribution: Arrest Could Make It Easier to Bring Other Tyrants to Justice*, WASH. POST, Oct. 25, 1998, at A21.

¹⁵ *Id.*

¹⁶ Anthony Faiola, *Pinochet Case Opens Closet of a Continent*, WASH. POST, Oct. 23, 1998, at A20.

¹⁷ *See id.*

¹⁸ Trueheart, *supra* note 14, at A21.

¹⁹ Louis René Beres, *Why and How Saddam Must Be Punished: A Jurisprudential/Philosophic Explanation*, 75 U. DET. MERCY L. REV. 667, 676 (1998) (arguing that the United States’ responsibility to ensure punishment of Saddam Hussein derives from both international and natural law principles).

²⁰ *See* Faiola, *supra* note 16, at A20.

²¹ *See* Alan Cowell, *Spain Widens Charges for Pinochet; He Signals He’ll Fight Extradition*, N.Y. TIMES, Oct. 20, 1998, at A14.

²² Trueheart, *supra* note 14, at A21.

The principle of universality, first promulgated at Nuremberg, reached its high water mark as Pinochet was wheeled into the Belmarsh magistrates court, Britain's "designated venue for terrorists and high-security criminals" following a House of Lords decision denying him immunity and ruling that the extradition process could proceed.²³ Despite this achievement, many issues remain unresolved.

This Note seeks to use the matter pending against Augusto Pinochet as a case study to determine whether there is an emerging obligation in international law to investigate and impart justice on those former heads of state guilty of committing war crimes, genocide, and crimes against humanity in light of the growing acceptance of universal jurisdiction. Part I examines Pinochet's rule, chronicling the human rights abuses and amnesty his regime was granted prior to the transfer of power in 1990. Part II details the rise of universal jurisdiction through various international conventions and resolutions as well as individual countries' implementation of such legislation. Part III assesses Britain's House of Lords' ruling that Pinochet, as a former head of state, enjoyed no immunity from arrest for several of his crimes and for subsequent extradition from Britain. Special attention will be paid to the relevant British laws and recent case law suggesting that crimes against humanity can no longer be considered normal functions of a head of state. Part IV discusses the impact of and assesses the role that the recently created International Criminal Court will have on future prosecutions of despots, as well as what effect it might have had on the Pinochet case. Finally, this Note concludes that there is an emerging norm to investigate and impart justice on those authoritarians who commit such acts as genocide and crimes against humanity, but that this norm can only be maintained by a consistent policy reflecting the world's desire to punish the wrongdoers, bring justice to the victims and their families, deter future violators, and spread a pedagogical message concerning the rules of moral conduct.

I. PINOCHET'S LICENSE TO KILL

On September 11, 1973, Augusto Pinochet and the Chilean military wrested power from the socialist government of Salvador Allende in a bloody coup, the ramifications of which would be felt during the next seventeen years of his brutal tenure.²⁴ The first five

²³ David Graves & Neil Tweedie, *The Day the General Went to Court*, DAILY TELEGRAPH, Dec. 12, 1998, at 4.

²⁴ See Derechos Human Rights Report, *The Criminal Procedures Against Chilean and Argentinean Repressors in Spain*, (visited Nov. 7, 1998) <<http://www.derechos.net/marga/papers/spain.html>> [hereinafter Derechos Report].

years of his rule proved to be the harshest years of repression as Pinochet sought to strengthen his regime by weeding out all left-leaning or socialist supporters of the deposed and soon-murdered Allende.²⁵ During this period, hundreds of Pinochet's political opponents were arrested and tortured at the hands of the Chilean National Intelligence Directorate (DINA), and between three and four thousand were executed or simply disappeared.²⁶ Many of the arrests and executions were the result of the implementation of "Operation Condor," a series of mutual aid agreements between the intelligence services of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay designed to facilitate the "elimination of communism."²⁷ Funded in part by the U.S. Central Intelligence Agency, with whom Pinochet's top military adviser, Manuel Contreras, kept close contact, the agreement allowed intelligence agents of countries that were party to the agreement access to other party countries to "eliminate opposition politicians, subversives and suspected subversives."²⁸ Through this collaboration, hundreds of Pinochet's political opponents who had fled the country when he ascended to power were arrested and returned to Chile where they either disappeared or were executed.²⁹

As the number of human rights violations slowed to a trickle in 1978, Pinochet sought to secure immunity for both himself and the military officials that had carried out the crimes against humanity at his direction by issuing a general amnesty decree, called the Amnesty Law of 1978.³⁰ Taking effect on March 10, 1978, the decree immunized his regime for any and all crimes it had committed between September 11, 1973 and March 10, 1978.³¹ In 1990, Pinochet stepped down as head of Chile, but in exchange for the peaceful abdication of power and the chance to hold democratic elections, he requested and received a new Constitution granting him a Senator-for-Life status under which he is immune from prosecution.³² Following Chile's return to civilian law in 1990, President Aylwin established the Commission for Truth and Reconciliation in response to the hundreds

²⁵ See *id.*

²⁶ See *id.* (discussing the arrests and torture by the DINA); Alexander MacLeod, *What's Next for Chile's Pinochet*, CHRISTIAN SCI. MONITOR, Nov. 27, 1998, at 6 (noting that Judge Garzon's request for Pinochet's extradition implicated him in 3,178 murders or disappearances).

²⁷ Derechos Report, *supra* note 24.

²⁸ *Id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ See Amnesty Int'l Report, *CHILE: Transition at the Crossroads; Human Rights Violations Under Pinochet Rule Remain the Crux* (last modified March, 1996) <<http://www.amnesty.it/ailib/aipub/1996/AMR/22200196.html>> [hereinafter Amnesty Int'l Report].

³² See Derechos Report, *supra* note 24.

of lawsuits filed against Pinochet by relatives of those who disappeared or who were tortured or executed during his rule.³³ Despite the publishing of the staggering figures of the nearly four thousand deaths and executions that occurred, the majority dating to the initial five years of Pinochet's tenure, the Chilean Supreme Court continued the process it began in 1979 of closing lawsuits against the former head of state due to the Amnesty Law.³⁴

Amnesty International has led the charge to halt the arbitrary closing of cases based on human rights violations that occurred during the amnesty period, arguing that such amnesty laws run contrary to international human rights standards.³⁵ In particular, Amnesty International points to article 13 of the United Nations Declaration on the Protection of All Persons From Enforced Disappearance, which mandates that "[a]n investigation . . . should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified."³⁶ Despite these ongoing arguments, the Chilean Supreme Court began expediting its case closings in 1995.³⁷

Amidst the closings, however, one glimmer of hope has emerged for cases arising during the amnesty period. On May 23, 1995, the II Chamber of the Chilean Supreme Court rejected the state's argument for the application of the 1978 Amnesty Law in the case of Carmelo Soria, a dual Chilean-Spanish national working for the U.N., whose mutilated body was found in a roadside canal in 1976.³⁸ In that case, lawyers for Soria's family successfully argued that the Vienna Convention on Crimes Committed Against International Civil Servants and other Diplomatic Officials, which mandated that states punish those persons guilty of crimes against such individuals, took precedence over the Amnesty Law because it had been ratified by Chile in 1977 prior to the 1978 Amnesty Law.³⁹ However, subsequent attempts in other cases to invoke similar conventions such as the Geneva Convention of 1949 or the Universal Declaration of Human Rights have been largely unsuccessful.⁴⁰

Finally, although cases involving crimes against humanity committed after 1978 are not barred by the law, these prosecutions have made little or no progress as well.⁴¹ In fact, Amnesty International

³³ See Amnesty Int'l Report, *supra* note 31.

³⁴ See *id.*

³⁵ See *id.*

³⁶ *Id.*

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.*

has discovered that a few of the lawyers or judges who have enjoyed mild success at the lower levels of the judiciary have been suddenly "reallocated to other duties" by the government soon after victory.⁴² At present, the Chilean Foreign Minister Jose Miguel Insulza has indicated that only fourteen cases alleging human rights abuses against Pinochet "are in the hands of prosecutors."⁴³

II. THE BIRTH AND MATURATION OF THE UNIVERSALITY PRINCIPLE

Scholars and international law jurists alike claim that the principle of universality was born out of the Nuremberg Charter of 1945. Its drafters, however, insisted they were not making law, but instead were merely codifying a principle that had permeated history since the days of piracy on the high seas when these bandits were considered "hostis humanis generis," or enemies of mankind.⁴⁴ Universality has since generally been accepted to encompass crimes so heinous in nature that they constitute a mutual threat to all states; thus, the offender may be prosecuted by any state under that state's national laws.⁴⁵ At Nuremberg, lead prosecutor Justice Robert H. Jackson was guided by the belief that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁴⁶ As such, the Nuremberg Charter was drafted to allow the piercing of states' sovereignty in order to hold individuals accountable, regardless of their position as heads of state or government officials, for "crimes against peace (aggressive war), crimes against the laws of war (war crimes), and crimes against humanity (murder and injury to civilians for racial, religious, or political

⁴² *Id.*

⁴³ Warren Hoge, *Chilean Official Says His Country Will Pursue Justice Against Pinochet*, N.Y. TIMES, Nov. 30, 1998, at A10.

⁴⁴ Hari M. Osofsky, Note, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L.J. 191, 194 (1997) (detailing the evolution of the universality principle).

⁴⁵ Universality is one of five recognized principles of attaining jurisdiction, the other four being: territorial, nationality, passive personality, and protective. Under the territorial principle, jurisdiction is determined with respect to the location of the crime, and a state is entitled to punish crimes that occur in its own territory. Under the nationality principle, states prescribe laws that bind their nationals regardless of the location of the crime or the national. Under the protective principle, jurisdiction is exercised over those acts that occur outside a state's territory but that threaten that state's security. Under the passive personality principle, jurisdiction is granted to a state over crimes committed against its own nationals regardless of their location or that of the crime. See Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 MICH. J. INT'L L. 222, 235-36 nn.79-82 (1993) (citations omitted).

⁴⁶ Berg, *supra* note 13, at 232 (citation omitted).

reasons).”⁴⁷ As one Nuremberg prosecutor has noted, “[Nuremberg] was a revolutionary break with the shackles of the past, and it grew out of the conviction that there was a better way.”⁴⁸

A. *The Evolution*

In the years immediately following Nuremberg, the Charter served as a launching pad for several more attempts to codify international humanitarian law while at the same time pierce states’ sovereignty.⁴⁹ Most notable were the European Convention on Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention of 1948), and the Universal Declaration of Human Rights (1948).⁵⁰ Through these conventions, the international community mandated that it would no longer turn a blind eye to the atrocities that were being committed worldwide. Rather, it would hold anyone, including heads of state, internationally responsible for the crimes he committed in his own territory against his own nationals. In particular, the Convention on the Prevention and Punishment of the Crime of Genocide helped cement the concept of universal jurisdiction, as it called for international condemnation of war crimes, crimes against humanity, and aggressive war, but also added the crime of genocide to the list of universally punishable atrocities.⁵¹ Article IV of that Convention clearly mandated that even “constitutionally responsible rulers” or public officials were subject to punishment.⁵² The Convention also delineated two possible places in which to try defendants: an international tribunal or the country in which the human rights abuses took place.⁵³

Although the world community’s involvement in the Cold War slowed the pace with which the principle of universality was implemented in the language of other international conventions, several important steps were taken toward increasing the roles that national courts would play in prosecuting human rights abuses.⁵⁴ In 1956, the Convention on the Abolition of Slavery, the Slave Trade, and Institu-

⁴⁷ Henry T. King, Jr., *The Meaning of Nuremberg*, Remarks at the McLean Lecture at the University of Pittsburgh Law School, in 30 CASE W. RES. J. INT’L L. 143, 144 (1998).

⁴⁸ *Id.* at 148.

⁴⁹ *See id.* at 144.

⁵⁰ *See id.*

⁵¹ *See* Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), Dec. 9, 1948, 78 U.N.T.S. 277, 281-83.

⁵² *Id.* at 282.

⁵³ *See* Osofsky, *supra* note 44, at 195.

⁵⁴ *See id.* at 196 (stating that the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery and the International Convention on the Suppression and Punishment of the Crime of Apartheid were important steps in increasing the role that national courts would play in policing human rights abuses).

tions and Practices Similar to Slavery⁵⁵ mandated the "national criminalization of the slave trade . . . and international cooperation regarding the commission and prosecution of the slave trade."⁵⁶ While no article of the Convention explicitly mandates that violators may be punished in an unrelated third nation, there is a strong presumption that national courts are the appropriate forums for such prosecutions as no mention is made of the need for international tribunals in such matters.⁵⁷ Following a similar convention in 1973, the International Convention on the Suppression and Punishment of the Crime of Apartheid,⁵⁸ signatories were obligated to implement national legislation criminalizing apartheid.⁵⁹ Articles IV and V of that convention indicate that any state possessing in personam jurisdiction of the accused may subject him to its own national jurisdiction.⁶⁰ While the phrase "universal jurisdiction" itself is not explicitly mentioned as the basis for this jurisdiction, logic presumes it is the only one of the five traditional principles of obtaining jurisdiction that would suffice in such a situation.⁶¹

The proliferation of worldwide terrorist activities during the 1960s and 1970s prompted the international community to extend the gambit of universality to cover these crimes as it became apparent that only by giving national courts jurisdiction over any person accused of terrorism could the fight against it be successfully waged. The first of the notable measures, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft,⁶² while providing both protective and territorial jurisdiction, also sounded a call for universality by mandating that no "criminal jurisdiction exercised in accordance with national law" is excluded.⁶³ In short, this provision affords those countries whose national legislation creates universal jurisdiction over terrorist acts the right to prosecute these offenders alongside those countries claiming territorial or protective jurisdiction.⁶⁴ Identical provisions were also drafted in the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage)⁶⁵ and the 1963 Tokyo Convention on offenses and certain

⁵⁵ Sept. 4, 1956, 266 U.N.T.S. 3.

⁵⁶ Osofsky, *supra* note 44, at 196.

⁵⁷ *See id.*

⁵⁸ Adopted Nov. 30, 1973, 1015 U.N.T.S. 244.

⁵⁹ *See* Osofsky, *supra* note 44, at 196.

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² Opened for signature Dec. 16, 1970, 10 I.L.M. 133.

⁶³ *Id.* at 134.

⁶⁴ *See* Osofsky, *supra* note 44, at 197.

⁶⁵ Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177.

other acts committed on board aircraft.⁶⁶ In 1977, the member states of the Council of Europe signed the Convention on the Suppression of Terrorism, article 6 of which provides universal jurisdiction by mandating that the Convention does not exclude any form of jurisdiction "exercised in accordance with national law" and by requiring each signatory to "take such measures as may be necessary to establish its jurisdiction . . . in the case where the suspected offender is present in its territory and it does not extradite him."⁶⁷ Terrorism was drawn further under the wing of universality in 1979 with the International Convention against the Taking of Hostages, which drew on the principles adopted by the States of the Council of Europe two years earlier.⁶⁸ Aside from providing territorial, nationality, protective, and passive personality jurisdictions, signatories to this convention are also bound to either prosecute alleged offenders or extradite them when found in their territory.⁶⁹

The scope of national courts' jurisdiction over heinous crimes was again expanded in 1984 as the international community sought to curb the use of torture as a means of wreaking havoc upon the civilian population. The means implemented was the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁷⁰ Signatories to this Convention look to article 5, which establishes jurisdiction:

(a) When the offences are committed in any territory under its jurisdiction . . . ; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate. 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.⁷¹

These all-inclusive jurisdictional requirements, as well as those involving the suppression of terrorism, provide an excellent indication of the power the international community has given to national courts

⁶⁶ Done Sept 14, 1963, 704 U.N.T.S. 219 (entered into force Dec. 4, 1969).

⁶⁷ Council of Europe, *Explanatory Report on the European Convention on the Suppression of Terrorism*, art. 6 (Jan. 27, 1977).

⁶⁸ Adopted Dec. 17, 1979, 18 I.L.M. 1456.

⁶⁹ See *id.* at 1458; see also Osofsky, *supra* note 44, at 197.

⁷⁰ G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, U.N. Doc. E/CN.4/1984/72 (1984).

⁷¹ *Id.* at art. 5.

to try the most egregious of crimes against humanity committed by the most notorious of individuals.

The most recent implementations of universality can be viewed in creations of ad hoc international tribunals designed to punish those associated with humanitarian violations in the former Yugoslavia and Rwanda. United Nations Security Council Resolutions 808 in 1993 and 955 in 1994 created the International Criminal Tribunals for the former Yugoslavia and Rwanda, respectively.⁷² These Resolutions not only gave the tribunals jurisdiction over the crimes of genocide, crimes against humanity, and expanded war crimes definitions, but also mandated that all U.N. signatories were obligated to cooperate with the requests and directives of the tribunals—no doubt a symbol of the universal movement against complacency and impunity when basic human rights are violated.⁷³ In one of the more celebrated cases before the Yugoslavia tribunal, *Prosecutor v. Tadić*,⁷⁴ the court went on record as saying:

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.⁷⁵

In further commentary, the court went to write:

[T]hat the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State.⁷⁶

⁷² See Henry T. King, *Nuremberg to Rome: A Critical Review of the Recent U.N. Treaty Negotiations at Rome in Light of the Vision of Justice Robert H. Jackson*, Address at Case Western Reserve University School of Law (Nov. 1998) [hereinafter *Nuremberg to Rome*] (outline on file with the Case Western Reserve Law Review). The creation of tribunals to try human rights abuses in these states has led many to question why they were not created in countries such as Somalia, Chechnya, Cambodia, or in the Persian Gulf. Unfortunately, the answer lies not in a disparity of the atrocities, but rather in the meeting room of the United Nations Security Council, where politics and the veto often reign over humanity. See Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 386 (1998).

⁷³ See Brown, *supra* note 72, at 395-96.

⁷⁴ 35 I.L.M. 32 (Int'l Crim. Trib. for the former Yugoslavia 1995).

⁷⁵ *Id.* at 52.

⁷⁶ *Id.*

Yet, by far the most monumental achievement of those seeking to bring the notorious malefactors of human rights to justice is the creation of the International Criminal Court (ICC) this past July. Based upon the principles which guided the drafters at Nuremberg, article 5 mandates that the ICC's jurisdiction is limited "to the most serious crimes of concern to the international community as a whole," specifically, genocide, war crimes, crimes against humanity, and crimes of aggression (once a more suitable definition is agreed upon by the ICC signatories).⁷⁷ Not surprisingly, one of the ICC's least controversial principles during the negotiations is its inclusion of article 27 which provides accountability for all persons, including heads of state, for their crimes.⁷⁸ While the ICC is still hindered by some limitations, which will later be discussed, its passage signifies the continued belief that the veil of states' sovereignty has been pierced and universality is here to stay.

In addition to the conventions and United Nations declarations and resolutions that have codified this principle, universality has also acquired credibility in the realm of the international customary law of human rights. Customary law has been generally recognized as reflecting how worldwide general "practices long accepted as obligatory acquire the status of rules of law."⁷⁹ The appeal of this doctrine for human rights advocates is that it allows judges and jurists to infer these principles from an "'international consensus,' independent of any official acts of governments."⁸⁰ While customary law used to play a larger role in the rudimentary legal systems, it currently tends to reflect the developing beliefs or aspirations in societies around the world as viewed through the works of conventions, declarations, proclamations, and the works of scholars and jurists. Today, many scholars refer to this process as "instant customary law" as human rights activists and world leaders seek to make an end run on the cumbersome process of attending, negotiating, signing and ratifying treaties and conventions.⁸¹ Whether this customary law can emerge as a serious obstacle for Pinochet supporters remains to be seen.

⁷⁷ See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Statute of the International Criminal Court)* at art. 5 (visited Sept. 17, 1999) <<http://www.un.org/law/icc/statute/rome.htm>> [hereinafter *Rome Statute*].

⁷⁸ See *id.* at art. 27.

⁷⁹ Jeremy Rabkin, *First They Came for Pinochet*, WKLY. STANDARD, Nov. 23, 1998, at 26.

⁸⁰ *Id.* at 27.

⁸¹ *Id.* at 26.

B. United States and Universality: Lagging Behind

While the world community has steadily progressed in its acceptance of universal jurisdiction, the United States' reluctance to relinquish its own sovereignty and its subsequent failure to ratify many human rights treaties has allowed the world's policeman and supposed moral pedagogical leader to be bypassed in the movement to implement universal jurisdiction. Despite this overall apathy, there are noted exceptions both in statutory and caselaw.⁸² Although universal jurisdiction existed on U.S. law books as early as 1819 for piracy, the first true codification of the principle came in 1974 with the Antihijacking Act,⁸³ passed pursuant to its obligations under the Convention for the Suppression of Unlawful Seizure of Aircraft.⁸⁴ The Antihijacking Act helped break the shackles of territoriality that had until this time governed U.S. criminal jurisdiction, as prosecutions could now go forward regardless of the nationality of the offender or the locale of incident.⁸⁵ In 1984, the U.S. fulfilled its obligations under the International Convention Against the Taking of Hostages by passing the Taking of Hostages Act.⁸⁶ The most important clause of this act for the purposes of universality read that the U.S. could exercise jurisdiction if "the offender is found in the United States."⁸⁷ While "universality" as a term of art is not used, the act's wording clearly allows prosecution notwithstanding the fact that there are no territorial or nationality ties to the offender.⁸⁸ One of the few cases to apply the universality principle to international actions was *United States v. Yunis*,⁸⁹ wherein the court ruled that the Acts in question provided enough jurisdiction over the offender in spite of the fact that he was forcibly brought within U.S. territory.⁹⁰

The United States' next milestone, and a long awaited one, came in 1988 when it finally ratified the Geneva Convention. Though heralded by human rights activists, the ratification was so heavily laden

⁸² See Osofsky, *supra* note 44, at 198-293 (detailing Congress' limited codification of universal jurisdiction and the federal courts' treatment of international law).

⁸³ Antihijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409 (1974).

⁸⁴ *Opened for signature* Dec. 16, 1970, 10 I.L.M. 133; see also Osofsky, *supra* note 44, at 199 (explaining that "[t]he Antihijacking Act [was] passed to implement U.S. obligations under the Convention for the Suppression of Unlawful seizure of Aircraft").

⁸⁵ See Osofsky, *supra* note 44, at 199.

⁸⁶ Act for the Prevention and Punishment of the Crime of Hostage-Taking (Hostage Taking Act), Pub. L. No. 98-473, 98 Stat. 2186 (1984).

⁸⁷ Osofsky, *supra* note 44, at 200 (quoting the Hostage Taking Act § 1203, 98 Stat. at 2186).

⁸⁸ See *id.* at 200.

⁸⁹ 924 F.2d 1086 (D.C. Cir. 1991).

⁹⁰ See *id.* at 1090 (holding that the Hostage Takings Act provided the basis for exercising U.S. jurisdiction over the defendant, accused of hijacking a Royal Jordanian Airlines flight).

with restrictions that its punch was effectively nullified.⁹¹ Of more significance was the 1994 modification of the U.S. criminal code "to provide that any U.S. national or person physically located within the United States could be held criminally liable for torture he or she commits anywhere against anyone."⁹² Adhering to its obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, this change increased the United States' reliance on universal jurisdiction and complemented existing legislation designed to protect the rights of its citizens in civil suits, such as the Alien Tort Claims Act (ATCA)⁹³ and the Torture Victim Protection Act of 1991⁹⁴ (TVPA).⁹⁵ An additional statute passed in 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA),⁹⁶ is not quite universal in nature, yet its criminalization of "conduct outside of the United States that created harm or risk of harm to people and property in the United States," further evidences the break from strictly territorial criminal jurisdiction.⁹⁷

Unfortunately, acts such as the ATCA, TVPA, AEDPA, and the Foreign Sovereign Immunities Act provide U.S. courts with jurisdiction only over civil actions by aliens for torts "committed in violation of the law of nations or a treaty of the United States."⁹⁸ In this vein, U.S. courts have provided civil remedies for those torts committed in violation of customary international human rights laws abroad.⁹⁹ These cases have included causes of action for torture, genocide, war crimes, disappearances, executions, prolonged arbitrary detention, and cruel, inhuman, or degrading treatment.¹⁰⁰ As one author points out, "[s]ince the torts being adjudicated often have no connection to the American forum, the only applicable jurisdictional base is universal."¹⁰¹ Despite these advancements in the civil arena, criminal jurisdiction outside the U.S. remains limited to the few aforementioned

⁹¹ See Monica L. McHam, *All's Well That Ends Well: A Pragmatic Look at International Criminal Extradition*, 20 HOUS. J. INT'L L. 419, 429 (1998).

⁹² Osofsky, *supra* note 44, at 191 (citing Foreign Relations Authorization Act, Pub. L. No. 103-236 § 506(a), 18 U.S.C. § 2340 (Supp. III 1997)).

⁹³ 28 U.S.C. § 1350 (Supp. III 1997).

⁹⁴ Pub. L. No. 102-256, 106 Stat. 73 (1992).

⁹⁵ See Osofsky, *supra* note 44, at 209-11 (detailing the U.S. national civil regime for addressing severe human rights violations).

⁹⁶ 28 U.S.C. § 1605 (Supp. III 1997).

⁹⁷ *Id.* at 200.

⁹⁸ *Id.* at 210 (quoting 28 U.S.C.A. § 1350 (West 1994)).

⁹⁹ See *id.* at 210.

¹⁰⁰ See *id.*; see also *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995); *Siderman de Blake v. Argentina*, 965 F.2d 699, 716 (9th Cir. 1992); *Xuncax v. Gramajo*, 886 F. Supp. 162, 177 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987). Each of these courts found that government-sponsored torture violated the international law of nations.

¹⁰¹ Osofsky, *supra* note 44, at 210.

ratified treaties and conventions.¹⁰² Although the Restatement (Third) of the Foreign Relations Law of the U.S. explicitly recognizes universal jurisdiction for such crimes as hijacking, genocide, war crimes, and certain acts of terrorism, and maintains that this category is an ever-expanding one, the U.S. fears that in order to pierce other states' sovereignties it will have to give up some of its own. It is thus reluctant to fully embrace universality in criminal jurisdiction.¹⁰³

C. European States and Universality: Britain, Spain, and France

In Europe, the concept of universality appears to be on stronger footing with respect to criminal jurisdiction than it is in the United States. Britain's Criminal Justice Act of 1988,¹⁰⁴ for instance, allows the prosecution of a public official or private figure for torture, regardless of his nationality and without regard to the location of the offense.¹⁰⁵ Enacted to fulfill Britain's obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, its language is central in the Pinochet case. Lawyers in that case do not question the universal nature of the act, but rather whether the phrase "public official" ought to be interpreted to include heads of state or former heads of state. French caselaw has also adopted universality for criminal offenses, as the courts explicitly endorsed it in the extradition of Klaus Barbie.¹⁰⁶ Israel also made use of the principle in the extradition of Adolf Eichmann.¹⁰⁷ Spain, too, has passed the necessary legislation and signed the relevant treaties granting its courts jurisdiction to try the most heinous of crimes even when they occur outside its borders and when Spain has no nationality ties to the offenders or the victims.¹⁰⁸ The Organic Law of Judicial Power (OLJP), passed in 1985, is one such law granting Spanish courts jurisdiction over crimes committed by its nationals or aliens outside its territory including genocide, terrorism, and torture, as well as any other crimes that Spain has jurisdiction over due to international treaties or conventions.¹⁰⁹ Aside from ratifying the Genocide Convention in 1968, Spain also ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1987 and

¹⁰² See *id.* at 211.

¹⁰³ See *id.* at 215-19.

¹⁰⁴ ch. 33 (Eng.).

¹⁰⁵ See Osofsky, *supra* note 44, at 216.

¹⁰⁶ See *The Pinochet Case: Bringing the General to Justice*, ECONOMIST, Nov. 28, 1998, at 24.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See Derechos Report, *supra* note 24.

International Convention on Civil and Political Rights (also prohibiting torture), and has incorporated these treaties into its Penal Code.¹¹⁰

D. Universal Jurisdiction is Here to Stay

The Court in *Prosecutor v. Tadić*¹¹¹ summed up the movement toward worldwide expansion and codification of the principle of universal jurisdiction well when it held that “sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as [crimes against humanity] affect the whole of mankind and shock the conscience of all nations of the world.”¹¹² This assertion captured the sense that the “[c]lassical notions of sovereignty have faded” in light of the “interdependence” of the world community.¹¹³ For years, the most egregious offenders of humanity have continually escaped justice while international law and customary humanitarian law have struggled to realize that some norms transcend the artificial territorial borders of nation states. Spain’s arrest and attempted extradition of General Augusto Pinochet signals a willingness to treat even the most notorious malefactors of humanity as “enem[ies] of all mankind”¹¹⁴ and no longer “lend legitimacy to [their] terrible abuses.”¹¹⁵ This willingness has even been endorsed by U.N. Secretary General Kofi Annan, a sure sign that international law is on the right track.¹¹⁶ Having endured many trials and tribulations since the days of Nuremberg, the successful extradition and trial of Pinochet will once and for all prove that the detractors of Nuremberg were dead wrong when they stated that “Nuremberg ‘would be a blot on the American record which we shall long regret.’”¹¹⁷

¹¹⁰ See *id.*

¹¹¹ 35 LL.M. 32 (Int’l Crim. Trib. for the former Yugoslavia 1995)

¹¹² *Id.* at 52.

¹¹³ Patricia A. McKeon, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 ST. JOHN’S J. LEGAL COMMENT. 535, 541 (1997).

¹¹⁴ Osofsky, *supra* note 44, at 226 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

¹¹⁵ *Id.* at 204.

¹¹⁶ See Rabkin, *supra* note 79, at 26.

¹¹⁷ Nuremberg to Rome, *supra* note 72 (quoting Senator Robert Taft).

III. *EX PARTE PINOCHET*

*We have (in Pinochet) one of the most horrendous criminals of the 20th century . . . here in our country. We have an extradition treaty. Spain has jurisdiction under international law. Quite frankly, I don't see what the fuss is about.*¹¹⁸

On October 16, 1998, Baltasar Garzon, an investigating magistrate from Madrid, Spain issued a provisional arrest warrant, pursuant to section 8(1)(b) of Britain's Extradition Act of 1989, for General Augusto Pinochet, former Chilean Head of State, who was then recovering from back surgery in London.¹¹⁹ The warrant asserted that during the period between September 11, 1973 and December 31, 1983, Pinochet had murdered seventy-nine Spanish citizens in Chile, people over whom Spain claimed passive personality jurisdiction under its 1985 Organic Law of Judicial Power and its 1971 Code of Military Justice. However, as Britain's national laws do not recognize passive personality as a valid assertion of jurisdiction, and countries normally refuse to extradite unless each finds the act punishable and hence extraditable, the first act was destined to be found defective for want of mutuality.¹²⁰ Within days, Garzon presented a second arrest warrant and extradition request, charging the former leader with genocide, torture, hostage taking, conspiracy to commit torture, conspiracy to take hostages, and conspiracy to commit murder.¹²¹ The accompanying extradition request read:

'Offences . . . [were] committed, by Augusto Pinochet Ugarte, along with others in accordance with the plan previously established and designed for the systematic elimination of the political opponents, specific segments of sections of the Chilean national groups, ethnic and religious groups, in order to

¹¹⁸ *Spain's Courts to Rule on Pinochet: Judges to Decide Legality of Requesting Extradition from London*, HOUS. CHRON., Oct. 21, 1998, at 24A (quoting Oxford University international law specialist Michael Byers).

¹¹⁹ See *Regina v. Evans* (Q.B. Div'1 Ct. 1998) (Eng.), reprinted in *Sovereign Immunity for Former Head of State*, LONDON TIMES, Nov. 3, 1998, at 47.

¹²⁰ See *The Pinochet Case: Bringing the General to Justice*, *supra* note 106, at 24. The provisional arrest warrant failed to meet any of the defined types of extradition crimes as delineated in section 2 of the 1989 Extradition Act. Section 2(1)(a), territorial jurisdiction, was not met as the murders prompting the arrest warrant were not committed in Spain; Spain thus had no territorial jurisdiction and could not claim jurisdiction under that principle. Section 2(1)(b) was not satisfied as, unlike Spain, Britain could only try a defendant for a crime committed outside its territory if the defendant was its own citizen. Section 3(1)(a), nationality jurisdiction, was not satisfied since Spain was not basing its jurisdictional claim on Pinochet's nationality and passive personality did not suffice. See Extradition Act, 1989, ch. 33, § 2 (Eng.).

¹²¹ See *The Pinochet Case: Bringing the General to Justice*, *supra* note 106, at 24.

remove any ideological dispute and purify the Chilean way of life through the disappearance and death of the most prominent leaders and other elements which defended Socialist, Communist (Marxist) positions, or who simply disagreed.'¹²²

In short, the second warrant asserted jurisdiction under the principle of universality, arguing that the ordering of others to commit systematic large scale torture, hostage taking, and murder constituted either genocide or crimes against humanity for which universal jurisdiction mandated punishment or extradition by any country having in personam jurisdiction. Pinochet's lawyers quickly responded that as a former head of state, he enjoyed immunity from arrest and extradition while in Britain with respect to any of his official functions or acts committed while in power.¹²³ Two issues thus emerged for Britain's judiciary to decide: (1) Does Pinochet enjoy continuing immunity for acts that he committed while head of state?; and (2) Do Britain's laws or customary international law grant it the jurisdiction it needs in order to extradite Pinochet to Spain?

A. Baltasar Garzon: A Spanish Elliot Ness?

Magistrate Garzon's involvement in investigations in South America began over two years ago in Argentina at the request of several non-profit Spanish legal societies.¹²⁴ During this time he has actively investigated similar types of crimes against humanity, namely executions and disappearances, committed against Spanish citizens by Argentina's military government during its rule from 1976-1983.¹²⁵ Having ruled on June 28, 1996 that Spain's Central Instructing Court of National Audience had the requisite jurisdiction to investigate these crimes in Argentina, Garzon is best known for issuing the October 1997 arrest warrant for Argentinean Navy Captain Adolfo Scil-

¹²² Regina v. Bow St. Metro. Stipendiary Magistrate, ex Parte Pinochet Ugarte, 4 All E.R. 897 (H.L. 1998) [hereinafter *Ex parte Pinochet I*] (appeal taken from Q.B. Div'l Ct.). Participating in the appeal were Lords Slynn of Hadley, Lloyd of Berwick, Nicholls of Birkenhead, Steyn, and Hoffman. See *id.*

¹²³ See *The Pinochet Case: Bringing the General to Justice*, *supra* note 106, at 24.

¹²⁴ See Marlise Simons, *Pinochet's Spanish Pursuer: Magistrate of Explosive Cases*, N.Y. TIMES, Oct. 19, 1998, at A1 [hereinafter *Pinochet's Spanish Pursuer*]. In 1996, the Spanish Progressive Union of Prosecutors essentially began the investigations into the atrocities committed in Argentina and Chile when they filed criminal complaints against these states. See Derechos Report, *supra* note 24.

¹²⁵ See Derechos Report, *supra* note 24. Although Spain was the first country to actively seek the prosecutions of Argentinean military officials for their actions during this time period, the Italian League for Rights and Liberations of People was among the first to consider the idea. The investigations were postponed in the late 1980s, however, as Argentina began prosecuting the responsible individuals on its own accord as democracy regained its hold on the country. See *id.*

ingo pursuant to these investigations.¹²⁶ Often quoted as insisting that "[w]e have a moral debt with the relatives of hundreds of victims," Garzon's investigations have in the past been received with animosity in light of the amnesties or pardons granted to Argentinean officials guilty of the crimes.¹²⁷ At the urging of groups such as the Agrupacion de Familiares de Detenidos y Desaparecidos de Chile (Chilean Group of Relatives of Detained and Disappeared People) and Izquierda Unida (United Left), Garzon expanded his investigations to include those atrocities committed during Pinochet's reign, the decision to issue the arrest warrant coming nearly six months after he initially began the investigation.¹²⁸

This was despite condemnation from several camps, including Chile's government (especially among the right-wing elitists from whom Pinochet receives most of his support),¹²⁹ former British Prime Minister Margaret Thatcher, who views the ex-despot as a former ally in the Falklands War,¹³⁰ and several U.S. Senators such as Jesse Helms who believe that Chile made a conscious decision to forgive and forget Pinochet's abuses in exchange for democratic elections.¹³¹ On October 31, 1998, Garzon cleared his biggest obstacle as an eleven-member panel of Spain's National Court issued an unappealable decision that Spain could bring charges against Pinochet.¹³² Prior to the decision, Spain's Prime Minister, Jose Maria Aznar, gave a formal acquiescence to seek extradition, albeit a lukewarm one.¹³³ Simultaneous to these proceedings, Garzon began receiving world-

¹²⁶ See *id.*

¹²⁷ *Pinochet's Spanish Pursuer*, *supra* note 124, at A1.

¹²⁸ See Derechos Report, *supra* note 24.

¹²⁹ See Faiola, *supra* note 16, at A20.

¹³⁰ See John Deane et al., *Pinochet Lawyers Launch Bid for Freedom*, Oct. 22, 1998, available in LEXIS, U.K. Press Association Newfile.

¹³¹ In an editorial in the Washington Post, Helms asserted that:

The Chilean people took stock of Pinochet's legacy . . . and made a conscious decision to move on . . . Now comes Baltasar Garzon, who has arbitrarily decided he will overrule their decision . . . The new system of global "justice" being created here is arbitrary and capricious. The same day that Pinochet was arrested in London, Spain's prime minister was clinking glasses with Fidel Castro at the Ibero-American summit . . . [I]f Garzon succeeds, there will be no more "peaceful transitions to democracy." If dictators cannot be offered amnesty or safety in exile, they will never hand power to democratic movements. The incentive will be for greater repression, not less.

Jesse Helms, *And After Pinochet?*, WASH. POST, Dec. 10, 1998, at A31.

¹³² See Marlise Simons, *Judges in Spain Affirm Pinochet Can Face a Genocide Trial*, N.Y. TIMES, Oct. 31, 1998, at A6 [hereinafter *Judges in Spain*].

¹³³ See *Pinochet's Spanish Pursuer*, *supra* note 124, at A1. Aznar is reputed to disapprove of the investigations but feels he cannot call for their end in light of the National Court's ruling. See *id.*

wide support for his actions in the form of similar extradition requests for Pinochet from at least seven countries.¹³⁴

In addition to echoing the arguments made by Pinochet's British lawyers, Chile responded to these developments by asserting that the arrest violated Chilean sovereignty as Pinochet had been granted immunity under its Amnesty Law of 1978 and that Spain lacked jurisdiction over the crime of genocide since it did not cover attacks on political groups.¹³⁵ Furthermore, Foreign Minister Jose Miguel Insulza has insisted that Pinochet can only receive "symbolic" justice in Britain or Spain and thus should be returned to Chile where "some kind of justice" might be had.¹³⁶ Unfazed, Spanish officials have countered that the extension of the definition of genocide to cover attacks on political groups is "in the spirit" of the Genocide Convention, that Chile's Amnesty Law carries no weight outside of Chile, and that its assertion of jurisdiction parallels the manner through which the United States tries hijackers and terrorists who commit crimes abroad.¹³⁷ As such, their case is supported by numerous bodies of international jurisprudence: the 1992 U.N. General Assembly declaration on the "disappeared," European Convention on the Prevention of Torture, the Genocide Convention, and the Nuremberg Tribunal Charter of 1945.¹³⁸

B. Round One: The Queen's Bench

On November 3, 1998, General Pinochet won the first legal battle in Britain's courts when the Queen's Bench decreed that as a former head of state, Pinochet enjoyed continuing immunity with respect to

¹³⁴ France, for example, has issued a warrant for Pinochet's arrest. *See France Asks Britain to Arrest Ex-Dictator Pinochet*, DEUTSCHE PRESSE-AGENTUR, Nov. 3, 1998, available in LEXIS, News Library, Deutsche Presse-Agentur File. The French warrant, issued by Magistrate Roger Le Loire, charges Pinochet with the disappearances and probable murders of Frenchmen Rene Chanfreau, Etienne Pesle, and Marcel Amiel-Baquet. France's extradition request raised eyebrows for two reasons: (1) preferring to avoid the extradition battle with which Britain is now faced, France, tipped off to Garzon's plans, denied Pinochet's request to enter the country for his back surgery; and (2) France is one of a few countries whose laws allow it to try suspected criminals in absentia, a power it used in the trial of Alfredo Astiz, an Argentinean Naval officer accused of murdering two French nuns. *See Marlise Simons, Spain Says It's Neutral on Pinochet; Signs Are Otherwise*, N.Y. TIMES, Oct. 21, 1998, at A14 [hereinafter *Spain Says It's Neutral*]; *Judges in Spain*, *supra* note 132, at A6.

¹³⁵ *See* Giles Tremlett, *Spanish Court May Release Pinochet*, SUNDAY TELEGRAPH, Oct. 25, 1998, at 30.

¹³⁶ Hoge, *supra* note 43, at A10.

¹³⁷ Mark Steyn, *If Pinochet is Guilty Then so is Her Majesty the Queen*, SUNDAY TELEGRAPH, Nov. 29, 1998, at 37; *see also* Robert Pear, *Officials Accused of Atrocities Losing Places to Hide, Scholars Say*, N.Y. TIMES, Oct. 19, 1998, at A8 (detailing treatment of governmental officials accused of crimes against humanity).

¹³⁸ *See* David Buchan and Jimmy Burns, *A Trap for Tyrants*, FIN. TIMES, Oct. 22, 1998, at 18.

all public acts committed during his tenure.¹³⁹ In reaching this decision, the lower court relied on section 20(1) of the State Immunity Act of 1978 when read with article 39(2) of Schedule 1 to the Diplomatic Immunities Act of 1964, which incorporated the principles of the Vienna Convention on Diplomatic Relations of 1961.¹⁴⁰ In short, the tribunal found that these provisions conferred similar immunity:

[O]n a head of state or a former head of state as on a head or former head of a diplomatic mission; and that after ceasing to be so, a head of state ceased to enjoy immunity in respect of personal or private acts but continued to enjoy immunity in respect of public acts performed by him as head of state.¹⁴¹

Since the acts with which Pinochet is charged relate to actions carried out while he was the Chilean head of state, he was thus immune from prosecution.¹⁴²

The lower court was similarly unpersuaded with the prosecution's assertion that the crimes were so repugnant to morality that they constituted the kinds of crimes against humanity for which anyone could be liable.¹⁴³ While the prosecution argued that Pinochet could be tried for genocide, torture, and the taking of hostages, the court chose to cursorily dismiss these claims. The court found that in Britain, heads of state could not be held liable for the crime of genocide because Britain, in adopting the provisions of the Genocide Convention in its Genocide Act of 1969, did not incorporate article IV, the provision calling for unlimited liability regardless of one's position as head of state.¹⁴⁴ Similarly, it held that the acts which incorporated the conventions on terrorism and torture failed to include provisions expressly mandating that heads of state could be liable for the delineated crimes.¹⁴⁵ Though a blow to claims of an emerging norm

¹³⁹ See *Regina v. Evans* (Q.B. Div'l Ct. 1998) (Eng.), reprinted in *Sovereign Immunity for Former Head of State*, LONDON TIMES, Nov. 3, 1998, at 47.

¹⁴⁰ See *id.*

¹⁴¹ *Id.*; see also State Immunity Act, 1978, ch. 33, § 20(1) (Eng.); Diplomatic Privileges Act, 1964, ch. 81, §§ 1-2, sched. 1, art. 39(2) (Eng.) (incorporating the Vienna Convention on Diplomatic Relations of 1961).

¹⁴² See *Evans*, reprinted in *Sovereign Immunity for Former Head of State*, LONDON TIMES, Nov. 3, 1998, at 47.

¹⁴³ See *id.*

¹⁴⁴ See *id.*; see also Genocide Act, 1969, ch. 12, § 1 (Eng.); Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277. Article IV reads: "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." *Id.* at 280.

¹⁴⁵ See *Evans*, reprinted in *Sovereign Immunity for Former Head of State*, LONDON TIMES, Nov. 3, 1998, at 47; see also Taking of Hostages Act, 1982, ch. 28, § 1 (Eng.); Criminal Justice Act, 1988, ch. 33, § 134 (Eng.) (omitting provisions extending liability to heads of state for such crimes).

that former leaders can be held liable for their crimes against humanity, the case was soon destined for appeal.

C. Recognizing the Norm in the House of Lords

Following numerous days of testimony before the House of Lords, a five-judge panel reversed the lower court by a vote of three to two, holding that Pinochet enjoyed no immunity as a former head of state and could thus be extradited to Spain pending approval of the Home Secretary.¹⁴⁶ Though clearly a recognition and acceptance of the principle that, through universality, heads of state can be found liable for such gross humanitarian violations while in office, such a close split of the court might be seen as indicia of the precarious hold on this position the issue possesses. However, a close examination of the opinions, especially those of the two dissenting Lords, reveals several indications that their positions are not on as solid a foundation as they first appear. In fact, these opinions even seem to foreshadow the inevitability that former heads of state may be forced to answer for their crimes against humanity on a much wider scale. In order to view this phenomenon, however, it is necessary to break down the House of Lords' decision and analyze the components of each Lord's opinion in conjunction with those that fell on the other side of coin.

1. Immunity and the Common Law

In ruling on the point of immunity, all five Lords concurred with the divisional court's assessment that the relevant statutes and sections were contained in the 1978 State Immunity Act, 1964 Diplomatic Privileges Act, and the Articles of the Vienna Convention on Diplomatic Relations which had been incorporated in the schedule of the 1964 act. In fact, all five agreed that section 20(1) of the 1978 Act ought to be read with Articles 29, 31(1), and 39(2) of the Vienna Convention.¹⁴⁷ Article 20(1) states that "the Diplomatic Privileges Act [of] 1964 shall apply to (a) a sovereign or other head of State."¹⁴⁸ Article 29 mandates that "[t]he person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention."¹⁴⁹ This article serves as the basis for article 31(1), which states that "[a] diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State."¹⁵⁰ Having established this immu-

¹⁴⁶ See *Ex parte Pinochet I*, 4 All E.R. 897 (H.L. 1998).

¹⁴⁷ See *id.*

¹⁴⁸ State Immunity Act, 1978, ch. 33, § 20(1) (Eng.).

¹⁴⁹ Diplomatic Privileges Act, 1964, ch. 81, § 2, sched. 1, art. 29 (Eng.) (incorporating the Vienna Convention on Diplomatic Relations of 1961).

¹⁵⁰ *Id.* at art. 31.

nity for members of the diplomatic community, the Lords then sought to apply it to heads of state and former heads of state via article 39(2), which states:

When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.¹⁵¹

When read with the aforementioned articles and section of the 1978 Act, the Lords were in agreement that the phrases "diplomatic agent" and "member of the mission" could be interchanged with "heads of state," thus technically providing immunity for a former head of state's functions committed while in office.¹⁵² At this point, the Lords' opinions diverge, with each emphasizing different doctrines.

Lords Slynn and Lloyd, dissenting, turn first to interpretations of the common law to support Pinochet's immunity claim. In particular, they draw on several scholars' attempts to deal with this issue. For example, *Oppenheim's International Law* was cited by Lord Slynn for its proposition that a former head of state, "[f]or his official acts as Head of State he will, like any other agent of a state, enjoy continuing immunity."¹⁵³ Lord Lloyd also makes reference to the appellants' own brief, which reads:

'No international agreement specifically provides for the immunities of a former head of state. However, under customary international law, it is accepted that a state is entitled to expect that its former head of state will not be subjected to the jurisdiction of the courts of another state for certain categories of acts performed while he was head of state'¹⁵⁴

Satow's *Guide to Diplomatic Practice*, cited by Lords Slynn and Lloyd, echoes these sentiments in its assertion that a head of state who has resigned is "entitled to continuing immunity in regard to acts which he performed while head of state, provided that the acts

¹⁵¹ *Id.* at art. 39(2).

¹⁵² See *Ex parte Pinochet I*, 4 All E.R. 897, at 906-08.

¹⁵³ *Id.* at 910 (quoting OPPENHEIM'S INTERNATIONAL LAW § 456 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992)).

¹⁵⁴ *Id.* at 923.

were performed in his official capacity.”¹⁵⁵ The Lords close their opinion with a look at the Restatement (Third) of the Foreign Relations Law of the U.S., which notes the immunities that former heads of state have sought for their official actions, and found that “[o]rdinarily, such acts are not within the jurisdiction to prescribe of other states.”¹⁵⁶

Lords Slynn and Lloyd also support Pinochet’s immunity case by drawing on the Act of State doctrine.¹⁵⁷ While not a codified law, this widely accepted judge-made law is based mainly on the principle that a “sovereign can do no wrong.”¹⁵⁸ When applied, states’ courts refuse to adjudicate the actions of another’s sovereign for the acts committed in the sovereign’s country. Thus, the dissenters argue that, as British judges, they cannot sit in judgment on actions that were committed in Chile by Pinochet.¹⁵⁹ This assertion is supported by *Duke of Brunswick v. King of Hanover*¹⁶⁰ which held that a “foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong.”¹⁶¹ This rationale was also incorporated in *Oppenheim’s*, which states that “[c]ourts of one State do not, as a rule, question the validity or legality of the official acts of another Sovereign State.”¹⁶²

Looking at these findings alone, one might easily become convinced that an international norm holding former heads of state liable for the crimes they committed against humanity while in office is not emerging. Yet, each of these sources of law contains a similar fallacy that critically undermines the position of the dissenting Lords. In short, in establishing immunity for former heads of state these sources all include a provision limiting the immunity to “official acts,” “public functions,” or actions committed in “official capacity.” While seemingly an out for heads of state, the Lords then qualify these

¹⁵⁵ *Id.* at 910 (quoting SIR ERNEST SATOW, SATOW’S GUIDE TO DIPLOMATIC PRACTICE 10 (5th ed. 1979)).

¹⁵⁶ *Id.* at 924 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 464 reporters’ note 14 (1987)).

¹⁵⁷ Although mentioned in both of the dissenting Lords’ opinions, the act is never expressly used as a justification because the Lords feel that since Pinochet is immune under the statutory and common law, there is no need to implement the doctrine. *See id.* at 910-11, 925-27.

¹⁵⁸ *Id.* at 918 (quoting *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 855 (2d Cir. 1962)).

¹⁵⁹ *See id.* at 918-19, 934-35.

¹⁶⁰ 9 Eng. Rep. 993 (H.L. 1848).

¹⁶¹ *See Ex parte Pinochet I*, 4 All E.R. 897, at 909 (quoting *id.* at 998-99).

¹⁶² OPPENHEIM’S INTERNATIONAL LAW 365 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); *see also* *Hatch v. Baez*, 7 Hun. 596, 597 (N.Y. Sup. Ct. 1876) (requiring physical presence within a jurisdiction in order to be subject to that jurisdiction’s laws).

statements by positing that the principle of immunity still must be continuously viewed "in the light of developments in international law relating to what are called international crimes," an indication that some public acts may not warrant immunity or that some acts may not be considered public/official.¹⁶³ This curtailed immunity is particularly evidenced by the quotation from the appellants' own brief which states that a former head of state can expect immunity in foreign nations for "certain categories of acts."¹⁶⁴ The Restatement also hedges on this immunity by saying that "ordinarily" official actions are the subject of immunity.¹⁶⁵ In not one instance do any of the cited sources implement wide scale immunity for "all" official or public acts. As it is already well established law that heads of state are not immune from personal acts or public actions committed for personal gain while in power,¹⁶⁶ the negative implication that results from the failure to provide such blanket immunity can only be that for certain types of public acts immunity does not exist. Consciously or unconsciously, this sample of jurisprudence thus recognizes the possible need to withhold heads of states' immunity in certain instances due to the nature of their action, a phenomenon in accordance with the principles of universality.

A second fallacy emerges when one attempts to reconcile the phrases "public acts," "official acts," and "official capacity" with the crimes of which Pinochet is accused. It is on this point that the three majority Lords choose to focus their argument, insisting that acts of torture and terrorism do not fit into these categories.¹⁶⁷ Lord Nicholls proffers the view that the immunity conferred by article 39(2) of the Vienna Convention is done so "in respect of acts performed in the exercise of functions which international law recognises as functions of a head of state."¹⁶⁸ This view is strikingly similar to the qualifying language of the dissenters with respect of the need to continually monitor the growing body of internationally condemned crimes, a further indication that the category of public acts is limited.¹⁶⁹ As the

¹⁶³ See *Ex parte Pinochet I*, 4 All E.R. at 911.

¹⁶⁴ *Id.* at 923 (quoting appellants' brief ¶ 26).

¹⁶⁵ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 464 reporters' note 14 (1987).

¹⁶⁶ See *Ex parte Pinochet I*, 4 All E.R. at 923-24; see also *Underhill v. Hernandez*, 168 U.S. 250, 254 (1897); *Hilao v. Marcos*, 25 F.3d 1467, 1470-72 (9th Cir. 1994); *Jimenez v. Aristeguieta*, 311 F.2d 547, 557-58 (5th Cir. 1962); *United States v. Noriega*, 746 F. Supp. 1506, 1521-23 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997). Each of these courts found sovereign immunity for former heads of state only for their actions under the auspices of their power and not for personal gain.

¹⁶⁷ See *Ex parte Pinochet I*, 4 All E.R. at 944-45.

¹⁶⁸ *Id.* at 939.

¹⁶⁹ See *id.* at 911.

crimes of terrorism and torture have been the subject of numerous international conventions and national statutes mandating that national courts accept universal jurisdiction over these crimes, it is clear that they cannot be considered as part of the definition of official or public acts.¹⁷⁰ To do so, Lord Nicholls insists, would make a “mockery of international law,” as these crimes are the latest addition to a list of condemned actions that began following World War II at Nuremberg.¹⁷¹ Rather, these acts must fall into the category of unprotected private acts carried out in an effort to maintain a stranglehold on the country.

In an attempt to counter that argument, the dissenting Lords appear to reason that by allowing the growing list of international crimes to serve as a weathervane for which a head of state’s actions can be deemed official or public, the majority has created a slippery slope upon which a head of state will slowly lose his power. In order to avoid this type of infringement, they assert that no line can or must be drawn to differentiate between public and private acts.¹⁷² Yet, in making this assertion, the dissenters have contradicted history and international jurisprudence since, under their line of thought, even atrocities such as those committed by Hitler would be viewed as immune official acts, a view that Nuremberg quickly eroded.¹⁷³ History has thus put heads of state on notice that the depravity of their “official” actions may result in their withdrawal from the gambit of immunity.

This argument is also flawed, as the majority points out, since distinctions have already been made between private and public acts, whereby once “official acts” of torturing for pleasure or the killing of the gardener while in a rage by a head of state are already viewed as falling in the private realm.¹⁷⁴ Thus, as the line has already been drawn and is in need of both clarification and a mechanism to monitor its sliding scale, the appropriate vehicle can only be the rules and principles of international jurisprudence. In the alternative, the dissenters attempt to make an end run on this argument by insisting that if the words “public acts” or “official acts” are replaced by “governmental acts,” the distinction between private and public acts becomes clear.¹⁷⁵ In attempting to solidify its “governmental” distinction, the dissenters point to the fact that since Pinochet used both resources and

¹⁷⁰ See *id.* at 941.

¹⁷¹ *Id.* at 940.

¹⁷² See *id.* at 927.

¹⁷³ See *id.* at 945.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.* at 928.

agents of the government to carry out his crimes, and has no blood on his own hands, the mere ordering of the crimes must be considered governmental in nature.¹⁷⁶ This argument has two flaws. First, this mere play on words fails to explain or legitimize the necessity of carrying out a systematic and widespread government-sponsored murdering spree in supposed secret. Second, creating a loophole for heads of state merely because they do not themselves have blood on their hands runs contrary to the established laws of conspiracy and accomplicity,¹⁷⁷ as well as the principles of liability agreed to in Rome (International Criminal Court) this past July, the most recent expression of worldwide condemnation of such acts.¹⁷⁸ Thus, in light of this attempted end run, it is time to supplement those statutes that draw distinctions between public and private acts¹⁷⁹ with a provision reflecting the necessity of assessing this characterization in light of the growing body of internationally-proscribed crimes.

The fallout of the majority's finding that such crimes do not qualify as official acts would also simultaneously undermine the dissenters' Act of State doctrine argument, one which would certainly be thrust to the forefront as the new reason for Pinochet's immunity. As previously mentioned, the basic premise of this doctrine is that one State's judges will not "sit in judgment" on the official actions of another sovereign committed in its own territory.¹⁸⁰ Thus, since the acts of terrorism and torture cannot now be considered public or official acts, the doctrine cannot apply. This theory is buttressed by *U.S. v. Noriega*,¹⁸¹ wherein the court held that "[i]n order for the act of state doctrine to apply, the defendant must establish that his activities are 'acts of state,' i.e., that they were taken on behalf of the state and not, as private acts on behalf of the actor himself."¹⁸² Notwithstanding this argument, however, the majority correctly points out that such a doctrine might not be applicable in the case of such a gross humanitarian violation.¹⁸³ Finally, the Restatement (Third) of the Foreign

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *infra* Part IV.A-B.

¹⁷⁹ See State Immunity Act, 1978, ch. 33 (Eng.); Diplomatic Privileges Act, 1964, ch. 81, sched. 1, art. 39 (Eng.) (incorporating the 1961 Vienna Convention on Diplomatic Relations).

¹⁸⁰ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (elaborating on the application of the Act of State doctrine).

¹⁸¹ 746 F. Supp. 1506 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997).

¹⁸² *Id.* at 1521-22 (finding that a former leader can only be liable for private but not public acts); see also *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409-10 (1990) (limiting the court's application of the doctrine to cases where a decision is to be had on the lawful and sovereign acts of foreign states); *Jimenez v. Aristeguieta*, 311 F.2d 547, 557-58 (5th Cir. 1962) (finding that financial crimes were committed for a personal gain and thus did not qualify as official actions).

¹⁸³ See *Ex parte Pinochet I*, 4 All E.R. 897, 946-47 (H.L. 1998).

Relations Law of the U.S. appears to recognize the emerging relationship between the principle of universality and the Act of State doctrine through its statement that a claim of torture or genocide "would . . . probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established."¹⁸⁴

2. *Jus Cogens*

The Restatement (Third) of the Foreign Relations Law of the U.S., in addition to dispatching the Act of State doctrine, encapsulates the second issue involved in Pinochet case: whether, in committing acts of terrorism and torture, the former head of state violated *jus cogens* norms of international law. This type of norm was defined in the Vienna Convention on the Law of Treaties as a "'peremptory norm' of international law . . . accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted."¹⁸⁵ As such, norms attaining *jus cogens* status appear to have been placed on a springboard toward universal jurisdiction. In ascertaining whether such a norm has been violated, judges must look to the subjects of international tribunals and their respective national statutory implementations, common law doctrines, and the works of respected theorists and jurists. Lawyers arguing for the extradition of Pinochet insist that such norms have been broken, and that a finding of immunity for Pinochet must be viewed as hypocrisy since one can not "condemn conduct as a breach of international law and at the same time grant immunity."¹⁸⁶ In short, they argue that a violation of a *jus cogens* norm must necessarily trump immunity.

Having determined that Pinochet is not entitled to immunity in Britain as the former head of Chile, and is thus extraditable, the majority chooses not to address this issue. The dissenters, however, attempt to discount both the significance of the growing list of internationally condemned crimes as they relate to sovereign immunity and the implementation of punishment for *jus cogens* violations in national legislation.¹⁸⁷ While accepting that there has been a general international movement toward placing some crimes outside the scope of immunity for heads of state or other diplomatic officials, Lord Slynn expresses his belief that such instances represent only "aspirations" in their "embryonic" form.¹⁸⁸ Notwithstanding the im-

¹⁸⁴ *Id.* at 947 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443(c) (1986)).

¹⁸⁵ *Hilao v. Marcos*, 25 F.3d 1467, 1471 n.6 (9th Cir. 1994) (citations omitted).

¹⁸⁶ *Ex parte Pinochet I*, 4 All E.R. at 928.

¹⁸⁷ *See id.* at 913.

¹⁸⁸ *Id.*

plementation of the concept of universal jurisdiction with respect to the crimes of torture and terrorism, Slynn turns a blind eye to such action by finding that it has not "been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in national courts on the basis of the universality of jurisdiction."¹⁸⁹ Such an assertion is irrelevant for the present purposes, however, since the well-documented condemnation of terrorism and torture on both a national and international level has resulted in a widespread implementation of universal jurisdiction over these crimes in various national courts.¹⁹⁰ While it is true that states have not provided for the assertion of universal jurisdiction for all breaches of international law, such a grandiose argument has no bearing in such a pointed matter. Furthermore, such an assertion fails to recognize the ever expanding list of condemned crimes begun at Nuremberg, over which universal jurisdiction has been granted, and fails to appreciate the efforts to bring notorious violators of human rights to justice over the last fifty years.

Turning first to the relevant international conventions and Britain's respective implementation, the dissenters argue that the only means by which heads of states' immunity is trumped by a violation of a *jus cogens* norm is if the relevant statutory language specifically refuses to extend them immunity much in the same manner that Nuremberg (article 7), the Genocide Convention (article 4), the tribunals for Rwanda and the former Yugoslavia, and the International Criminal Court statute (article 25) all did.¹⁹¹ After reviewing section 134(1) of the Criminal Justice Act (1988)¹⁹² and the Taking of Hostages Act (1982),¹⁹³ they found that neither specifically mentions heads of state or former leaders, nor do they refuse to extend immunity to people in such capacity; thus the *jus cogens* norms cannot be allowed to trump Pinochet's immunity.¹⁹⁴ Specifically, section 134(1) of the Criminal Justice Act reads: "A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance

¹⁸⁹ *Id.*

¹⁹⁰ See, for example, the conventions, treaties, and statutes discussed at *supra* notes 51, 58, 62, 66, 68, 70, and 77.

¹⁹¹ See *Ex parte Pinochet I*, 4 All E.R. at 917.

¹⁹² Criminal Justice Act, 1988, ch. 33 (Eng.).

¹⁹³ Taking of Hostages Act, 1982, ch. 28 (Eng.).

¹⁹⁴ See *Ex parte Pinochet I*, 4 All E.R. 897 at 917 (reminding readers that Britain's Genocide Act (1969) failed to incorporate Article IV of the Genocide Convention (1948) which specifically refused to extend immunity to heads of state for the commission of genocide; ergo, Pinochet could not be tried for this crime in Britain).

of his official duties.”¹⁹⁵ In interpreting the language of this statute, the dissenting Lords felt that its drafters did not intend to bring heads of state within the gambit of the phrases “public official” or “person acting in that capacity.”¹⁹⁶ Additionally, language in the Torture Convention mandating that “[a] person, whatever his nationality, who, in the United Kingdom or elsewhere . . . commits an offence,” was similarly dismissed as failing to extend liability to heads of state.¹⁹⁷

The dissenting judges’ stance on the Criminal Justice Act’s true meaning lacks credibility in light of their aforementioned attempts to discern the meaning of phrases such as “public official” and “acting in official capacity” with respect to conferring immunity to Pinochet. While from the outset it is difficult to believe that a head of state would not fit within these categories, this point is hammered home when one applies the dissenters’ own logic to these statutes. This entails replacing these phrases with the word “governmental.” However, the result of the addition of this word to the statute further suggests that heads of state are covered by the statute, as it would be inconceivable not to consider a head of state as a “government official” or one who acts in “governmental capacity.” A seemingly stronger argument as it pertained to immunity, the dissenters’ own logic thus works against them with respect to *jus cogens* norms and statutory application.

In no single source of international jurisprudence is it mandated that statutes or conventions must specifically reference heads of state with respect to conferring or denying them immunity for their actions. This fact, combined with the fact that replacing statutory language with different wording often conveys an interpretation contrary to the intention of the drafters, suggests that the two positions may be reconciled without exchanging language. The reconciliation involves interpreting the phrase “acting in official capacity” synonymously with “acting under color of law,” a phrase drawn from section 1983 of the U.S. Code.¹⁹⁸ In this vein, “public officials” would encompass all public or government officials short of a head of state, yet “acting in official capacity,” under its new interpretation, would serve as a catch-all phrase assigning liability to all persons, including heads of state. Thus, since the dissenters argue that Pinochet used the power

¹⁹⁵ Criminal Justice Act, 1988, ch. 33, § 134(1) (Eng.).

¹⁹⁶ *Ex parte Pinochet I*, 4 All E.R. 897 at 916.

¹⁹⁷ Taking of Hostages Act, 1982, ch. 28, § 1(1) (Eng.); see also *Ex parte Pinochet I*, 4 All E.R. at 917.

¹⁹⁸ 42 U.S.C. § 1983 (1994 & Supp. III 1997).

and resources of the state to carry out his actions,¹⁹⁹ it cannot be contradicted that he acted in official capacity under the color of Chilean State law and governmental authority. As such, his actions, clearly in breach of international *jus cogens* norms, are entitled to no immunity, and he may be prosecuted or extradited under the 1988 Criminal Justice Act.

Although the dissenters cursorily dismissed the language contained in the 1984 Torture Convention²⁰⁰ since it failed to explicitly impose liability on former heads of state, their haste resulted in a failure to fully appreciate the applicability of articles 2(2) and (3).²⁰¹ In short, the first section states that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."²⁰² The significance of this provision can only be understood when one asks the question: "Who would attempt to justify their actions using this example?" The answer can only be heads of state, since they are the ones that have the most to lose should war or political instability break out in their countries. This provision serves to pre-empt the "public function" basis for claiming immunity by stating that no form of public emergency can justify an act of torture. In Pinochet's case, the coup d'état and years of martial law that ensued certainly can be described as a time of public emergency, thus rendering his actions punishable under the act. The second provision asserts that "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture."²⁰³ In light of the conventions in existence at the time of this provision's drafting that extend liability to those who gave the orders to commit humanitarian crimes, it is inconceivable that this Convention's drafters sought only to provide liability for the "little fish" while the "big fish" escape repercussion. Such a phenomenon would again fly in the face of the principles of accomplicity and conspiracy.

Finally, an ironic twist, peculiar to the Pinochet case, is worth mentioning. The former head of state stepped down in 1990 only after negotiating a new constitution granting him Senator-for-Life status.²⁰⁴ As a Senator, surely Pinochet now qualifies as a public offi-

¹⁹⁹ See *Ex parte Pinochet* I, 4 All E.R. at 927.

²⁰⁰ The Criminal Justice Act of 1988 was implemented pursuant to Britain's obligations following its becoming a signatory to the Torture Convention of 1984.

²⁰¹ See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, Part I, art. 2, §§ 2(2)-(3), U.N. Doc. E/CN.4/1984/72 (1984) [hereinafter *Torture Convention*].

²⁰² *Id.* § 2(2).

²⁰³ *Id.* § 2(3).

²⁰⁴ See *Derechos* Report, *supra* note 24.

cial within meaning of the 1988 Act. Although Lord Slynn noted in his opinion that "[a] head of state on ceasing to be a head of state is not converted into a public official," that very anomaly exists in the this situation.²⁰⁵ While it is unlikely that this will have bearing on the proceedings since this status is only recently attained and none of the actions for which he is charged pertains to post-1990, it is indicative of possible loopholes that may have yet to be contemplated.

Ascertaining the drafters' true intentions in the Taking of Hostages Act initially seems more difficult. While the most obvious argument would proffer that the phrase "a person" was inserted to cover all persons regardless of their hierarchical position, without foundation this assertion would lack the very credence from which the dissenters' bald statement suffers. However, the necessary foundation can be provided by merely turning to the International Convention Against the Taking of Hostages, from which this act is derived.²⁰⁶ Under this convention, article 1, section (2)(b) establishes liability for any person who "participates as an accomplice of anyone who commits . . . an act of hostage-taking."²⁰⁷ Thus, as the arrest warrant accuses Pinochet of organizing, funding, and ordering the acts of hostage taking, he can be viewed as nothing less than an accomplice, and definitely a co-conspirator, to the crimes committed. As such, his status as head of state should not exempt him from liability, as this would make a mockery out of well-established principles of criminal law.

Turning to the common law for additional support, the dissenters argue that Pinochet's detractors have been unable to cite a single case "in which official acts committed by a head of state have been made the subject of suit or prosecution after he has left office."²⁰⁸ Instead, the dissenters point to two cases, *Al Adsani v. Kuwait*²⁰⁹ and *Siderman de Blake v. Argentina*,²¹⁰ in which heads of state were exonerated from liability for acts that violated *jus cogens* norms. In *Al Adsani*, a case involving alleged torture of the plaintiff by the Kuwait government, the court rejected an argument that states were not entitled to immunity with respect to acts that violated customary international law.²¹¹ Similarly, the *Siderman* court, in an action alleging that the Argentinean government committed acts of torture against the plain-

²⁰⁵ *Ex parte Pinochet I*, 4 All E.R. 897, 917 (H.L. 1998).

²⁰⁶ See International Convention Against the Taking of Hostages, adopted Dec. 17, 1979, 18 I.L.M. 1456.

²⁰⁷ *Id.* at art. 1, § (2)(b).

²⁰⁸ See *Ex parte Pinochet I*, 4 All E.R. at 927.

²⁰⁹ 107 LL.R. 536 (Eng. C.A. 1996).

²¹⁰ 965 F.2d 699 (9th Cir. 1992).

²¹¹ See 107 LL.R. at 541.

tiff, found that "although prohibition against torture has attained the status of *jus cogens* in international law it did not deprive the defendant state of immunity under the Foreign Sovereign Immunities Act 1976."²¹² However, these cases are clearly distinguishable from the Pinochet case since they were brought against the state as an entity in an attempt to collect civil damages for the acts.

In fact, the case most relevant to Pinochet, as the dissenters acknowledged, is *Hilao v. Marcos*,²¹³ wherein the former head of state was accused of committing numerous acts of torture while in office. Although a civil case, the *Marcos* court found that the acts of torture violated *jus cogens* norms, thereby removing them from the list of immune official or public acts and rendering Marcos liable.²¹⁴ The dissenters found this case distinguishable, not because of its civil nature, but on the grounds that the Philippines essentially waived all forms of immunity pertaining to the ex-leader.²¹⁵ However, in light of the Pinochet majority's finding that similar acts cannot be considered official or public acts in a criminal case, the implication is that a waiver of immunity is either not needed or is provided for by becoming a signatory to the international conventions establishing such *jus cogens* norms. Thus, while Chile has clearly not waived Pinochet's supposed immunity for such crimes, this assertion may be irrelevant due to its status, and more importantly, Britain's status as a signatory to the relevant conventions.

After reviewing both dissenters' opinions and the relevant statutory and case law, the logic supporting the denial of Pinochet's immunity rests on solid ground. While the dissenting Lords' attempts to validate their reasoning at first appears credible, their own rationale eventually undermines their later stance. Despite their firm belief that Pinochet is entitled to immunity regardless of *jus cogens* violations, their arguments also smack of insecurity and hint at the inevitability that former heads of state must be found liable for such gross humanitarian violations. Nowhere is this better evidenced by than their inclusion of the statement: "[W]hile there is some support for the view that generally applicable rules of state immunity should be displaced in cases concerning infringements of *jus cogens*, e[.]g[.], cases of torture, this does not yet constitute a rule of public international law."²¹⁶ Not only is this quote indicative of the shaky foundation

²¹² *Ex parte Pinochet I*, 4 All E.R. at 929 (citing *Siderman*, 965 F.2d at 718).

²¹³ 25 F.3d 1467 (9th Cir. 1994).

²¹⁴ *See id.* at 1472.

²¹⁵ *See Ex parte Pinochet I*, 4 All E.R. at 927.

²¹⁶ *Id.* at 930 (quoting Professor David Lloyd Jones, who testified before the panel of Lords).

upon which the dissenters' opinion lies, it highlights the emerging norm that the world will no longer tolerate the impunity that has allowed former heads of state guilty of crimes against humanity to traverse the world free from justice.²¹⁷

D. New Panel of Lords Reaches Similar Conclusion: Ex parte Pinochet II

On March 24, 1999, a panel of seven Lords, selected to rehear the *Pinochet* case following the questions surrounding Lord Hoffman's lack of impartiality, handed down a decision that closely mirrored its predecessors' recently vacated one. However, in ruling that head-of-state immunity did not exonerate Pinochet from prosecution for certain crimes against humanity and acts of torture, and that he thus could be extradited to Spain, the Lords significantly limited the crimes for which the General could be prosecuted and extradited under Britain's laws.²¹⁸ Despite this limitation, the Lords used nearly identical logic and bodies of law to reach their respective decisions and collective holding. Several points, including some holdover issues, merit discussion.

During the interim between the two panels' findings, the landscape changed considerably. Most importantly, Chile sought to be joined as a party in the matter, a move solidifying the notion that the desired immunity was that of the Republic of Chile and not of the General himself.²¹⁹ Additionally, the gambit of charges levied against Pinochet expanded yet again as more documented instances of torture and conspiracy to commit torture came to light.²²⁰ After assessing these nuances, six of the seven Lords ruling on the Pinochet matter agreed that torture is an international crime over which numerous bodies of international law, in particular, the United Nations Convention Against Torture, recognize universal jurisdiction of all courts, regardless of the crime's locus.²²¹ Five of these Lords, however, held that Pinochet could only be prosecuted and subsequently extradited for a limited number of the charges levied against him since the ma-

²¹⁷ At the time of this writing, this House of Lords decision had recently been vacated as a result of the failure of Lord Hoffman, who wrote for the majority, to disclose his personal ties to Amnesty International, a human rights group that was allowed to argue before the court. While the court's rationale still stands to reason, an entirely new panel of seven Lords reheard the appeal and rendered a new verdict. The vacating of the House of Lords decision was the first of its kind in the history of the House. See *The Law Lords and the General*, *ECONOMIST*, Dec. 19, 1998, at 18.

²¹⁸ See *Regina v. Bow St. Metro. Stipendiary Magistrate, ex Parte Pinochet Ugarte*, 2 All E.R. 97 (H.L. 1999) [hereinafter *Ex parte Pinochet II*].

²¹⁹ See *id.* at 103.

²²⁰ See *id.*

²²¹ See *id.* at 109, 141, 163, 168, 178, 190.

jority of his alleged actions did not constitute extradition crimes under U.K. law.²²²

Two issues predominated throughout each Lord's finding and accompanying rationale: (1) whether any of the charges levied against General Pinochet constituted extradition crimes; and (2) whether, as a former head of state, Pinochet enjoyed immunity *ratione materiae* for the alleged organization of state-sponsored terrorism.²²³ In addressing this first issue, the majority first looked to the dates on which the U.K. ratified the Torture Convention. In short, it found that section 134 of the Criminal Justice Act of 1988 gave effect to the Torture Convention on September 29, 1988, while the actual Convention was ratified by the U.K. on December 8, 1988. Consequently, any acts of torture committed outside the U.K. before September 29, 1988, did not constitute a crime under U.K. law and thus could not be deemed extraditable crimes.²²⁴ Furthermore, had Pinochet been entitled to immunity *ratione materiae* as a result of his former head of state status, the U.K.'s December 8, 1988 ratification of the Torture Convention rendered him unable to claim this form of immunity in cases of alleged official torture.²²⁵ Thus, of the thirty plus charges levied against Pinochet, only three involved conduct alleged to have occurred over a time span post-September 29, 1988.²²⁶ In fact, only Charge 30, an allegation of torture, related exclusively to this period.²²⁷ However, the Lords felt that conduct alleged in the other two charges, when viewed collectively, showed that Pinochet engaged in a policy of systematic torture during this period.²²⁸

After verifying the existence of extraditable crimes, the Lords addressed the issue of whether Pinochet could claim immunity *ratione materiae* in relation to acts committed as part of his official functions as head of state. The majority started with the premise that immunity *ratione materiae* protects all acts that a head of state performs as part of his official functions.²²⁹ The underlying assumption is that it is "[t]he purpose for which they were performed protects these acts

²²² See *id.* at 115, 153, 168, 180. The five Lords were Lords Browne-Wilkinson, Hope, Hutton, Saville and Phillips. Lord Millet, on the other hand, insisted that Pinochet could be extradited for the entire gambit of charges levied against him. See *id.* at 180.

²²³ See generally *id.*

²²⁴ See *id.* at 98.

²²⁵ See *id.* at 115.

²²⁶ Lord Browne-Wilkinson stated that "only those parts of the conspiracy to torture alleged in charge 2 and of torture and conspiracy to torture alleged in charge 4 which relate to the period after that date and the single act of torture alleged in charge 30 are extradition crimes relating to torture." *Id.* at 107. The murder and hostage-taking charges, however, did not qualify as such. See *id.*

²²⁷ See *id.* at 98.

²²⁸ See *id.* at 115.

²²⁹ See *id.* at 111.

from any further analysis.”²³⁰ However, two exceptions to this blanket-type immunity exist for: (1) criminal acts that a head of state, under color of authority, engages in for sheer pleasure or personal gratification; and (2) “acts the prohibition of which has acquired the status under international law of *jus cogens*.”²³¹ The theory governing *jus cogens* “compels all states to refrain from such conduct under any circumstances and imposes an obligation *erga omnes* to punish such conduct.”²³² The crucial question, as it was amongst the original panel of Lords, was whether, with regard to particular crimes achieving *jus cogens* status, there is a general consensus that these crimes “are outside the immunity to which former heads of state are entitled from the jurisdiction of foreign national courts.”²³³

Although the majority concluded both that the act of torture had achieved *jus cogens* status and that Pinochet did not enjoy immunity *ratione materiae* with respect to his actions of torture, their respective rationales differed slightly. Lord Browne-Wilkinson addressed the issue by questioning whether a *jus cogens* crime can be deemed an official function of a head of state on behalf of a state.²³⁴ Drawing on the essential elements of the international definition of the crime of torture as set forth in the Torture Convention, he stated:

[Torture] must be committed ‘by or with the acquiescence of a public official or other person acting in an official capacity.’ As a result all defendants in torture cases will be state officials. Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors . . . who carried out his orders will be liable. I find it impossible to accept that this was the intention.²³⁵

In addition, Lord Browne-Wilkinson concluded that if state-sponsored torture were deemed an official function “giving rise to immunity *ratione materiae*,” then even a head of state’s subordinates may escape liability under the same premise.²³⁶ Consequently, Lord Browne-Wilkinson stated:

It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought

²³⁰ *Id.* at 147.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *See id.* at 108. Lord Browne-Wilkinson proceeded with the knowledge that the Republic of Chile had conceded that the international law prohibition of torture had achieved a *jus cogens* status. *See id.*

²³⁵ *Id.* at 114.

²³⁶ *Id.*

unless the state of Chile is prepared to waive its right to its officials' immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention . . . will have been frustrated.²³⁷

As such, he found that continuing immunity *ratione materiae* for former heads of state must be deemed inconsistent with the Torture Convention.²³⁸ Noting that Chile had become a signatory to the Torture Convention on October 30, 1988, signifying its agreement to prosecute violators, and that the U.K. followed suit on December 8, 1988, Lord Browne-Wilkinson set the latter as the date on which Pinochet presumptively lost his immunity *ratione materiae* for these crimes.²³⁹

Lord Hope, on the other hand, placed his emphasis on whether the crime of torture had achieved the *jus cogens* status by the September 29, 1988 date. Stating that for Pinochet to lose his immunity, "it would have to be established that there was a settled practice for crime of this nature to be so regarded by customary international law at the time when they were committed," Lord Hope found that no such settled practice existed at that point.²⁴⁰ However, he quickly pointed out that "there are sufficient signs that the necessary developments in international law were in place by that date."²⁴¹ Relying on the discussion of *jus cogens* in *Siderman de Blake v. Republic of Argentina*,²⁴² the Torture Convention,²⁴³ and numerous articles written in 1988 and 1989, he found evidence that the prohibition of torture had achieved this status.²⁴⁴ Consequently, Pinochet lost his immunity *ratione materiae* on December 8, 1988, the date when the U.K. ratified the Torture Convention.²⁴⁵ Lord Hope's position on the issue, however, is best typified by his statement in reference to September 29, 1988, the date from which the crime of torture's status was measured: "But we must be careful not to attach too much importance to this point, as the opportunity for prosecuting such crimes seldom presents itself."²⁴⁶

²³⁷ *Id.* at 115.

²³⁸ *See id.*

²³⁹ *See id.*

²⁴⁰ *Id.* at 151.

²⁴¹ *Id.* at 152.

²⁴² 26 F.2d 1166 (9th Cir. 1992).

²⁴³ *See supra* note 201.

²⁴⁴ *See Ex parte Pinochet II*, 2 All E.R. 97, 152 (H.L. 1999).

²⁴⁵ *See id.*

²⁴⁶ *Id.* at 151.

Lord Hutton, in contrast, dealt primarily with the issue of whether Spain could bring suit against Chile in the U.K. without Chile's consent. Drawing upon the principle that a state is responsible for the actions of its officials when they perform those actions under the color of authority, Hutton stated that this principle covered even actions performed "in excess of their proper functions."²⁴⁷ The Lord next dispatched with Pinochet's lawyers' argument that Part I of the State Immunity Act of 1978²⁴⁸ afforded Chile immunity in the U.K. Although conceding that Chile would be afforded immunity in a civil proceeding for damages, Lord Hutton cited Part I, section 16(4) as controlling.²⁴⁹ That section expressly states that the immunity afforded under the act does not extend apply to criminal proceedings.²⁵⁰ Inherent in this conclusion was the rejection of *Al-Adsani v. Government of Kuwait*,²⁵¹ *Jaffe v. Miller*,²⁵² and *Siderman de Blake v. Republic of Argentina*²⁵³ as precedential authority.²⁵⁴ Finally, turning to the actual provisions of the Torture Convention,²⁵⁵ he stated:

²⁴⁷ *Id.* at 156.

²⁴⁸ ch. 33 (Eng.).

²⁴⁹ See *Ex parte Pinochet II*, 2 All E.R. at 156; State Immunity Act, 1978, ch. 33, Part I, § 16(4) (Eng.).

²⁵⁰ See *Ex parte Pinochet II*, 2 All E.R. at 156. Lord Phillips also relied upon similar logic in his opinion. Citing Part III of the 1978 Act, affording immunity to a former head of state "in respect of the performance of his official functions," Phillips stated: "I do not believe that those functions can, as a matter of statutory interpretation, extend to actions that are prohibited as criminal under international law. In this way one can reconcile . . . the provisions of the 1978 Act with the requirements of public international law." *Id.* at 192. Additionally, analogizing a head of state's functions to those of a diplomat, he cited article 3 of the Vienna Convention as instructive: "protecting in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law." *Id.* In short, this article strongly suggested that Pinochet had overstepped his bounds in light of the prohibition of torture achieving a *jus cogens* status. See *id.*

²⁵¹ 107 LL.R. 536 (Eng. C.A. 1996). In *Al-Adsani*, a plaintiff brought a tort claim against the government of Kuwait alleging torture. The court upheld the government's immunity under section 1 of the State Immunity Act of 1978. See generally *id.*

²⁵² 95 LL.R. 446 (Can., Ont. Ct. App. 1993). In *Jaffe* government officials, sued in tort for conspiracy to kidnap, were granted immunity for these actions. See generally *id.*

²⁵³ 965 F.2d 699 (9th Cir. 1992). In *Siderman de Blake*, the court remanded a family's tort claim against military officials for torture for a determination of whether Argentina's involvement of United States courts in its suit constituted an implied waiver that rendered it subject to U.S. jurisdiction. In short, despite recognition of prohibition of torture as *jus cogens*, Congress' passage of the FSIA without such a provision prevented the *jus cogens* crime from trumping the statute. See *id.* at 719.

²⁵⁴ Pinochet/Chile's lawyers argued that these cases should govern the Lords' decision; however, Lord Hutton concisely stated that Part I of the State Immunity Act 1978 did not apply to criminal proceedings. See *Ex parte Pinochet II*, 2 All. E.R. 97, 158 (H.L. 1999).

²⁵⁵ See Torture Convention, *supra* note 201, at arts. 2, 4, & 7. These articles provide, in part:

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

I do not accept the argument advanced by counsel on behalf of Senator Pinochet that the provisions of the convention were designed to give one state jurisdiction to prosecute a public official of another state in the event of that state deciding to waive state immunity. I consider that the clear intent of the provisions is that an official of one state who has committed torture should be prosecuted if he is present in another state.²⁵⁶

Consequently, since Lord Hutton could not reconcile a former head of state's commission of torture with an official function, he was not entitled to immunity *ratione materiae*.²⁵⁷

Finally, Lord Saville also drew upon the language of the Torture Convention in reaching his conclusion, yet found that the act of torture did not need to be deemed as being outside the realm of official functions to trigger liability. Stating that an act of torture is "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," he concluded that the Convention contemplated coverage for heads of state as "official torturers."²⁵⁸ Consequently, immunity *ratione materiae*, with respect to torture, could not coexist with the Torture Convention since signatories could not "simultaneously claim an immunity . . . based on the official nature of the alleged torture."²⁵⁹ Thus, Lord Saville agreed with his brethren that General Pinochet lost his immunity *ratione materiae* on December 8, 1988 with respect to alleged official torture.²⁶⁰

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2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

....
Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

....
Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

....
Id.

²⁵⁶ *Ex parte Pinochet II*, 2 All E.R. 97, 165 (H.L. 1999).

²⁵⁷ *See id.* at 167.

²⁵⁸ *Id.* (quoting Torture Convention, *supra* note 201, at art. 1, § 1).

²⁵⁹ *Id.*

²⁶⁰ *See id.*

On April 15, 1999, the UK Home Secretary, Jack Straw, issued a decision to order the application for Pinochet's extradition to proceed.²⁶¹ Pending the Magistrate's approval, the Home Secretary (Jack Straw) will be delegated with the authority to finally surrender Pinochet to the Spanish authorities.²⁶²

IV. WHAT COULD HAVE BEEN: PINOCHET AND THE ICC

A discussion on bringing Pinochet and other like-minded former heads of state to justice would not be complete without mention of the International Criminal Court's jurisdiction over such individuals. Adopted in July of this past year, by a vote of 120 to 7 with 21 abstentions, the ICC's statute is currently open to ratification by the world community and will become operative when sixty states have become signatories.²⁶³ Unfortunately, Pinochet will not be subject to the court's jurisdiction as it is non-retroactive in nature.²⁶⁴ However, an examination of the court's structure and how it might have garnered jurisdiction over the former Chilean Head of State serves as an excellent indication of how future despots may be subject to the body. Furthermore, the creation of the body is the latest example of the emerging norm that former heads of state guilty of horrific human rights abuses will no longer escape justice.

A. *The Birth and Maturation of the ICC*

In December of 1989, the United Nations General Assembly, in response to a request by Trinidad and Tobago, instructed the International Law Commission to push forward in its work to create an International Criminal Court with jurisdiction to cover such crimes as

²⁶¹ See Amnesty News, *U.K.-Pinochet: Justice Is Being Done* (visited May 27, 1999) <http://www.amnesty.org.uk/news/press/releases/27_may_1999-0.shtml>.

²⁶² See generally *id.* (explaining that unless an appeal is allowed and is subsequently successful, "the extradition case will proceed to a committal hearing in the Magistrate's Court"). Immediately prior to this Note's publication, on October 8, 1999, a British magistrate ruled that Pinochet could be extradited to Spain to stand trial. The ruling, while not an extradition order, stated that Britain could legally extradite the general pursuant to the Home Secretary's approval. Under British law, the Home Secretary enjoys broad discretion in evaluating extradition cases and may, after all legal appeals are exhausted, end the case on a variety of grounds including politics or Pinochet's ailing health. Interestingly, the Home Secretary, Jack Straw, recently declined to force an eighty-seven (87) year old British woman, accused of treason, to stand trial on account of her age and ailing health. Consequently, Chilean and Spanish diplomats who do not support the extradition have begun to appeal to both Straw's humanitarian and political sensitivities. See T.R. Reid, *Pinochet Extradition Approved; Former Chilean Leader May Be Tried in Spain, British Judge Rules*, WASH. POST, Oct. 9, 1999, at A15.

²⁶³ See Nuremberg to Rome, *supra* note 72.

²⁶⁴ See Rome Statute, *supra* note 77, at art. 11.

drug trafficking.²⁶⁵ A draft statute for an international criminal court was presented to the General Assembly in 1994.²⁶⁶ In July of 1998, after nearly six years of preparatory meetings and negotiations, the Rome Statute of the International Criminal Court was adopted.²⁶⁷ Endorsed by 120 nations, the ICC is viewed as a means "to end impunity," promote universal justice, "help end conflicts," "remedy the deficiencies of ad hoc tribunals," "take over when national criminal justice institutions are unwilling or unable to act," and deter future despots.²⁶⁸ U.N. Secretary General Kofi Annan summed up the world's commitment to the body:

In the prospect of an international criminal court lies the promise of universal justice We ask you . . . to do [your part] in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.²⁶⁹

However, despite such a universal rejoicing at the adoption of the ICC, the body encountered its first obstacle as the United States, the world's policeman on human rights violations, joined the likes of Libya, China, Iraq and Sudan in advocating against the creation of the court.²⁷⁰ As one delegate to the Rome Conference commented: "You cannot have a court of universal jurisdiction without the world's major military power on board."²⁷¹

The United States' veto stems from its disapproval of the Court's structure and the manner in which cases are referred to the prosecutor charged with investigating the crimes. Although article 1 of the statute dictates that the ICC will only exercise its jurisdiction over those individuals accused of the most serious of international crimes, and will do so in accordance with the principle of complementarity with respect to states' national court systems, the U.S. fears that its sovereignty will be frequently invaded by virtue of its status as the world's peacekeeper.²⁷² In short, the U.S. has assumed that its soldiers and

²⁶⁵ See *Rome Statute of the International Criminal Court – Overview* (visited Aug. 27, 1999) <<http://www.un.org/law/icc/general/overview.htm>>.

²⁶⁶ See *id.*

²⁶⁷ See *id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ See Scharf Testimony, *supra* note 1, at 73.

²⁷¹ Alessandra Stanley, *U.S. Dissents, But Accord is Reached on War-Crime Court*, N.Y. TIMES, July 18, 1998, at A3 (quoting Dutch delegate Gam Strijards).

²⁷² See Rome Statute, *supra* note 77, at art. 1; see also Nuremburg to Rome, *supra* note 72.

political leaders, who in their capacities as world peacekeeper often engage in acts that may be construed as crimes under the ICC's jurisdiction, will be the target of vengeful prosecutions.²⁷³ As such, the U.S. has argued that all members of the U.N. Security Council, of which the U.S. has a permanent seat, ought to be given the right to veto any such prosecution attempt by the ICC.²⁷⁴ In order to understand the U.S. position, and how the ICC's provisions are necessary in order to gain jurisdiction over former despots such as Pinochet, several of the ICC's provisions must be examined.

B. Understanding the ICC's Structure and Jurisdiction

As mentioned above, the ICC statute is based on the principle of complementarity, meaning that crimes fall within its jurisdiction only when there is no competent or credible national court that can or will exercise jurisdiction.²⁷⁵ As such, it provides for automatic, yet not total, universal jurisdiction over the atrocities of genocide, war crimes, crimes against humanity,²⁷⁶ and crimes of aggression. Its preamble states the desire to vanquish the impunity for the perpetrators of such crimes that has existed for much of the last half-century.²⁷⁷ At the heart of controversy surrounding the United States was article 13, the mechanism by which the ICC prosecutor is referred cases.²⁷⁸ What emerged from the Rome Conference is a two-track approach in which cases are triggered by either: (1) the Security Council or (2) individual countries or the ICC prosecutor on his own proprio motu after receiving credible information concerning grave violations of international law.²⁷⁹ Already insulated from prosecutions under the first track by virtue of its Security Council veto, the U.S. sought assurances that no U.S. national would be tried under the second track without U.S. approval on a case-by-case basis.²⁸⁰ However, acquiescing to the U.S. position would have effectively "gutted the treaty" and given "de facto immunity to the most conspicuous" and notorious

²⁷³ See Scharf Testimony, *supra* note 1, at 73.

²⁷⁴ See *id.*; see also Nuremberg to Rome, *supra* note 72.

²⁷⁵ See Brown, *supra* note 72, at 386.

²⁷⁶ Crimes against humanity are defined as including such acts as the following when they are carried out on a widespread or systematic basis: murder, torture, rape, persecution against identifiable group on political, racial, national, ethnic, religious, or gender-based grounds, forced disappearances, deportations, and enslavement. See Rome Statute, *supra* note 77, at art. 7.

²⁷⁷ See *id.* at preamble.

²⁷⁸ See *id.* at art. 13.

²⁷⁹ See *id.*; Scharf Testimony, *supra* note 1, at 73; *UN Diplomatic Conference Concludes with Decision to Establish Permanent International Criminal Court*, M2 Presswire, July 21, 1998, available in 1998 WL 14097075.

²⁸⁰ See Scharf Testimony, *supra* note 1, at 73.

criminals, as the very heads of state that the ICC was designed to punish would never have consented to the jurisdiction of the court.²⁸¹ Furthermore, much of universal credibility of the ICC would be lost if the second track of trigger mechanisms was abandoned and each prosecution was thereby subject to the veto of the five members of the Security Council.²⁸²

To alleviate U.S. apprehensions, the court's structure was bolstered by protective mechanisms mandating jurisdiction over only serious crimes "that represent a 'policy'" as opposed to "random acts of U.S. personnel" abroad, a major concern of the U.S. delegation.²⁸³ Additionally, a system of checks and balances was adopted whereby a three-judge pre-trial chamber must review the prosecutor's decision to initiate an investigation into alleged crimes,²⁸⁴ a provision designed to flesh out the politically-motivated or vengeful prosecutions the U.S. felt would be brought against its nationals or leaders.²⁸⁵ Notwithstanding these assurances, the failure to obtain an "ironclad" exemption for its servicemen and political leaders signaled the U.S. delegation's decision to vote against the ICC.²⁸⁶ As such, the U.S. will not be afforded the opportunity to assist in the drafting of the remaining rules and procedures or to nominate a judge to sit on the tribunal.²⁸⁷ Additionally, while not bound to cooperate with the court, U.S. nationals could still conceivably be arrested and extradited to the court by a party-nation having in personam jurisdiction.²⁸⁸ Finally, and most importantly, the U.S. withdrawal of support sends a mixed message to despotic heads of state and future violators of crimes against humanity.²⁸⁹

Notwithstanding the fracas caused by the United States and the mixed message it sends to former despots such as Pinochet, the bulk

²⁸¹ See Nuremberg to Rome, *supra* note 72.

²⁸² See *id.*

²⁸³ Scharf Testimony, *supra* note 1, at 73. This assurance would prevent prosecutions for such acts as the downing of the Iranian passenger airliner by the U.S.S. Vincennes or the ATF assault on the Branch Dividian compound in Waco, Texas where 23 British nationals, three Canadians, two Australians, two New Zealanders, and two Filipinos were killed. See Paul Craig Roberts, *British Abandon Law for Thuggery*, WASH. TIMES, Oct. 20, 1998, at A12.

²⁸⁴ See Rome Statute, *supra* note 77, at art. 15. Under article 15, the prosecutor must initially conclude that, in light of the proffered evidence, there is a reasonable basis to proceed with the investigation. He then submits this proof to the Pre-Trial chamber for authorization to proceed; that body only gives its approval if it likewise believes there is a reasonable basis to commence the investigation. See *id.*

²⁸⁵ See Scharf Testimony, *supra* note 1, at 73. Furthermore, the Security Council is provided with the opportunity to take a collective, not individual, vote on whether to postpone or table an investigation for up to twelve months at its discretion. See *id.*

²⁸⁶ See *id.* at 74.

²⁸⁷ See *id.*

²⁸⁸ See *id.*

²⁸⁹ See *id.*

of the ICC statute represents the concerted effort to hold such leaders responsible for their actions after they leave office. Jurisdiction is governed by article 12, which states that any signatory thereby accepts the Court's jurisdiction on a continual, and not a case-by-case, basis.²⁹⁰ In short, the ICC may exercise this jurisdiction "if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court . . . (a) The State on the territory of which the conduct in question occurred . . . (b) The State of which the person accused of the crime is a national."²⁹¹ In keeping with its stated goals in the preamble, article 27 prescribes jurisdiction over "all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government . . . shall in no case exempt a person from criminal responsibility."²⁹²

The Court's complementary jurisdiction is evidenced through article 17, which renders various cases inadmissible²⁹³ where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint . . .²⁹⁴

As indicators of a national court's inability to prosecute an individual, the article cites such phenomena as the collapse of the entire judicial system or an inability to collect evidence and testimony from relevant parties.²⁹⁵ An unwillingness to prosecute the alleged offender shall be determined if "[t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility," if the proceedings are not being conducted "independently or impartially . . . [and are thereby] inconsistent with an intent to bring the person concerned to justice," or there has been "an unjustified delay in the proceedings."²⁹⁶ Fi-

²⁹⁰ See Rome Statute, *supra* note 77, at art. 12.

²⁹¹ *Id.*

²⁹² *Id.* at art. 27.

²⁹³ Article 20 of the Rome Statute also covers the inadmissibility of certain cases and mandates that an individual who has already been tried by another court for his alleged crime cannot be tried by the ICC unless the previous trial was conducted "for the purpose of shielding the person" from responsibility. *Id.* at art. 20.

²⁹⁴ *Id.* at art. 17.

²⁹⁵ See *id.*

²⁹⁶ *Id.*

nally, the court may not force a nation to extradite an alleged offender if this action would contravene internationally recognized principles of diplomatic immunity.²⁹⁷

C. Pinochet and Beyond

Unfortunately, the recent adoption of the ICC and its inability to extend liability retroactively means that Pinochet will escape the jurisdiction of the tribunal. However, by adopting the "what if" approach,²⁹⁸ this high profile case may serve as a model for punishing former heads of state under the ICC. Symbolically, on September 11, 1998, the twenty-fifth anniversary of Pinochet's ascent to power, the Chilean Foreign Minister, Jose Miguel Insulza, signed the Rome Statute, a gesture implying Chile's eventual acceptance of the court's jurisdiction pursuant to article 12.²⁹⁹ While the Chilean Senate has yet to ratify the treaty, fearing that ratification will imply acquiescence to the Spanish position, this occurrence would in theory pave the way for the ICC's ability to assert jurisdiction.³⁰⁰ As Chile would therefore be a signatory to the Court, the ICC would be able to validly assert jurisdiction over Pinochet since he is both a Chilean national and the crimes he is accused of committing were carried out in Chile, thereby meeting both prongs of article 12.

In order to then carry out an investigation pursuant to articles 13 and 15, the case would need to be referred to the ICC's prosecutor by the collective Security Council, another state party to the treaty, or on the prosecutor's own *proprio motu*. In light of the United States' involvement in the carrying out of Pinochet's Operation Condor, its desire to keep the related intelligence files secret, and its tight-lipped approach to the current matter before the British High Court, it is likely the U.S. would veto such a motion. Instead, a more plausible occurrence would find Spain, a state-party to the ICC, referring the matter to the ICC prosecutor and delivering the research that Judge Garzon has accumulated for the ICC prosecutor's assessment. Since the cases of torture, terrorism, and murder are well documented, there would more than likely be a reasonable basis to proceed with the investigation and both the Prosecutor and the Pre-Trial chamber would likely authorize its commencement. Pinochet's status as a former

²⁹⁷ See *id.* at art. 98.

²⁹⁸ In applying the "what if" approach, the reader must assume either that the ICC was already in existence at the time the crimes were committed or that Pinochet was alleged to have committed crimes following the creation of the court.

²⁹⁹ See *Debate Over Pinochet's Arrest Rages On*, Inter Press Service, Oct. 21, 1998, available in 1998 WL 19901101.

³⁰⁰ See *id.*

head of state would cause none of the problems encountered by Britain as article 27 specifically extends liability to such officials for their atrocities.

Chile, however, would likely argue that the case is inadmissible under article 17 on the grounds that it had investigated and is continuing to investigate the crimes, and that the Amnesty Law of 1978 exonerates Pinochet from prosecution.³⁰¹ Furthermore, Chile is likely to point to the fourteen pending cases currently in the hands of prosecutors as evidence that it is genuinely dealing with the matter nationally.³⁰² However, it is the position of this note that in light of the provisions contained in article 17, such amnesty laws run contrary to the principles of international law and are inconsistent with an intent to bring the people to justice for their alleged crimes.³⁰³ In short, the existence and passage of similar laws must only be viewed as an unwillingness to prosecute those accused of the most horrific of crimes. Specifically, the expeditious and cursory closings of numerous cases against Pinochet by the Chilean Supreme Court not only smack of a lack impartiality, but also an unwillingness to expend the time and resources to afford justice to the victims of Pinochet's crimes.³⁰⁴ Furthermore, the removing and relocating of Chilean human rights lawyers following their successful prosecutions can only be viewed as an attempt to unjustly delay and impede the forward movement of the most justiciable claims.³⁰⁵ Finally, token cases that currently remain open must not be mistaken for light at the end of the tunnel, but rather as a shield against international responsibility. While it is too late to avenge the deaths of Pinochet's many victims via the ICC, proponents of the Court must join forces with such human rights groups as Amnesty International to champion the illegality of national amnesty laws. A failure to do so will inevitably allow a future despot to make an end run on justice.

V. CONCLUSION

“[F]or blood pollutes the land, and no expiation can be made for the blood that is shed in it, except by the blood of him who shed it.”³⁰⁶ Drawn from the ancient Hebrews, this message is indicative of

³⁰¹ See *supra* notes 30-31 and accompanying text.

³⁰² See Hoge, *supra* note 43, at A10.

³⁰³ This position appears to have been hinted at in Lord Lloyd's dissenting opinion when he remarked: "It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators." *Ex parte Pinochet I*, 4 All E.R. 897, 929 (H.L. 1998).

³⁰⁴ See Amnesty Int'l Report, *supra* note 31.

³⁰⁵ See *id.*

³⁰⁶ Beres, *supra* note 19, at 670 (quoting *Numbers* 35:33).

the emerging norm to extend former heads of state no quarter with respect to their atrocious crimes committed while in office. For much of the last half century, the earth has been continually stained with the blood of civilians caught up in political struggles to gain power at any cost. Yet, while Nuremberg sounded a call for the end of the impunity which marked the first half century, the world community was initially sluggish in its response, lurching from crisis to crisis in attempt to ameliorate the victims with legislation and punishment designed solely on a case-by-case basis. Despite this irregularity, international jurisprudence ranging from the Genocide Convention to the recently passed International Criminal Court has begun to break the molds of apathy and come to reflect the growing belief that the notorious violators of human rights law—in most cases former heads of state—must not be allowed to traverse the world eluding justice. However, this emerging norm can only be maintained by a consistent policy reflecting the world's desire to punish the wrongdoers, bring justice to the victims and their families, deter future violators, and spread a pedagogical message concerning the rules of moral conduct.

While both Spain's call for the extradition of Pinochet and the House of Lords' second finding that Pinochet is entitled to no immunity for certain crimes of torture and conspiracy to commit torture have sounded the alarm for despots living abroad, the United States' failure to ratify the ICC, endorse the rise of the applicability of universal jurisdiction, and support Spain in its recent endeavors has muted the force of Spain's actions and sent a mixed message to the very same despots. Unfortunately, these apathetic policy choices stem not from a condemnation of these states' actions, but rather from selfish concerns about potential political embarrassment or unsubstantiated and unrealistic fears over hypothetical repercussions that might result from a U.S. acquiescence to the world community's emerging position. Particularly, Washington is reluctant to support Spain's call for extradition as this would necessarily result in the need to turn over classified files to Spain which document the U.S.' complicity in both bringing Pinochet to power via the overthrow of Salvador Allende in 1973, and its continued funding of Operation Condor despite its awareness of the atrocious human rights violations that were occurring in Chile.³⁰⁷

³⁰⁷ Despite these concerns, U.S. officials are slowly complying with the requests of Spanish Magistrate Baltasar Garzon to turn over such documents. One newly de-classified cable clearly shows how Henry Kissinger continued to provide support to Pinochet's regime through 1976 despite the hundreds of civilians that remained jailed following the 1973 overthrow. See Lucy Kosimar, *Kissinger Covered Up Chile Torture*, OBSERVER, Feb. 28, 1999, at 3.

Additionally, lackluster U.S. support can be blamed on the attenuated fears that some nations will attempt to use institutions such as the ICC as forums in which to hold American policymakers like Henry Kissinger or Madeleine Albright liable for their decisions which resulted in accidental civilian losses. Yet these concerns must only be viewed as exaggerations of the cons in light of both the nature of such decisions and the difficulty in prosecuting these cases.³⁰⁸ In short, most, if not all U.S. foreign policy decisions involving military force are defensive or retaliatory in nature, triggered by an aggressive or rogue state that has violated the human rights norms that the world community embraces. Furthermore, such efforts are generally carried out with the physical, or at least the political, support, of many of the world's representative nations, thus effectively guaranteeing world acquiescence in U.S. action. Thus, such haphazard attempts to inflict a vendetta-driven type of justice upon U.S. policymakers will ultimately be unsuccessful. Finally, "[t]his concern oversimplifies the mechanisms of justice" by failing to take into account the difficulty in prosecuting such cases to fruition.³⁰⁹ One needs to look no further than the Pinochet case to view the complex and lengthy investigatory, extradition, and prosecutorial requirements that must be met to bring even the notorious malefactor to the brink of justice. With such difficulty pervading the establishment of both a legal and factual basis for the criminal charges, cases such as these "will continue to be rare."³¹⁰

Recently, the U.S. has further convoluted the situation by siding with Turkey in its attempt to extradite Abdallah Ocalan, leader of the Kurdish Workers Party, from Italy,³¹¹ and pledging support to the Cambodian government in its attempts to bring Ta Mok, a former leader of the Khmer Rouge regime, to justice.³¹² While in accordance with Madeleine Albright's recent assertion that the United States must "strive to ensure that sooner or later, one way or another, terrorists are held accountable for their crimes," these positions stand in marked

³⁰⁸ See Jerry Fowler, *Pinochet Arrest Is a Step Toward World Justice*, NAT'L L.J., Feb. 22, 1999, at A26.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ See Jim Lobe, *Ocalan and Pinochet, A Tale of Two Terrorists*, Inter Press Service, Nov. 22, 1998, available in 1998 WL 19901647 [hereinafter *A Tale of Two Terrorists*].

³¹² See Julie Schmit, *Cambodia's Quest for Justice Leads to 'Butcher,'* USA TODAY, Mar. 8, 1999, at 10A. Ta Mok continues to be one of the most feared and hated of the Khmer Rouge leaders responsible for the deaths of nearly 1.7 million Cambodians during the 1975-79 reign of the regime. He has been personally implicated in numerous executions during that period. U.S. State Department spokesman James Rubin recently spoke out on Mok's arrest and inevitable trial: "We are encouraged that we now have the opportunity to bring one of the most notorious war criminals in recent past to justice, and we will now be focusing our efforts on working with the Cambodian government to that end" *Id.*

contrast to the official U.S. position on Pinochet, a former head of state implicated in both terrorist acts and human rights violations against not only Chileans, but citizens from all over the world, including the U.S.³¹³

Will the world be a better place if the Pinochets of the past and future are held accountable for their crimes and brutal regimes? The answer is a resounding yes. Accountability must displace the impunity that has marked the world's past efforts to bring such malefactors of human rights to justice. For it is through accountability that the pedagogical impact of retribution, redress, and deterrence can be imposed and subsequently realized.³¹⁴ Accountability must also prevail over the belief that pursuing justice hampers internal social reconciliation, as such an argument fails to appreciate the gravity and magnitude of the international shock waves that emanate from such a widespread breach of human rights norms. Finally, accountability is the only answer as it ensures that amidst the legal and political hurdles, the world never loses sight of the victims and survivors of victims who at long last receive some sense of justice, vindication, and, hopefully, closure. Thus, although politics often dictate policy, and the bonds of old alliances are difficult to overcome, the time has come for individual States to follow Spain's lead and call vociferously for an end to the impunity that has marked the world community's attempts to bring the most notorious of human rights violators to justice.

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³¹³ *A Tale of Two Terrorists*, *supra* note 303. To date, Pinochet has been charged with criminal acts that occurred in Rome, Buenos Aires, and Washington D.C. While Attorney General Janet Reno has indicated that she is looking into the possibility of reopening the case involving a 1976 D.C. car bombing of former Chilean foreign ambassador, *see* T.R. Reid, *Britain Judges the Judges in the Pinochet Case*, WASH. POST, Jan. 17, 1999, at A32, and Pinochet enemy Orlando Letelier and his American aide, Ronni Moffit, it is unlikely that the case will proceed in light of the aforementioned U.S. fears over investigating Pinochet. *See* Jonathan S. Landay, *Why U.S. Is Quiet on Pinochet Case*, CHRISTIAN SCI. MONITOR, Dec. 4, 1998, at 4.

³¹⁴ *See* Fowler, *supra* note 308, at A26.

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