

# THE EXTRADITION PROCEEDINGS AGAINST GENERAL PINOCHET:

## A CASE STUDY IN THE EMERGING INTERNATIONAL SYSTEM OF CRIMINAL JUSTICE

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On October 16, 1998, General Augusto Pinochet was arrested in London, England on charges contained in a Spanish provisional arrest warrant alleging that he was responsible for the murder of Spanish citizens in Chile while he was the ruler of that country.<sup>171</sup> A second provisional warrant was issued on October 22, 1998<sup>172</sup> and both were quashed by the Queen's Bench Divisional Court on October 28, 1998.<sup>173</sup> Next, on November 25, 1998, an appellate committee from the House of Lords issued an opinion reversing the lower court's decision, finding that General Pinochet could not benefit from head-of-state immunity and could potentially be extradited for crimes against international law.<sup>174</sup> This opinion was set aside on the ground that there was bias found on the committee. The issue was presented to a second panel in the House of Lords, which ruled with one dissenter on March 24, 1999 that General Pinochet's extradition could proceed.<sup>175</sup> Based on this opinion and supplemental charges from the Spanish government,<sup>176</sup> Magistrate Ronald Bartle decided on October 8, 1999 that the requirements had been met to "commit Senator Pinochet to await the decision of the Secretary of State" on whether to extradite him to Spain.<sup>177</sup> Ultimately, the decision whether to extradite General Pinochet rests in the hands of the United Kingdom Home Secretary Jack Straw, who can take into consideration the courts' rulings.<sup>178</sup>

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<sup>171</sup> See *The Case of General Pinochet: Universal Jurisdiction and the Absence of Immunity for Crimes Against Humanity* (visited Oct. 20, 1999) <http://www.amnesty.org/ailib/aipub/1998/EUR/44502198.htm>.

<sup>172</sup> See *Regina v. Bartle ex parte Pinochet*, 38 I.L.M. 581, \*583 (H.L. 1999).

<sup>173</sup> See *id.* at \*584.

<sup>174</sup> See *Regina v. Bartle ex parte Pinochet*, 37 I.L.M. 1302 (H.L. 1998), cited in *Regina v. Bartle ex parte Pinochet*, 38 I.L.M. at \*584.

<sup>175</sup> See *Bartle*, 38 I.L.M. at \*581.

<sup>176</sup> See Ronald David Bartle, *Judgment, October 8, 1999, The Kingdom of Spain v. Augusto Pinochet Ugarte, In Bow Street Magistrates' Court* (visited Nov. 20, 1999) <http://www.open.gov.uk/lcd/magist/pinochet.htm>, at p. \*3.

<sup>177</sup> *Id.* at \*6.

<sup>178</sup> See *id.* at \*2.

The ruling of the House of Lords that General Pinochet can be extradited to Spain to stand trial for crimes against humanity lends support to the emerging theory of universal jurisdiction for certain crimes under international law.<sup>179</sup> The following discussion of the elements of General Pinochet's case will show that the international community, by and large, is willing to sacrifice some national sovereignty in order to eradicate torture and other human rights violations. It will do so through an elucidation of the concepts of *jus cogens*, international ethics, head of state immunity, human rights crimes, universal jurisdiction, and extradition.

## I. JUS COGENS

The system of international law is a tangled mass of bilateral and multilateral agreements between States that has grown steadily over the years.<sup>180</sup> However, the notion of *jus cogens*, fundamental social and legal norms, is superior to all treaties and any other customary law.<sup>181</sup> The Vienna Convention on the Law of Treaties defines *jus cogens* as "a norm accepted and recognized by the international community of States as a whole, a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."<sup>182</sup>

Because the international system of laws is not centralized and relies mainly upon the independent will of various states,<sup>183</sup> it is critical to have certain norms that every country agrees are important and should have precedential status over all other laws. Legal norms that have reached the status of *jus cogens* are inextricably linked to the concept of obligations *erga omnes*, or obligations that a State owes toward the entire international community rather than toward just one or a few other States.<sup>184</sup> In the *Barcelona Traction Case*, the International Court of Justice referred to such obligations in dicta, stating that they derive from outlawing "acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person."<sup>185</sup> In general,

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<sup>179</sup> See Oppenheim's Treatise on Int'l Law 998 (9th ed. 1992), cited in *Bartle*, 38 I.L.M. at \*659.

<sup>180</sup> See Lyal S. Sunga, *The Emerging System of International Criminal Law* 229 (1997).

<sup>181</sup> See *id.*

<sup>182</sup> Vienna Convention on the Law of Treaties, concluded May 23, 1969, art. 53, reprinted in Barry E. Carter & Phillip R. Trimble, *International Law, Selected Documents* 64 (1999-2000 ed.).

<sup>183</sup> See Sunga, *supra* note 10, at 230.

<sup>184</sup> See *id.* at 235-36.

<sup>185</sup> *Barcelona Traction, Light and Power Co. Ltd. (Spain v. Belg.)*, 1970 I.C.J. at paras. 33-34, cited in Sunga, *supra* note 10, at 235-36.

for a norm to reach *jus cogens* status and in turn generate obligations *erga omnes*, the norm must be developed through the international system for many years until it is recognized throughout the world.

The prohibition against torture began to gain status as an international legal norm after World War II, following discovery of the inhumane treatment of people in prisons and concentration camps.<sup>186</sup> The prohibition was officially referred to as early as 1948 in the Universal Declaration of Human Rights wherein Article 5 reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>187</sup> This same prohibition was also included in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, with the exception of the term "cruel" which was considered too subjective.<sup>188</sup> In 1973 and 1974, the U.N. General Assembly passed Resolutions 3059, 3452 and 3453, essentially declaring torture on a large scale to be a crime against humanity.<sup>189</sup> Today "it is the generally accepted view among international lawyers that the prohibition of torture has developed into a rule of *customary* international law applying equally to States" (emphasis in original).<sup>190</sup>

The concept of *jus cogens* is very important in the case of General Pinochet, because if the prohibition of torture has indeed reached the status of an international peremptory norm, as the authorities tend to agree,<sup>191</sup> then it would logically follow that torture is an international crime for which anyone can be punished anywhere in the world. This principle is well-illustrated in a recent case decided in the United States District Court for the Northern District of Ohio where the court reasoned that offenders of *jus cogens* are in effect "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution,"<sup>192</sup> To better understand the role of peremptory norms in international law, it is necessary to explore the basic concepts of international ethics and how they relate to human rights.

## II. INTERNATIONAL ETHICS

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<sup>186</sup> See J. Herman Burgers & Hans Danelius, A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 10 (1988).

<sup>187</sup> *Id.* at 11.

<sup>188</sup> See *id.*

<sup>189</sup> See *Bartle*, 38 I.L.M. at \*589.

<sup>190</sup> Burgers and Danelius, *supra* note 16, at 12.

<sup>191</sup> See Statute of the International Criminal Tribunals for the Former Yugoslavia, adopted May 3, 1993, art.5; see also Statute of the International Criminal Tribunal for Rwanda, adopted Nov. 8, 1994, art.3, both cited in *Bartle*, 38 I.L.M. at \*589.

<sup>192</sup> *Demjanjuk v. Petrovsky*, 603 F. Supp. 1468 (N.D. Ohio 1985), *aff'd* 776 F.2d 571 (6th Cir. 1985), cited in *Bartle*, 38 I.L.M. at \*589.

A large part of international ethics is determining who has the authority or power to enforce international laws. This question is answered very differently by the two main competing theories of law, "naturalism" and "positivism."<sup>193</sup> Naturalism assumes that the rules of human behavior arise from sources beyond the will of man. The theory of naturalism posits that the rules that we instinctively follow come from physical nature, ethics or morality, and the concept of "divine law."<sup>194</sup> Cicero was the father of a theory called "true law" which is the natural law based on human ethics that results in "eternal, universal and constant rules of law" that govern human behavior.<sup>195</sup> A common morality, felt within all human beings, is what makes people value basic human rights such as justice, respect for human life, and the ability to live life with honor and dignity.<sup>196</sup>

The theory of positivism dominates modern political thinking.<sup>197</sup> It emphasizes human discretion as the authority for law and is distrustful of any moral balancing that might factor into lawmaking.<sup>198</sup> Positivism is directly opposed to the universal conceptions of morality espoused by naturalism and upon which international law depends, because no state has the power to enforce a universal law on any other state.<sup>199</sup> If there is to be enforcement of international crimes like those committed by Pinochet, there must be a recognized source of authority that supersedes the sovereign state.<sup>200</sup>

In the realm of international law, the theories of naturalism and positivism are given meaning by the legal concepts of monism and dualism. The dualistic system, which prevails in modern thinking, distinguishes between international legal rules and the law of sovereign states.<sup>201</sup> If criminals like Pinochet are to be punished, dualism must give way to some extent to the monistic system. The system of monism advanced by John Jay, the first Chief Justice of the United States, consists of treaties that govern sovereign states as well as the international community. It propounds that state constitutions can be amended by treaty and that a single legal order, based upon reason, reigns over the entire international system.<sup>202</sup> While monism would be more compatible with

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<sup>193</sup> See Alfred P. Rubin, *Ethics and Authority in International Law* 6 (1997).

<sup>194</sup> See *id.* at 7.

<sup>195</sup> *Id.* at 9.

<sup>196</sup> See Mark R. Amstutz, *International Ethics: Concepts, Theories and Cases in Global Politics* 75 (1999).

<sup>197</sup> See Rubin, *supra* note 23, at 15.

<sup>198</sup> See *id.* at 19.

<sup>199</sup> See *id.*

<sup>200</sup> See *id.* at 20.

<sup>201</sup> See *id.* at 64.

<sup>202</sup> See *id.* at 77.

international law, it would be unrealistic in a world built upon national sovereignty.

To complicate matters further, the conflicting legal approaches of dualism and monism combine with varying philosophical perspectives to create several theories of international ethics.<sup>203</sup> "Supernatural" ethics rely on either divine law or universal reason and find that any law made which violates these principles is void and is therefore not binding. "Intuitionist" ethics rely on an individual's objective and intuitive feeling of the rightness or wrongness of certain conduct to determine which laws are binding. "Pragmatic" ethics focus on the feasibility of punishing criminals for their moral violations. "Noncognitivist" ethics regard certain moral dilemmas as beyond the reach of rational discussion because there are so many individual views.<sup>204</sup> The supernatural scheme is most compatible with the naturalistic and monistic schools of thought.

Deaths related to mass murder, torture and "disappearance" carried out over a number of years by totalitarian and authoritarian regimes, like those for which Pinochet is responsible, have claimed the lives of 169 million persons worldwide this century.<sup>205</sup> This rate is "nearly four and a half times the rate of wartime deaths."<sup>206</sup> One recent example of such a regime is the internal struggle in the African nation of Rwanda and the resulting genocide.<sup>207</sup> An international tribunal has been set up to try and punish those involved for their crimes against human rights, but the authority to enforce the punishments is still tenuous; ". . . their authority is based exclusively on positive submission" of the parties to the dispute, and if either party is unhappy with the result, it does not have to obey the tribunal's ruling.<sup>208</sup> Although work on the International Criminal Court is ongoing and human rights supporters are hopeful that it will be effective in carrying out punishments,<sup>209</sup> as long as the protection of human rights is regarded by states as a noncompulsory alternative rather than as an obligation, punishments will not be regularly enforced.<sup>210</sup>

Human rights are based on universally accepted ethical norms and were first "expressed fundamentally as claims of individuals against the

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<sup>203</sup> See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 77 (1992) quoting W. Friedman, *Legal Theory* 40-42 (1967).

<sup>204</sup> See *id.* at 77-79.

<sup>205</sup> See Amstutz, *supra* note 26, at 85, citing R.J. Rummel, *Death by Government* 15 (1994).

<sup>206</sup> *Id.*

<sup>207</sup> See *id.* at 86.

<sup>208</sup> Rubin, *supra* note 23, at 157.

<sup>209</sup> See *Pinochet Case: No Turning Back in the Global Fight Against Impunity* (last modified Mar. 2, 2000) <http://www.amnesty.org/news/2000/12mar00.htm>.

<sup>210</sup> See Amstutz, *supra* note 26, at 88.

state."<sup>211</sup> The moral theory of human rights claims that individuals are entitled to certain fundamental rights that are grounded in morality, simply by virtue of their humanity.<sup>212</sup> Although these rights were originally thought to exist independently of the society and the State in which people lived, Edmund Burke challenged this thought with his theory that human rights were benefits that people received in return for participation in their political community.<sup>213</sup> The moral theory has been rejected by modern scholars, due at least in part to the lack of authority to enforce the rules.<sup>214</sup> In addition, "[b]ecause of the widespread relativity of values found in the world, some thinkers have concluded that there can be no international morality."<sup>215</sup>

Cultural relativism seriously affects human rights and the ethics debate because different cultures value different morals, making it difficult, if not impossible, to enforce a universal concept of human rights. In order to prosecute crimes against humanity, like those committed by Pinochet, on a worldwide scale, the concept of human rights must fall somewhere in between total universalism and cultural relativism.<sup>216</sup> Such a balance must be struck to protect human rights "without unduly threatening the decentralized nature of global society."<sup>217</sup>

In almost every culture, torture, in varying degrees, is considered a crime against humanity as well as a violation of human morality. General Pinochet's crimes can hardly be recognized as anything less than torture, and, therefore, international ethical principles demand that he be punished for the crimes of his regime. However, in the Pinochet case, another powerful international norm exists that is directly opposed to General Pinochet's potential extradition and punishment for the crime of torture: the concept of sovereign immunity for former heads of state.

### III. HEAD OF STATE IMMUNITY

The doctrine of sovereign immunity has arisen mainly through judicial decisions in national courts since the nineteenth century.<sup>218</sup> The American Supreme Court was the first to recognize this doctrine in the case of *The Schooner Exchange v. M'Faddon and Others*, 11 U.S. (7 Cranch) 116 (1812), where Chief Justice Marshall clearly set out the supreme

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<sup>211</sup> *Id.* at 71.

<sup>212</sup> *Id.* at 72-73.

<sup>213</sup> *See id.* at 73.

<sup>214</sup> *See id.*

<sup>215</sup> *Id.* at 75.

<sup>216</sup> *See id.* at 76.

<sup>217</sup> *Id.* at 90.

<sup>218</sup> *See* Gamal Moursi Badr, *State Immunity An Analytical and Prognostic View* 9 (1984).

importance of national sovereignty in international law.<sup>219</sup> The United States codified its interpretation of foreign state immunity in the Foreign Sovereign Immunities Act of 1976. The British treaty governing state immunity is the State Immunity Act of 1978, and it is this Act that General Pinochet relies upon to exempt him from British jurisdiction. Generally, Part I of the British Act provides for immunity of foreign states from the jurisdiction of the courts of the United Kingdom except as provided by the Act.<sup>220</sup> However, Section 16(4) provides that Part I does not apply to criminal proceedings, thus making that part inapplicable to Pinochet.<sup>221</sup>

At this point, a clarification must be made between immunity *ratione personae* and immunity *ratione materiae*. In the Pinochet case Lord Millet makes the distinction that immunity *ratione personae* protects an individual who holds a particular office, such as a head of state or a diplomat.<sup>222</sup> Immunity *ratione materiae*, on the other hand, "operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another and only incidentally confers immunity on the individual."<sup>223</sup> Since General Pinochet no longer holds the office of head of state in Chile, he is not entitled to immunity *ratione personae*. Only immunity *ratione materiae*, Pinochet's immunity for acts committed while he was in office, is at issue in this case.

Part III, Section 20(a)(1) of the British State Immunity Act gives statutory force to the doctrine of immunity *ratione materiae*, and it is the section upon which General Pinochet relies as giving him immunity from prosecution for acts of torture.<sup>224</sup> This section incorporates the Diplomatic Privileges Act of 1964 and, subject to the provisions of the section and to "any necessary modifications," applies the same immunity to heads of state as is applied to "the head of a diplomatic mission."<sup>225</sup> The Diplomatic Privileges Act is the codification into British law of the Vienna Convention on Diplomatic Relations of 1961.<sup>226</sup> Article 39 of the Vienna Convention is difficult to apply to the present situation with General Pinochet as a former head of state. The language in Article 39 refers to the diplomat's "appointment" and "functions as a member of the mission,"<sup>227</sup> which can be stretched to cover a head of state, as in Section 20(a)(1), but clearly does not make sense as applying to a former head of

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<sup>219</sup> See *id.* at 11.

<sup>220</sup> See *id.* at 193.

<sup>221</sup> See *id.* at 199.

<sup>222</sup> See *Bartle*, 38 I.L.M. at \*644.

<sup>223</sup> *Id.*

<sup>224</sup> See *id.* at \*598.

<sup>225</sup> Badr, *supra* note 48, at 201.

<sup>226</sup> *Bartle*, 38 I.L.M. at \*598.

<sup>227</sup> *Id.*

state who is merely visiting the United Kingdom. Basically, state immunity and diplomatic immunity are seen as completely separate from one another in international law, with each doctrine having its own set of rules and restrictions.<sup>228</sup>

Lord Goff of Chieveley, the lone dissenter in the House of Lords decision delivered on March 24, 1999, was largely concerned with the fact that the majority interpreted Chile's signing of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "Torture Convention") as an implied waiver of immunity.<sup>229</sup> Lord Goff contends that a state's waiver of immunity must be expressly stated in a treaty.<sup>230</sup> Since Chile did not expressly waive immunity when signing the Torture Convention, Lord Goff believes Chile did not waive its immunity by signing it.<sup>231</sup> Lord Goff also relied heavily on a United States Supreme Court decision which ruled that signing a treaty is not enough to waive immunity and that a waiver must be express.<sup>232</sup> The majority of the Lords did not accept Lord Goff's argument that Chile did not waive its immunity by signing the Convention<sup>233</sup> and the distinction between public and private acts is useful to point out the fatal flaw in his reasoning.

Because state immunity extends to actual persons who represent the state in an official capacity, it is necessary to distinguish between those persons' public and private acts. The widely used factual test for determining whether a state official has acted publicly or privately is "whether private individuals can also perform an act similar to the foreign state's disputed act."<sup>234</sup> The acts committed by Pinochet, it is argued, were done under state authority and in the furtherance of governmental objectives and accordingly were functions of the head of state.<sup>235</sup> However, Lord Hutton argues quite simply that General Pinochet is not entitled to immunity because acts of torture cannot possibly be construed as functions of the head of state.<sup>236</sup> Also, by the factual test set out above, Pinochet's acts of ordering torture and conspiring to perform torture are private acts, because they could also have been committed by a private individual. Lord Hope of Craighead points out that if these acts *are* acts of state, as Pinochet argues, then regardless of whether they are criminal or

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<sup>228</sup> See Charter of the International Military Tribunal of Nuremberg, *adopted* 1945, art.7, *quoted in Bartle*, 38 I.L.M. at \*634.

<sup>229</sup> See *Bartle*, 38 I.L.M. at \*601.

<sup>230</sup> See *id.* at \*604.

<sup>231</sup> See *id.* at \*608.

<sup>232</sup> See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), *cited in Bartle*, 38 I.L.M. at \*603.

<sup>233</sup> See *Bartle*, 38 I.L.M. at \*643.

<sup>234</sup> Badr, *supra* note 48, at 64.

<sup>235</sup> See *Bartle*, 38 I.L.M. at \*629.

<sup>236</sup> See *id.* at \*639.

not, no further analysis is necessary.<sup>237</sup> Lord Hope relies on the fact that these acts have acquired the status of *jus cogens*, and thus all states are compelled not to engage in such conduct.<sup>238</sup> In this situation, the prohibition on torture, accepted worldwide, overrides the immunity that a former head of state may assert for acts committed while in office. The fundamental legal norm against the commission of human rights violations trumps sovereign immunity.

#### IV. HUMAN RIGHTS CRIMES

General Pinochet faces over thirty different charges, according to the Spanish extradition request.<sup>239</sup> These charges range from conspiracy to torture and conspiracy to take hostages, to torture and attempted murder.<sup>240</sup> Although, Pinochet's secret police force, Direction de Inteligencia Nacional (DINA), is thought to have carried out most of the actual torture,<sup>241</sup> Lord Hope of Craighead puts forth in his opinion that Pinochet was at the center of a continuing "conspiracy to commit widespread and systematic torture and murder in order to . . . maintain control of government."<sup>242</sup> The torture carried out by the DINA, allegedly ordered by General Pinochet, included "the grill," a method involving administering electric shocks to sensitive body parts, and the "dry submarine," a method of suffocation by placing a bag on the victim's head.<sup>243</sup> The United Nations deplored this type of regime in government and in 1977 began drafting the Torture Convention, which came into effect in 1984.

Although this is a fairly new agreement, it is important to remember that torture was already considered an international crime when the Torture Convention was adopted by the United Nations.<sup>244</sup> The purpose of the Torture Convention is "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world"<sup>245</sup> by adopting a system under which the alleged torturer cannot escape punishment simply by fleeing his country.<sup>246</sup> The Torture Convention is specific in the type of torture it seeks to prosecute

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<sup>237</sup> See *id.* at \*622.

<sup>238</sup> See *id.*

<sup>239</sup> See *id.* at \*585.

<sup>240</sup> See *id.*

<sup>241</sup> See *Bartle*, 37 I.L.M. at \*1335.

<sup>242</sup> *Bartle*, 38 I.L.M. at \*612.

<sup>243</sup> See *Bartle*, 37 I.L.M. at \*1335-36.

<sup>244</sup> See *Bartle*, 38 I.L.M. at \*590.

<sup>245</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, preamble, 23 I.L.M. 1027, reprinted in Carter, *supra* note 12, at 452.

<sup>246</sup> See *Bartle*, 38 I.L.M. at \*590.

and the statutory definition found in Part I, Article I of the Torture Convention is important to analyzing the case of General Pinochet. The Torture Convention outlaws as torture "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."<sup>247</sup> The Torture Convention outlaws "official" torture, that torture engaged in by the government against citizens, identical to the alleged crimes of General Pinochet. The Torture Convention is also clear in its position on possible governmental justification for torture, stating that "no exceptional circumstances whatsoever . . . may be invoked as justification of torture."<sup>248</sup>

The Torture Convention was ratified by the United Kingdom on December 8, 1988 and was adopted into British law by the Criminal Justice Act of 1988, Section 134.<sup>249</sup> Article I, Part I of the Torture Convention was restated as Section 134(1) of the British Criminal Justice Act.<sup>250</sup> The effect of this section is to make official torture, no matter where it was committed or the nationality of the offender, an extraterritorial offense in the United Kingdom.<sup>251</sup> The international crime of torture became an "extradition crime" under the law of the United Kingdom as of September 29, 1988,<sup>252</sup> when the Criminal Justice Act came into force. Spain had ratified the Torture Convention on October 27, 1987<sup>253</sup> as did Chile on September 30, 1988; at the time the British ratified the Torture Convention, December 8, 1988, all three countries involved in General Pinochet's extradition for human rights crimes were parties to the agreement.<sup>254</sup>

The requirements for the exercise of jurisdiction are set out in Part I, Article 5 of the Torture Convention. Jurisdiction is given first to either (a) the territory where the offenses were committed, in this case, Chile; (b) the territory of which the offender is a national, also Chile; or (c) the territory of which the victim is a national, in this case, Spain. Notably, although Chile and/or Spain may have primary jurisdiction over General Pinochet with respect to these crimes, jurisdiction may also be exercised by the United Kingdom through Section 2 of Article 5 of Britain's Criminal Justice Act.<sup>255</sup> At this point in the analysis it is clear that the

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<sup>247</sup> Torture Convention, *supra* note 50, pt. I, art. 1, 23 I.L.M. 1027, *reprinted in* Carter, *supra* note 12, at 453.

<sup>248</sup> *Id.* at pt. I, art. 2(2).

<sup>249</sup> *See Bartle*, 38 I.L.M. at \*627.

<sup>250</sup> *See id.* at \*614.

<sup>251</sup> *See id.* at \*619.

<sup>252</sup> *See id.* at \*620.

<sup>253</sup> *See Bartle*, 38 I.L.M. at \*626-27.

<sup>254</sup> *See id.*

<sup>255</sup> *See Carter*, *supra* note 12, at 454.

head of state immunity asserted as a defense by General Pinochet is completely illogical. Lord Hope of Craighead agrees that it would be a "strange result" if the provisions of the Torture Convention could not be applied to heads of state who, having instigated the carrying out of torture by their officials, were primarily responsible for the acts of torture.<sup>256</sup> Lord Saville adds that "a head of state . . . would indeed to my mind be a prime example of an official torturer."<sup>257</sup> Essentially, when states ratified the Torture Convention, they agreed to a type of "universal jurisdiction" for the international crime of torture.

## V. UNIVERSAL JURISDICTION

The concept of universal jurisdiction was introduced by international military tribunals. The first of these tribunals was established at Nuremberg, Germany in August 1945 by the Allied Powers that had just defeated Nazi Germany.<sup>258</sup> The purpose of the tribunal was to try war criminals whose offenses, and thus jurisdiction, could not be linked to any one country. Not only was this the advent of granting universal jurisdiction for war crimes, it also marked the official recognition of individual responsibility for international crime.<sup>259</sup> A similar agreement, the International Military Tribunal for the Far East, was established in Tokyo for the same purpose and like the Nuremberg Tribunal, derived its competence to exercise jurisdiction over those crimes from the Charter which created it.<sup>260</sup>

More recent examples of international tribunals that truly apply international law on an international scale include the International Criminal Tribunals for the Former Yugoslavia (1993) and Rwanda (1994).<sup>261</sup> The need for these tribunals arose from internal power struggles among different ethnic groups in those countries.<sup>262</sup> Even though the jurisdiction of these tribunals was on a smaller scale than the aforementioned Military Tribunals, the United Nations Security Council resolution which created them allowed for the prosecution of "persons responsible for serious violations of international humanitarian law."<sup>263</sup> Torture is included as a crime against humanity punishable under the statutes which created the tribunals for Yugoslavia and Rwanda, "when committed as part of a widespread or systematic attack against any

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<sup>256</sup> See *Bartle*, 38 I.L.M. at \*624.

<sup>257</sup> *Id.* at \*642.

<sup>258</sup> See Barry E. Carter & Phillip R. Trimble, *International Law* 1163 (3d ed. 1999).

<sup>259</sup> See *id.*

<sup>260</sup> See *Sunga*, *supra* note 10, at 283.

<sup>261</sup> See *id.* at 283-84.

<sup>262</sup> See *id.* at 284-89, 290-97.

<sup>263</sup> U.N. Secretary General's Report, S/25704, May 3, 1993 & Add. 1, May 17, 1993, *quoted in Sunga*, *supra* note 10, at 289.

civilian population."<sup>264</sup> The prohibition against torture as an international crime also appears in Article 7 of the Rome Statute of the International Criminal Court.<sup>265</sup>

The International Criminal Court was created by a Rome statute adopted by the United Nations Diplomatic Conference on July 17, 1998.<sup>266</sup> Once it has been ratified by 60 states, this Statute will go into force creating the International Criminal Court in The Hague, Netherlands.<sup>267</sup> Article 7(1)(f) specifically mentions torture as a crime against humanity and Article 5(1)(b) expressly gives the Court jurisdiction over the crime of torture.<sup>268</sup> In addition, once a state becomes a party to this agreement, the Court may exercise its functions and powers over the territory of that State. By giving the Court this power, a State sacrifices its national sovereignty in the area of international crime and the Statute makes clear that no claim of official immunity shall bar the Court from exercising jurisdiction over a person.<sup>269</sup> Unfortunately, the Statute does not apply to crimes committed before its adoption<sup>270</sup> and thus is not an option for punishing General Pinochet. However, the Torture Convention, discussed above, provides for universal jurisdiction in national courts rather than jurisdiction by an international tribunal.<sup>271</sup>

Article 5 of the Torture Convention governs jurisdiction. As previously discussed, primary jurisdiction is given to the state where the torture was committed, the state of the torturer or the state of the victim.<sup>272</sup> However, secondary jurisdiction is also given to any State Party to the Convention where the torturer is present and the State does not extradite him.<sup>273</sup> Lord Browne-Wilkinson noted that by drafting the agreement this way, the Convention introduced the idea of "*aut dedere aut punire* - either you extradite or you punish."<sup>274</sup> Throughout the negotiations surrounding the drafting of the Torture Convention, there were countries who wished to make the secondary jurisdiction in Article 5(2) dependent upon the refusal of the state assuming jurisdiction to extradite the offender to a state with primary jurisdiction under Article 5(1).<sup>275</sup> The final result, however, was noted in Working Group draft documents in 1984, when all state

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<sup>264</sup> Statutes of the International Tribunals for the Former Yugoslavia and Rwanda, art. 5 and art. 3, respectively, *supra* note 21, *quoted in Bartle*, 38 I.L.M. at \*626.

<sup>265</sup> *See Bartle*, 38 I.L.M. at \*626.

<sup>266</sup> *See Carter*, *supra* note 12, at 921.

<sup>267</sup> *See id.*

<sup>268</sup> *See id.* at 922-23.

<sup>269</sup> *See id.* at 933, art.27.

<sup>270</sup> *See id.* at 927, art.11.

<sup>271</sup> Torture Convention, *supra* note 75, art.5, 23 I.L.M. 1027, *reprinted in Carter*, *supra* note 12, at 454.

<sup>272</sup> Torture Convention, *supra* note 75.

<sup>273</sup> *See id.*

<sup>274</sup> *Bartle*, 38 I.L.M. at \*591, *citing* Burgers, *supra* note 16, at 131.

<sup>275</sup> *See Bartle*, 38 I.L.M. at \*591.

objections to universal jurisdiction were withdrawn.<sup>276</sup> The drafters of the Torture Convention agreed that the only way for the Torture Convention to be used effectively would be to relax national jurisdiction principles to allow for torture to be punished anywhere the offender tried to hide. Again, as of December 8, 1988, the United Kingdom, Spain and Chile were all parties to the Torture Convention, and, thus, General Pinochet should reasonably expect to lose any immunity he could have claimed for his crimes as of that date.<sup>277</sup>

Proposing an alternative theory for asserting universal jurisdiction in the case of General Pinochet, Lord Millett suggested two requirements that might be met.<sup>278</sup> First, the crime "must be contrary to a peremptory norm of international law so as to infringe a jus cogens" and secondly, the crime "must be so serious and on such a scale that [it] can justly be regarded as an attack on the international legal order."<sup>279</sup> Either by using the jurisdiction granted by the Torture Convention to which all three states are parties, or by using Lord Millett's test for universal jurisdiction, the crimes of General Pinochet clearly justify his prosecution in any state where jurisdiction is asserted.

## VI. EXTRADITION

Although jurisdiction can be exercised over General Pinochet in either Spain, Chile or the United Kingdom, Spain has formally indicted the former general on charges of genocide, terrorism and torture.<sup>280</sup> Extradition in the United Kingdom depends first on a decision from the Secretary of State that the request should be considered. The offender is then arrested and brought before the Chief Metropolitan Stipendiary Magistrate at Bow Street, London who looks at the request and any attached documentation in support of the request and decides accordingly.<sup>281</sup> In this particular case, the ruling of the Magistrate was appealed and proceeded to the Queen's Bench Divisional Court and then the House of Lords<sup>282</sup> before finally going back to the Magistrate's Court at Bow Street where Pinochet was committed to await the decision of the Secretary of State.<sup>283</sup> The final decision on whether to extradite always

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<sup>276</sup> See *id.*, citing Working Group on the Draft Convention, U.N. Doc. E/CN.4/1984/72, para. 26.

<sup>277</sup> See *Bartle*, 38 I.L.M. at \*627.

<sup>278</sup> See *id.* at \*649.

<sup>279</sup> *Id.*

<sup>280</sup> See *The Pinochet Page: News & Info* (last modified Nov. 27, 1999) <http://www.publica.com/timeline.html> (reporting indictment by Spain on Dec. 10, 1998).

<sup>281</sup> See Michael Forde, *The Law of Extradition in the United Kingdom* 43 (1995).

<sup>282</sup> See *Bartle*, 38 I.L.M. 581.

<sup>283</sup> *Bartle*, *supra* note 6, at \*6.

belongs to the Secretary of State,<sup>284</sup> in this case Jack Straw. Above and beyond this general overview, Part III of the Extradition Act of 1989 has other requirements that must be met by Spain, the requesting state.<sup>285</sup>

Before the Extradition Act of 1989 came into effect in England, the Extradition Acts of 1870 and 1967 governed extradition in the United Kingdom,<sup>286</sup> and an important principle in those Acts survived to make a large impact on the Pinochet case. This is the principle of double criminality which means that for a crime to qualify as an extradition crime, it must be a crime in both the state requesting extradition and the state where the offender is being held.<sup>287</sup> According to the first schedule of the Act of 1870, criminal acts "had to be construed according to the law existing in England . . . at the date of the alleged crime."<sup>288</sup> This means that the alleged crimes of General Pinochet must have been considered crimes in England as well as in Spain *at the time they were committed*. Lord Browne-Wilkinson reasons that because there was no mention of the date at which to consider an act criminal under the Extradition Act of 1989, the date when the act was committed should stand as the norm, rather than the date at which the extradition request was made.<sup>289</sup> The importance of this distinction becomes clear when the dates of Pinochet's alleged crimes are examined. The charges against General Pinochet cover the years from 1972 through 1990, but his acts only became criminal in England as of September 29, 1988, when Section 134 of the Criminal Justice Act (applying the Torture Convention to British law) went into effect.<sup>290</sup> Therefore, the only crimes which may be considered in evaluating Spain's request for extradition are those committed after September 29, 1988.<sup>291</sup>

Part III of the Extradition Act of 1989 sets forth the requirements for extradition when extradition is requested by another state, like Spain, which is a party to the European Convention on Extradition.<sup>292</sup> These six steps are set out by Lord Templeman in *In re Evans*.<sup>293</sup> First, a court in the requesting State must consider the crime serious enough to justify the issuance of a warrant for arrest. Second, the requesting State must consider whether the crime, the laws of both countries, and the circumstances justify a request for extradition under the terms of the

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<sup>284</sup> See Forde, *supra* note 111, at 43.

<sup>285</sup> See *id.*

<sup>286</sup> See *id.* at 10.

<sup>287</sup> See *id.* at 94.

<sup>288</sup> *Bartle*, 38 I.L.M. at \*588, quoting Extradition Act, 1989, Eliz. 2, ch. 33, sched. 1 (Eng.).

<sup>289</sup> See *Bartle*, 38 I.L.M. at \*588.

<sup>290</sup> See *id.*

<sup>291</sup> See *id.*

<sup>292</sup> See *id.* at \*587.

<sup>293</sup> See 1 W.L.R. 1006 (1994) (U.K.).

Convention. Third, the requesting State must identify the offender, authenticate the arrest warrant, give the details of the crime and translate the foreign law that establishes an offense which is punishable by at least twelve months of imprisonment. Fourth, the British Secretary of State must make sure that the request is in order, that the offense named also constitutes a crime in the United Kingdom, and must give his permission to proceed. Fifth, there must be a committal hearing in Magistrate Court and the magistrate must be convinced that the charge against the offender is a serious crime in both the requesting State and the United Kingdom. Sixth, and finally, if the offender is committed by the Magistrate, the Secretary of State may enforce extradition.<sup>294</sup> In the case of General Pinochet, the committal hearing took place and Magistrate Bartle committed Pinochet to await the decision of Home Secretary Jack Straw.<sup>295</sup>

## VII. THE OUTCOME

After seventeen months under house arrest in London, General Pinochet returned home to Chile in March of 2000.<sup>296</sup> He suffered three strokes while he was being held in London, and, in accordance with medical tests run in England, Pinochet's doctors have found that he has suffered irreversible brain damage.<sup>297</sup> On January 11, 2000, after review of the medical report in England, British Home Secretary Jack Straw announced that "the unequivocal and unanimous conclusion of the four medical experts was that [Pinochet] is at present unfit to stand trial" and should not be extradited to Spain.<sup>298</sup> Although, Pinochet has been returned to his home country and may still be immune from prosecution there, according to the Chilean Constitution,<sup>299</sup> this case can be regarded as a victory for international human rights.<sup>300</sup>

The outcome of this case will certainly have a resounding effect not only on political relations between England, Spain and Chile, but on countries around the world. The Chilean government that put pressure on Spain to drop the charges and let them handle Pinochet's offenses

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<sup>294</sup> See Forde, *supra* note 111, at 43-44.

<sup>295</sup> Bartle, *supra* note 6, at \*6.

<sup>296</sup> See *Pinochet Has Irreversible Brain Damage - Scan Result* (last modified Mar. 23, 2000) [http://dailynews.yahoo.com/h/nm/20000323/wl/chile\\_pinochet\\_2.html](http://dailynews.yahoo.com/h/nm/20000323/wl/chile_pinochet_2.html).

<sup>297</sup> See *id.*

<sup>298</sup> *Pinochet Case: Letter Asks for Disclosure of Medical Reports, as New Development Adds to Concerns on Conduct of Tests* (last modified Jan. 17, 2000) <http://www.amnesty.org/news/2000/44501200.htm>.

<sup>299</sup> See *Chile Congress Amends Constitution for Pinochet* (last modified Mar. 25, 2000) [http://dailynews.yahoo.com/h/nm/20000325/ts/pinochet\\_chile\\_2.html](http://dailynews.yahoo.com/h/nm/20000325/ts/pinochet_chile_2.html).

<sup>300</sup> See *Pinochet Case: No Turning Back in the Global Fight Against Impunity* (last modified Mar. 2, 2000) <http://www.amnesty.org/news/2000/12mar00.htm>.

themselves<sup>301</sup> is now backing down and simply trying to find a way to let Pinochet bow out of politics gracefully.<sup>302</sup> As of March 28, 2000, General Pinochet faced charges in eighty different civil complaints in Chile, and Chilean Judge Juan Guzman is currently trying to strip Pinochet of his senatorial immunity via an appellate court in Santiago.<sup>303</sup> It is now up to the Chilean government to determine whether General Pinochet will be held "responsible for thousands of cases of torture, murder and 'disappearance' that took place during his time in power."<sup>304</sup>

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<sup>301</sup> See Chris Aspin, *Pinochet Must Be Returned, Says Frei* (last modified Nov. 19, 1999) [http://dailynews.yahoo.com/h/nm/19991119/wl/pinochet\\_chile\\_1.html](http://dailynews.yahoo.com/h/nm/19991119/wl/pinochet_chile_1.html).

<sup>302</sup> See *supra* note 105.

<sup>303</sup> See *Two New Complaints Filed Vs. Pinochet* (last modified Mar. 28, 2000) [http://dailynews.yahoo.com/h/ap/20000328/wl/chile\\_pinochet\\_4.html](http://dailynews.yahoo.com/h/ap/20000328/wl/chile_pinochet_4.html).

<sup>304</sup> *Pinochet Case*, *supra* note 131.