

THE PINOCHET CASE IN SPAIN

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The London arrest of the senator and retired general, Augusto Pinochet Ugarte, on October 16, 1998, at the request of Spanish judge, Baltasar Garzón, (the judge of the Fifth Central Court of Instruction of the National Court), and the steps taken thus far by the British and Spanish courts since the arrest have had, and will continue to have, undisputed transcendence. The purpose of this Article is to present and discuss some of the essential legal issues with respect to a matter that is filled with symbolism and complexity.

This matter is filled with symbolism because Pinochet represents an archetype of military, ruthless and omnipotent dictatorship, free of any humanitarian consideration and protected against any subsequent claim in Chile by his thousands of victims. In addition, the unyielding perseverance of some of his victims and their relatives has finally opened a door, a hopeful door, to the legal protection of their rights, which has at least granted them an immense moral victory.

The issue is a complex one because it involves a mixture of national legal systems and international law and because the implications for Criminal International Law are far reaching.

There are two parallel judicial proceedings; the criminal proceedings in Spain against General Pinochet, and the proceedings in the United Kingdom that gave rise to Spain's request for the extradition of General Pinochet. Here

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we shall focus only on the former. We shall begin by giving a brief account of the background and most significant facts in the evolution of the case.¹

I. HISTORY

In 1996, the Association, Progressive Union of Public Prosecutors, presented two indictments at the National High Court of Justice in Madrid, for the crimes of genocide and terrorism. The first indictment was presented on March 28, 1996 against the members of the military government that ruled Argentina between 1976 and 1983. The second indictment was presented on July 5, 1996 against those responsible for the acts that have occurred since the coup d'état began on September 11, 1973. The coup d'état was headed by General Augusto Pinochet Ugarte in Chile. Pinochet and his regime caused thousands of victims, including dozens of Spanish citizens, to become subject to the crimes of genocide and terrorism. The issue related to Argentina was assigned, by allotment, to Judge Baltasar Garzón. While the issue related to Chile, pursuant to previous proceedings, was assigned to Judge Manuel García Castellón. The two allegations mentioned above were followed by different criminal lawsuits filed in the first case, by the Free Association of Lawyers, the Argentina Pro-Human Rights-Madrid Association and the Left-Wing United; and in the second case, by the Association of Families of Detainees and Missing Chileans.²

On June 10, 1996, and February 6, 1997, Judges Garzón and García Castellón agreed to process their respective lawsuits. Subsequently, Judge Baltasar Garzón expanded Argentina's criminal dossier with the investigation of the so-called "Operation Condor." It was a program of international repression in which presumably, the military governments of Chile and Argentina (among others) had cooperated.

With knowledge of General Pinochet's presence in London, on October 16, 1998, Judge Garzón issued a temporary detention order against Pinochet, with a corresponding order for international arrest. These orders were in support of the agreement on the matter of extradition that was in force between Spain and the United Kingdom.

That same day, General Pinochet was arrested in London. On October 18, 1998, Judge Garzón issued a new warrant, which was more encompassing than the previous one. The purpose behind this action was to correct some

1. For a more complete statement, see generally (I) Antonio Remiro Brotons, *El Caso Pinochet. Los límites a la impunidad*, Política Exterior-Biblioteca Nueva, (1999) Madrid. The text of the main legal decisions can be found at (visited April 2, 2000) <<http://www.derechos.org/nizkor/chile/juicio>>; (visited April 2, 2000) <<http://www.parliament.the-stationery-office.co.uk/pa/ld/ldhome.htm>>.

2. Spanish law permits the particular or private associations to present criminal process before the courts of instruction, for which they do not need to be victims of the crime reported.

deficiencies that were detected and to better adapt it to the laws of the United Kingdom.

In light of these events, on October 20, 1998, Judge García Castellón issued an order disqualifying himself from proceeding further and passed the case to Court Number 5. On October 21, 1998, Judge Garzón agreed to take charge of the preliminary proceedings dealing with the Chilean case and agreed to process both cases together. The prosecutor sought to amend the detention orders, the disqualification and the joinder of the two cases but these amendments were refused by the judges. The prosecutor appealed.³

On November 3, 1998, Judge Garzón issued a new court order that formalized the extradition request against General Pinochet for the crimes of genocide, terrorism, and torture. Again, the prosecutor appealed by reform and was again denied by the court.

On November 4 and 5, 1998, in two identical orders in structure and contents, the Criminal Court of the National Audience denied by unanimity, the district attorney's appeals over Spanish jurisdiction, on the Argentina and Chile cases. On November 23, 1998, the Criminal Court of the National Audience again denied the prosecutor's appeal regarding the unification of both proceedings.

On December 10, 1998, Judge Garzón issued a warrant against General Pinochet that was extended with a new warrant on December 24, 1998. These warrants transferred to the Crown Prosecutor Service of the United Kingdom all of the evidence already shown in the case.

On February 1, 1999, in two separate orders of the Joint Session of the Criminal Court of the National Audience, they decided to deny each of the complaints filed by the Public Prosecutor's Office against the warrants directed by Judge Garzón. It was agreed in the first order, to admit the transfer of the complaint presented against Augusto Pinochet on March 20, 1998, by the Association of Families of Detainees and Missing Chileans, and the extension of the complaint of October 15, 1998, that followed, by the political organization Left-Wing United. In the second order, it was ordered to deliver the petition of the judge to the United Kingdom Authorities, so that he may interrogate Augusto Pinochet Ugarte, against whom a prison order was already issued.

3. The official position of the Spanish Prosecutor, which was not to oppose proceedings in progress, since April 1996, was modified at the beginning of December 1997. In March 1996, the elections had procured a change in the Spanish Government, which led to the appointment of a new Attorney General. The guidelines of the new position of the Spanish Prosecutor's office were exposed by the head prosecutor of the National Court, Eduardo Fungairino, in a public interview by the newspaper *El Mercurio* of Santiago de Chile, on October 22, 1997. Regarding this same issue, see also, CARLOS CASTRESANA FERNANDEZ, *Persecucion de Crimenes Contra la Humanidad en la Audiencia Nacional. Los informes que los fiscales no quisieron firmar*, *Jueces para la Democracia*, n 3-10 (1998).

On March 25 and 26, 1999, Judge Garzón directed new extended warrants of charges against General Pinochet according to the second decision of Judicial Committee of the House of Lords. This decision gave notification of the same to the Crown Prosecutor Service of the United Kingdom. Subsequently, on April 5, April 27, April 30 and June 16, Judge Garzón issued new extended warrants of charges with the new information contained in the judgment. In addition to the four torture cases mentioned in the initial extradition petition, the Judicial Committee of the House of Lords added another fifty cases corresponding to the period defined along with 1,198 missing persons cases. These additional cases are also considered a form of torture.

On September 24, 1999, the Third Section of the Criminal Court of the National Audience denied the District Attorney's appeal against the prison orders and the extended arrest warrants against Pinochet. Also, on November 19, 1999, the same court agreed to reject the appeal of the District Attorney's Office against the decree of Judge Garzón of an extension of charges from April 27, 1999.

II. THE FACTS

The facts attributed to General Pinochet are recorded in a more detailed manner in each successive order that is issued by Judge Garzón, which have been recanted with the collaboration of numerous people, voluntarily willing to declare and contribute documents.⁴

In the temporary detention order, which incorporated the first international arrest order and derived from the preliminary proceeding over Argentina, the judge affirmed that:

From what has happened, it appears that in Chile from September 1973, just like in the Argentinean Republic from 1976, there was a whole series of events and criminal activities committed under the cloak of a ferocious ideological repression against the citizens and residents of these countries. These activities were carried out by following plans and instructions originating from structures of power and their aim was to eliminate, abduct, kidnap and torture thousands of people, as described in 'Informe Retting' . . .

In this respect, Augusto Pinochet Ugarte, who was at the time Chief of the Armed Forces of the Chilean State, undertook criminal activities in coordination with the Argentinean military authorities between 1976 and 1983 (the period which is covered by the action). Within the aforementioned

4. See National Court, Dec. 10, 1998 (No. 10/97) (for report of these declarations).

“Condor Plan”, he ordered the Secret Services (DINA) to eliminate, torture and kidnap people and to make others, of various nationalities, disappear from Chile and other countries.⁵

Once Judge Garzón had accepted the preliminary criminal proceedings concerning Chile, General Pinochet’s indictment, which coincides with the 50th anniversary of the Universal Declaration of Human Rights, became lengthier, more detailed, and more impressive to read. It states the following:

From his position of command, Mr. Pinochet Ugarte undertook activity that was in conflict with his duties as president and as a member of the government constituted after the military coup on the night of September 11, 1973. Together with other military and civil leaders and in agreement with the military authorities that held power in other countries in the area, such as Paraguay, Uruguay, Bolivia, Brazil, and Argentina, he took advantage of his position and used his influence to create, first in his own country and then abroad, a criminal organization which was supported by institutional structures and whose sole purpose was to conspire, plan, and execute a systematic criminal program of illegal arrests, abductions, deaths by torture, the displacement of thousands of people and the selective disappearance of approximately 3,000 or more. Subsequently, the relationship was to continue with the aim of achieving certain political and economic objectives that would reaffirm the basis of the conspiracy and instill terror in the citizens.⁶

Among the specific facts highlighted by the indictment are summary executions or arrests leading to the disappearance of numerous people. Assassinations attempted or actually committed by the DINA outside Chile, in Argentina, Portugal, Spain and the United States and the widespread, systematic use of torture in numerous clandestine detention centers.

The acts of torture have been the main focus of the Pinochet case, since the Judicial Committee of the House of the Lords issued their second decision on March 24, 1999. The instructing judge considered in his order of April 30, 1999, that hundreds of thousands of people had been tortured:

From September 11, 1973 to practically March 12, 1990, in the cases studied, the detainees were treated in a despicable fashion while they were in the detention centers that were run with the authorization and permission of Augusto Pinochet’s government. Various techniques were used: detainees were subject to violent beatings which caused fractures and drew blood; they were made to lie face down on the

5. See National Appellate Courts of Ordinary Jurisdiction, Oct. 16, 1998 (19/97-L).

6. See National Appellate Courts of Ordinary Jurisdiction, Dec. 10, 1998 (No. 19/97).

floor or stand, naked, in constant light or with their heads covered by a hood, tied up, 'walled up' or in niches, that is to say in narrow cubicles in which it was impossible for them to move; they were suspended in the air, hanging by their arms; they were half-drowned in water and had electricity applied to their testicles, tongue or vagina. Other refined methods of torture, such as the so-called 'Pau de arara', were also used. This consisted of hanging people for long periods, depriving them of food, water and sleep, subjecting them to sexual abuse, including rape, exposing them to intense light and loud music, forcing them to eat excrement or drink urine, striking them simultaneously in both ears with the palms of the hands, burning them with acid or cigarettes, yanking out their fingernails, and much more.

The main psychological methods used were the following: they were insulted and humiliated, they or their relatives were threatened with torture or death, they were subjected to mock firing squads, they were told that their relatives would be arrested, they were forced to listen and observe other people being tortured, they were told that their friends had betrayed them, they were photographed or filmed in outrageous situations, they were pressured into becoming collaborators or signing confessions of guilt.

It has already been said that the torture and the cruel treatments were repressive methods used throughout Mr. Pinochet's government against all those detained and those persecuted for ethnic, political, or social reasons. It should now be added that the main reasons for the use of torture, apart from revenge and punishment, were to introduce a generalized fear in the population so that they would be discouraged from opposing the regime, to destroy physically or psychologically neutralize the victims and acquire information which would help repress more effectively the political and social movements of opposition.

It is important to keep in mind that neither the Spanish Prosecutor's Office, nor the London Pinochet Defense, has at any point questioned the truthfulness of the facts that have been exposed in the different judicial orders. This was confirmed by the Plenary of the Criminal Section of the National Court when it decided unanimously, to deny the recourse of the Spanish District Prosecutor, which opposed the Spanish jurisdiction:

The resolution of the recourse does not require a probability trial of accreditation nor of rationality of the indications of the imputation. It has not been discussed in the recourse about the scope of the incrimination, about the consistence of those facts that they describe as genocide or terrorism for the combated jurisdictional attribution.

The parts of the appeal have not discussed that those imputed facts consists of deaths, illegal detentions and torture for reasons of ideological screening or understanding of the identity and national values, attributed to rulers and members of the Armed Forces or security, also with the intervention of organized groups, all acting in secrecy, acts occurred in Chile during the military regime restored September 11, 1973.⁷

III. BASIS OF THE SPANISH JURISDICTION

The basis for Spanish jurisdiction is founded on both International and Spanish laws. Based on the standpoint of International law, the facts described fit in the category of crimes against humanity, made known after the Second World War in the International Tribunal Military Statute together with the agreement for the prosecution and punishment of the notorious war criminals of Central Europe, signed in London on August 8, 1945.⁸

Resolution 95(I) of the General Assembly of the United Nations⁹ confirmed the principles derived from the London Statute. Subsequently, the International Law Commission, in its formulation of the content of such principles, established, in Principle VI(c), what are considered crimes against humanity. They are:

[M]urder, extermination, slavery, deportation and other inhumane acts committed against any other civil population, or the persecutions for political, racial or religious reasons, when such acts are committed or such persecutions are carried out with the purpose of perpetrating a crime against the peace or a crime of war or in connection with it.

Today this category takes into consideration the general or customary international law¹⁰ but in that evolution it lost its connection with crimes against peace or crimes of war.¹¹ Therefore, the crimes against humanity, according to Article 7 of the Statute of Rome of the International Criminal Court, adopted

7. National Court, Nov. 5, 1998 (No. 173/98).

8. 82 U.N.T.S. 251.

9. G.A. Res. 95, U.N. GAOR, 5th Sess., U.N. DOC. A/1316 (1946): (Confirmation of the Principles of International Law recognized by the Nüremberg Tribunal Statute); *International Law Commission*, II Y.B. INT'L L. COMM'N 377, U.N. DOC. A/1316/1950.

10. In this sense the considerations contained in the Report of the Secretary-General that contained the proposal of the Statute for the International Tribunal for the Former Yugoslavia are relevant, approved by the Security Counsel pursuant to Res. 827 (1993), U.N. SCOR, 3217th mtg., U.N. Doc. 5/25704 (1993).

11. See *Tadic* (Prosecutor v. Tadic), Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia, No. IT-94-1-AR72, at 72-73 (1995).

in July 1998, include a collection of criminal acts¹² when they are committed “as part of a generalized or systematic attack against the civil population and with knowledge of such an attack.”¹³

Second, in the presence of this type of crime, as cited in Resolution 95(I) of the General Assembly of the United Nations, in Principle II, “the fact that internal law does not impose any guilt for an act that constitutes crime of international law, it does not excuse the responsibility in international law, of those who have committed it.” Likewise, and among many other texts, Article 1.2 of the Project Code of crimes against the peace and the security of humanity, approved by the Commission of International Law in 1996, states that: “The crimes against peace and the safety of humanity are crimes of international law, punishable as such, whether or not they are sanctioned by national law.”¹⁴

Third, the assumption within the scope of the international principle of legality on crimes has been defined, among other texts, in Article 11.2 of the Universal Declaration of Human Rights, which has established that: “No one shall be condemned by acts or omissions that were not considered crimes at the moment of commission according to national or international law...”¹⁵ In the same sense, Article 7 of the agreement has been amended for the protection of human rights and fundamental freedoms dated November 14, 1950,¹⁶ and Article 15 of International Pact of Civil and Political Rights dated December

12. The report of examined acts are as follows: a) murder; b) extermination; c) slavery; d) deportation or forced transfer of the population; e) incarceration or other serious deprivation of physical liberty in violation of the fundamental norms of international law; f) torture; g) rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and other comparable serious sexual abuses; h) persecution of a group or community with its own identity founded in political, racial, national, ethnic, cultural, religious, class ... motives, or other motives universally recognized as unacceptable according to international law, in connection with any act mentioned in the present paragraph or with any crime within the jurisdiction of the court; i) forced abductions; j) The crime of apartheid; k) other inhumane acts of similar character that cause great intentional suffering or serious attempts against the physical integrity or psychological or physical health.’ See Statute of Rome of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiary of the United Nations on the establishment of the International Criminal Court, Part II, Art. 7, U.N. Doc. A/CONF 183/9 (1998).

13. At this point the definition departs - in a positive sense - from the ones used in the statutes of the international courts for the ancient Yugoslavia and Rwanda, in which, the following terms were used, respectively: “when they have been committed against the civil population during an armed conflict, internal or international” and “when they have been committed as part of a generalized or systematic attack against the civil population, for nationality reasons or for political, ethnic, racial or religious reasons”; and the interpretation given adjusts itself for both international courts. *Id.*

14. *Report of the Commission of International Law*, U.N. GAOR 48th Sess., Supp. No. 10, at 16, U.N. Doc. A/51/10 (1996).

15. G.A. Res. 217 (111) U.N. GAOR, (1948).

16. BOLETIN OFICIAL DEL ESTADO (HEREINAFTER, B.O.E.), NO. 243, OCT. 10, 1979.

16, 1966.¹⁷ Nevertheless, these last two texts also state that they will not prevent the adjudication and sentencing of a person that is guilty of an action or omission that, at the time of its commission, constituted a crime “according to the general principles of law recognized by the international community.” Furthermore, the Commission of International Law has before mentioned, in the Project of Articles, Article 13.2, that: “Nothing stated in this article will prevent the trial of any individual for acts that, at the moment of execution, were criminal by virtue of international or national law.”¹⁸

All of this gives rise to the international characterization of the crimes against humanity, which generates individual criminal responsibility; with each independent crime having a different denomination in the state judicial system. The last element to consider is the obligation of the states to prevent and punish such crimes, expressly recognized in different treaties, in those cases where the state has a direct connection with the crime or with the criminal, and interpreted, under customary law, as the state’s right to exercise the pursuit of such crimes.

The fact that the principle on territorial jurisdiction is not the only one that governs the criminal systems has been acknowledged internationally for many decades,¹⁹ and confirmed by the Permanent Court of International Justice, in 1927, on the Lotus matter.²⁰ However, international law, after the Second World War, has applied the principle of universal²¹ jurisdiction to those crimes that are considered especially serious. Consequently, customary international law today allows any state to affirm its jurisdiction based on the principle of universal jurisdiction for crimes against humanity.²²

17. G.A. Res. 2200 (XXI) U.N. GAOR, Sess., 1496(a), at 60 (1966); B.O.E., 1977, 103.

18. *Supra* note 14, at 77.

19. The principles of territorial jurisdiction, active personal jurisdiction and protection of the state (including implicitly passive personal jurisdiction) are already covered in the Resolution adopted by the *Institute de Droit International* in its Munich Session. See *Tableau general des resolutions (1873-1956)*, Institute De Droit International [HEREINAFTER I.D.I.] 373-78 (1957).

20. In the case of S.S. “Lotus”, 1927 P.C.I.J. (Ser. A) No. 10, at 20 (Sept. 9).

21. Regarding this principle, see M. Donnedieu De Vabres, *Le Système de la Répression Universalle*, REVEU DE DROIT INTERNACIONAL PRIVÉ ET DE DROIT PENAL INTERNACIONAL, 557-564 (1922-1923). Regarding the general evolution, see A. PIGRAU, *Elementos de Derecho Internacional Penal*, CURSOS DE DERECHO INTERNACIONAL DE VITORIA GASTEIZ 1997, Tecnos/Universidad del País Vasco, 127-176 (1998). In international judicial practice the Eichman case, *Attorney General v. Eichman*, 36 I.L.R. 18 (Jerusalem District Court, 1961); 36 I.L.R. 277 (Supreme Court of Israel 1962); *Demjanjuk v. Petrovsky*, 603 F. Supp. 1468, 776 F.2d 571 (1985) are particularly relevant.

22. In accordance with Lord Millet: “crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria’s are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens.” *Opinions of the Lords of Appeal for Judgment in the Cause: Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appellants) Ex Parte Pinochet (Respondent) (on Appeal from a Divisional Court of the Queen’s Bench Division); Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others*

This tendency seems to be reinforced, in Article 8 of the Code Project on crimes against peace and the security of humanity, approved by the Commission of International Law of the United Nations in 1996.²³ More recently, the Preamble of the 1998 Rome Statute of the International Criminal Court, affirms "it is the duty of each state to exercise its criminal jurisdiction against those responsible for international crimes."²⁴

From the Spanish law point of view, the opening of the hearings on the repression of the military after the coup d'etat in Chile and Argentina is made possible by Article 23.4 of the Organic Law 6/1985, of July 1, of the Judicial Power,²⁵ which provides competition for the Spanish jurisdiction to acknowledge the crimes "committed by Spanish or foreigners outside of the national territory, susceptible to characterization, according to Spanish criminal law, as some of the following crimes: a) genocide; b) terrorism; as well as any other crime which, according to treaties or international agreements, should be pursued in Spain." Such rule incorporates the principle of universal persecution, since the jurisdiction is not dependent on either the nationality of the authors or the victims, or where the crime was committed.²⁶ Nevertheless, the cited rule does not mention the crimes against humanity that were not foreseeable, as such, in the Spanish criminal code.²⁷

In general, the Prosecutor alleged that the cited Organic Law of 1985 is not applicable to the facts that occurred previously, by virtue of the principal of legality. The Plenary of the Criminal Section of the National Court, in

(*Appellants*) *Ex Parte Pinochet (Respondent)* (on Appeal from a Divisional Court of the Queen's Bench Division), March 24, 1999.

23. U.N. Doc. A/51/10, (1996); see specifically the commentary of this article. As stated by A. Remiro Brotons, what was already permitted - the exercise of the universal jurisdiction - that it may be imposed as an obligation on all states. *El Caso Pinochet: Los Limites a la impunidad*, supra note 1, at 54-55.

24. *Supra* note 12.

25. B.O.E., 1985, 157; BOE, 1985, 264.

26. See TS, 1993 (R.J. No. 2567, p. 3341-42), the judgments by the Supreme Court on March 29, 1993. TC, Feb. 10, 1997; B.O.E., 1997, 63.

27. If the Spanish Criminal Code would have previewed the amount of crime against humanity, the argument of the Spanish judicial instances would have been extraordinarily facilitated; in this sense: JAUME FERRER LLORET, *Impunity in cases of serious human rights violations: Argentina and Chile*, III SPANISH Y.B. OF INT'L L. 25 (1993-1994); MONTSERRAT ABAD CASTELOS, *La actuación de la Audiencia Nacional Española Respecto de los Crímenes Contra la Humanidad Cometidos en Argentina y en Chile: Un Paso Adelante Desandando la Impunidad*, 2 Anuario da Facultade de Dereito da Univerisdade da Coruña, 45 (1998).

opposition to this point of reasoning together with the instructing judge,²⁸ has considered that:

It is not retroactively applied when the proclaimed jurisdiction is exercised within the statute of limitations, as it happens in this case, irrespective of the date of the facts in question. The cited Article 23, Section 4, of the Organic Law of the Judicial Power is not norms of punishment. The legal principle (Article 25 of the Spanish Constitution) imposes that the acts be crimes, in agreement with Spanish laws, according to Article 23, Section 4, where it is mentioned that, upon its occurrence, the guilt that can be imposed shall be already determined by the law prior to the perpetration of the crime, but not that the norm on jurisdiction and on procedure is preexistent to the triable act. The jurisdiction is a pretext of the process, not of the crime.²⁹

Likewise, as stated earlier, the Public Prosecutor's Office opposed the Spanish jurisdiction repeatedly arguing the exceptions to "judgments" and to "pending litigation." It was affirmed that contemplated facts in the case had already been tried in Chile and that there also existed pending criminal procedures in the Court of Appeals of Santiago de Chile, as a consequence of lawsuits for multiple crimes of homicide and abductions against the ex president of Chile, Augusto Pinochet Ugarte.³⁰

Thus, in the cases of the disappearance of Antonio Llido Mengual (Spanish priest arrested by security agents in Santiago in October of 1974, confined in a detention center, and subsequently disappeared); Michelle Peña (detained in Santiago by DINA agents in June of 1975, taken to a detention center, not knowing her fate, or that of the son she was expecting);³¹ or the death of Carmelo Soria Espinoza (Spanish U.N. "Cemisson Egnómica Para America Latina" CEPAL official, detained in Santiago on July 15, 1976, by

28. The Judge examined the legislation prior to the Organic Law of 1985 and reached the same conclusion. From a procedural point of view, the legislation before the Organic Law of 1985 also stated Spanish jurisdiction in matters of genocide and terrorism. In the case of genocide, Organic Law 44/71 (1971), had incorporated such crime within the crimes against exterior security of the state, which permitted Spanish jurisdiction for acts that occurred abroad. In the case of terrorism, Law 52/71 (1971), attributed the knowledge of the crimes of organized military groups, which implicated a special procedural law, The Code of Military Justice (art. 294 bis), and a Spanish jurisdiction very extensive (art. 17), much more than the one derived from the Organic Law of the Judicial Power, of September 15, 1870.

29. *Supra* note 7.

30. The Organic Law of the Judicial Power, Sec. 23(2)(c), states that "the criminal has not been absolved, pardoned or convicted abroad or, in this last case, he has not served his sentence."

31. On this subject, like in the case of *Letelier*, the Convention relates to the prevention and punishment of crimes committed against internationally protected persons, adopted in New York, December 14, 1973; B.O.E., 1986, 33.

DINA agents and found dead the following day); and the death of the Spanish Priest Juan Alsina Hurtos (detained on September 19, 1973, by a military patrol and executed at the Bulnes bridge over the Mapocho river the same day), the Chilean tribunals decided the final dismissal of the cases, by applying Legal Decree 2.191 of 1978, of the Military Government of Chile, which granted amnesty to those responsible for unlawful acts (with certain exceptions) committed between September 11, 1973, and March 10, 1978, it provided that they are not the subject of criminal proceedings or convictions.

According to the Plenary of the Criminal Section of the National Court, such crimes cannot be considered adjudicated, since the Legal Decree of writ of amnesty, apart from the fact that it is contrary to international law,³² is not comparable to statutory definition of pardons inherent in Spanish law. Rather it constitutes a "standard acquittal for reason of political convenience," in a way that does not affect Spain's extraterritorial jurisdiction by applying universal principles of prosecution.³³

Nevertheless, since the Organic Law of Judicial Power makes the jurisdiction dependent upon qualifying the imputed behavior in accordance with one of the categories of crimes mentioned in the proposition. Now, we must consider the qualifications established by the Spanish tribunals in the instruction phase.

A. *The Crime of Genocide*

In indictment proceedings, it is affirmed that the acts reported could constitute a crime of genocide under Art. 607 1, under sections one through five, of the Penal Code of 1995.³⁴ The precept establishes that:

Those that, with the purpose of destroying totally or in part a national, ethnic, racial or religious group, perpetrating one of the following acts, shall be punished: (1) with a prison sentence of fifteen to twenty years, if they have killed one of their members; (2) imprisonment of

32. See Victoria Abellan Honrubia, *Impunidad de Violaciones de los Derechos Humanos fundamentales en América Latina: Aspectos Jurídicos Internacionales*, LA ESCUELA DE SALAMANCA Y DEL DERECHO INTERNACIONAL EN AMERICA. DEL PASADO AL FUTURO 191 (A. Mangas Martín ed.) SALAMANCA. The law of Argentine "writ of amnesty" has been considered contrary to the international obligations advocated by the United Nations Committee on Human Rights and Inter-American Commission on Human Rights. See U.N. Doc. CCPR/C/79/Add. 46 (1995); Report 28/92 Inter-Am. C.H.R. 24, OEA/Ser. L/V/II, Doc. 14 (1993). With respect to Chilean Law, the resolution of the same Commission on Human Rights in the case of Juan Alcina, Juan Meneses, Ricardo Lagos, and Pedro Vargara, concluded that the decree of Amnistía is incompatible with the dispositions of the American Convention on Human Rights. Report 34/96, Inter-Am. C.H.R. 95, OEA/ser, Doc. 7 (1997).

33. *Supra* note 7. See L.O.P.J. art. 23(2)(a,c) (in relation to L.O.P.J. art. 23(5)).

34. L.O. No. 10 (1995); B.O.E., 1995, n 281.

fifteen to twenty years if they sexually assaulted one of their members, or produced some of the injuries under Article 149; (3) imprisonment of eight to fifteen years, if they subjected the group, or any one of their individual members, to conditions that place their life in danger or gravely affect their health, or when they produced some of the injuries found under article 150; (4) with the same penalty, if they carried out the forced displacement of the group or its members, adopting whatever measure that tends to impede their way of life or reproduction, or these individuals transferred by force from one group to another; (5) imprisonment of four to eight years if their act(s) result in any other injury different than those mentioned above.³⁵

In support of the petition to remove jurisdiction from Judge Garzón, Spain's Prosecutor raised two principal arguments related to genocide.³⁶ The first argument involves the text of Article 6 of the Convention for the Prevention and Sanction of Crimes of Genocide of 1948, which excludes the penal prosecution of genocide except by the tribunals located where the crime was committed or by an international penal tribunal still not in existence.³⁷ The Plenary of the Criminal Section of the National Court declared, correctly, in a manner completely contrary, appealing to the purpose and the spirit of the Convention:

That although the signatory countries have not agreed upon the universal prosecution of crime for each of their jurisdictions this does not impede a party State from establishing a type of jurisdiction for crimes of transcendence in the entire world and that affect the international community directly, all of humanity, similar to the way the very Agreement understands it. What it should recognize, by

35. C.P. Art. 607.1 (1-5) (1995). The incorporation of the crime of genocide into Spanish Law is full of errors or vagueness. The 1948 Convention on genocide came into effect in Spain on December 13, 1968. B.O.E., 1969, n 34. The Law 44/71, of November 15, which contains the recasted text of the Penal Code, introduced the crime of genocide, by means of article 137 and a text which, under the pretense of reproducing the language in article 2 of the Convention, substituted the adjective "racial" for the term "social" and forgot to place comas between the words "national" and "ethnic". With posterity, the Organic Law 8/83, of June 25th, corrected the first error. L.O. No. 8 (1983). The forgotten coma would not be incorporated until the actual version of the Penal Code, approved by the Organic Law 10/1995, of November 23, in effect since May 1996. L.O. No. 10 (1995). The actual editing of Article 607, with respect to genocide, corresponds, at this point, with the terms of the 1948 Convention: "Which, with the intent to destroy, completely or partially, national group, ethnic, racial or religious, perpetrate that some of the following acts, will be punished..."

36. The order which was appealed before the Appellate Court was that of September 15, 1998, in which Judge Garzon decided to keep his jurisdiction for the remainder of the proceedings and release an International Rogatory Commission to the legal authorities of Santiago, Chile, with the hope that it would confirm, in the briefest way possible, if there are any criminal causes of action against Mr. Augusto Pinochet Ugarte, and if there are, the number of the crimes that are imputed.

37. B.O.E., 1969, n 34; 78 U.N.T.S. 296.

reason of the prevalence in the international treaties regarding internal law, is that Article 6 of the Convention imposes the subsidiary of the actions of the different jurisdictions to those that the Agreement contemplates, and in the way that the jurisdiction of a State should abstain from exercising its jurisdiction over acts, constitutive of genocide, that would have been prosecuted by the tribunals of the country in which they occurred or by an international penal tribunal.³⁸

The second argument of the appellants refers to the their own concept of genocide. They allege that the relevant acts were not committed with the purpose of destroying, totally or partially, one of the groups mentioned in the Convention of 1958, that is to say, that the repression in Chile during the military regime as of September 11, 1973, did not act against any national, ethnic, racial or religious group.

A very different argument, which gathers in good part from the construction set forth by the instructing judge, has been unanimously supported by the judges of the Plenary of the Criminal Section of the National Court.³⁹ This approach is centered in an open and evolutionary interpretation of the concept of genocide, detached from the rigidity of the text of the Convention of 1948, indebted to the historic moment and the international situation in which it was adopted. In referencing the Statute of the Nuremberg Tribunal, Resolution 95(I) of the General Assembly of the United Nations and the works of the Commission on Human Rights of the United Nations in regards to the case of Camboya, the tribunal assumes a concept socially understood as genocide:

Genocide is a crime that consists of the total or partial extermination of a race or human group by killing or neutralizing its members. This is how it is understood in society and there is no need for a typical formulation. In general terms, it is a crime against humanity to carry out actions destined that aim to exterminate a human group, whatever the distinguishing characteristics of the group may be.

It is clear that there was an intention to exterminate a group of the Chilean population and other residents of similar characteristics. It was an act of persecution and harassment aimed at destroying a certain sector of the population, a group that was extremely heterogeneous but quite distinct. The group that was persecuted and harassed was made up of citizens who did not match the type that the promoters of repression had decided on as right for the new order that was to be set up in the country. This group was made up not only of

38. *Supra* note 7.

39. *Supra* note 6.

citizens who opposed the military regime of September 11th and who rejected the ideas about the national identity and national values sustained by the new rulers but also of citizens who were indifferent to the regime and these new ideas and values. The repression did not seek to change the attitude of the group; rather it sought to destroy the group by arresting, torturing, abducting, killing and threatening the members of the group that was clearly defined and "identifiable" to the repressors. It was not a random, indiscriminate act.⁴⁰

Independent of the intentions of the writers of the text, the Court and the Convention "came to like" as those members of the United Nations "who shared the idea that genocide was a hateful scourge which they could be committed to preventing and sanctioning" successively signed the treaty. For all of these reasons, neither Article 137 *bis* of the abrogated Spanish Penal Code nor Article 607 of the present Penal Code can:

[E]xclude from their classification acts like those alleged in this cause. Those countries party to the Convention of 1948 still feel that there is a need to respond criminally to genocide and to prevent it from going unpunished because they consider it to be a horrendous crime in international law. This feeling requires that the terms 'national group' should not mean 'a group made up of people who belong to a same nation,' but simply a national or different human group which has particular characteristics and which is part of a greater community. It is in these terms that the acts alleged in the indictment constitute genocide. So Article 23, Section 4 of the Organic Law of Judicial Power can be applied to the case. At the time of the events and in the country where they took place, an attempt was made to destroy those people from a particular group of the nation who did not fit into the project of national reorganization or who were considered by those who carried out the persecution not to fit in. Among the victims were foreigners, including some Spanish nationals. All of the victims, whether real or potential, Chilean or foreigner, were part of a separate community which was to be exterminated.

However, recognizing that the interpretation carried out by the Spanish tribunals of the concept of genocide does not find support in the text of the Convention,⁴¹ it is no less certain that any action of genocide necessarily

40. *Supra* note 38.

41. See M.A. Castelo, *supra* note 27, in 38-45; Javier A. Gonzalez Vega, *La Audiencia Nacional Contra La Impunidad: Los 'Derechos' Españoles y los juicios a los mililares Argentinos y Chilenos*, en XIX REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL (R.E.D.I.) 285, 287 (Enero-Junio 1997), J. Ferre Lloret,

implies a political preconception, in the sense that a specified human group does not fit in the ideal society. From this point of view, the strategies of "national reorganization" in Argentina or of the "restoration of the Chileanhood," in Chile, clearly reflect preconception of genocide; the proclamations and acts demonstrate the existence of a willingness to destroy the group, decisive in the type of genocide, and the methods employed to carry them out fully fit those foreseen in the crime of genocide. The restrictive concept of genocide, as far as the typology of the groups that are its victims, literally reflects the text of the Convention interpreted in light of its preparatory works, and does not correspond with all the genocide that occurs in reality, more than fifty years later.⁴² In any event, from the point of view of Pinochet's extradition, the crime of genocide has lost transcendency, in the manner in which it has been left apart from the trial of extradition.

B. *The Crime of Terrorism*

The crime of terrorism, since its incorporation to Article 260 of the Spanish Penal Code by Law 44/71 of the Text recast in the Penal Code, of November 15,⁴³ has passed by diverse vicissitudes and transformations,⁴⁴ all characterized for containing indefinite concepts of the crime.

In the editing of the actual Spanish Penal Code of 1995, Articles 571 through 580 refers to terrorism. The formula utilized to define it, is the commission of certain ordinary crimes for: "Those belonging to, acting at the service of, or collaborating with armed bands, organizations, or groups whose

supra note 27, en 21-2. In fact, the texts of the Statutes of the international courts for old Yugoslavia, Rwanda and of the International Penal Court strictly maintain the definition of genocide in agreement with the text of the Convention of 1948, although also it is certain that all of them provide equally the form of crimes against the humanity; S.C.O.R. Res. 827, U.N. S.C.O.R., 38th Sess., Art. 4, U.N. Doc. S/25704 (1993); S.C.O.R. Res. 955, U.N. S.C.O.R., Sess., Art. 3, U.N. Doc. (1994); U.N.Doc.A/CONF. 183/9, Art. 6 (1998).

42. The most evident assumption repeatedly alleged by the specific accusations and the instructional judge is the one of Cambodia, which is remitted to the Report of the Special Relator. M.B. Whitaker, and his study over the problem of the prevention and the repression of the crime of genocide, of July 2, 1985; M.B. Whitaker, *Estudio Sobre la Cuestión de la Prevención y la Represión del Crimen del Genocidio*, (July 2, 1985); UN, ESCOR, Doc. E/CN.4/Sub.2/1985/6; National Assembly (Auto December 10, 1998).

43. Art. 260 Penal Spanish Code (C.p., 1971, 44). Terrorism was described the following way: A person who acts, with the intent of attempting against the security of the State, the integrity of its territories, the national unit, its institutional order or the public order, or who would execute acts directed to the destruction or deterioration of buildings public or private, channels of mass media or mass transport, flow of electrical energy either another driving force or other analogous facts, shall be punished....

44. Afterwards the Ley 82/1978, Art. 571, 580 C.P., 1978, 82, abolished such article, among others. Thereafter, the Organic Law (9/1984) abolished the new articles relative to terrorism (e.g. Art. 174, 216 C.P.).

ultimate purpose is to destroy the constitutional order or gravely alter the public peace . . .”

Also in this case, the judicial qualification was refuted by the Prosecutor that considered in part, the reference to the constitutional order should be understood relative to the Spanish constitutional order; and in another part, that the actions of the State could not be considered terrorism.

The National Court rejected both arguments equally, with a greater forcefulness if applicable, since the tribunal in this case does did not need to refer to a penal type fixed in an international text.⁴⁵

In effect, the Tribunal affirms that: “The subversive tendency must be found in relation with the legal or social order of the country in which the terrorist crime is committed, or to the one directly affected as the target of the attack. . . .”⁴⁶ It is the only coherent interpretation that depicts terrorism in Section 4, of Article 23 of the Organic Law of Judicial Power. This section activates the principle of universal persecution, and not Section 3 of the same Article, which translates the principle of protection of the State.⁴⁷

The Tribunal has no doubt that the alleged acts are of a terrorist nature:

We find that the deaths, bodily injuries, coercions, and illegal detentions which are the object of these proceedings were performed by people, independently of any institutional functions that they might have had, who were part of an armed gang. It should be taken into account that they took advantage of their official capacity to commit deaths, bodily injuries, coercions and illegal detentions alluded to but that these acts were committed clandestinely, and not in the exercise of their official duties. This association for the illegal destruction of a group of people aimed to be kept a secret and it was parallel to the institutional organization to which the perpetrators belonged but one could not be mistaken for the other. Moreover, its structural characteristics (stable organization), its results (it causes insecurity, confusion and fear in a group or in the population at large) and its

45. Although, for the purpose of the extradition, they relied on the support of the European Convention for the repression of terrorism, currently in effect throughout Spain and the United Kingdom, which permits the universal prosecution and allows the crimes of terrorism to be susceptible to extradition. See B.O.E., 1980, 242; See generally Convenio Europeo para la Represión del Terrorismo, Jan. 27, 1977, E.T.S. No. 90. However, a universally accepted concept does not exist regarding what constitutes a crime of terrorism.

46. A.N. *supra*, (i) note 29 ('Legal finding sixth').

47. See also *Contra la Impunidad*, Federación de Asociaciones de Juristas Progresistas (FAJP) 33, 33-37 (Oct. 7, 1998) (in collaboration with Professors Mercedes García Arán, Hermán Hormazabal, Juan Carlos Ferré Olivé, José Ramón Serrano Piedecasas, and Diego López Garrido); But see Gonzalez Vega, *supra* note 41, at 287-88.

teleology (the rejection of judicial order in force in the country at the time) are all features of armed gangs.⁴⁸

C. *The Crime of Torture*

The crime of torture was not incorporated into the Spanish Penal Code until 1978. Article 174 of the Spanish Penal Code of 1995, establishes in paragraph one that:

Torture is committed by a public authority, or official who abuses his position, with the purpose of obtaining a confession, or information about any person, or to punish persons for acts committed, or suspected of committing. They are subjected to conditions or procedures that by their very nature, duration, or other circumstances, imposes physical or mental suffering, and the suppression of their ability to comprehend, discern or adjudge, various acts that attack moral integrity...⁴⁹

The Spanish tribunals did not consider the crime of torture as the center of the judicial controversy until the second decision of the Judicial Committee of the House of Lords.

In fact, in the order by the National Appellate Court of Ordinary Jurisdiction of November 5, 1998, the Tribunal considered (seventh legal finding) that the forbidden tortures are part of the most serious aspects of genocide or terrorism, and since the Tribunal had already accepted jurisdiction for these acts, it did not consider it necessary to analyze whether the torture was punishable under Spanish law, or a crime of universal persecution by way of Article 23, Section 4(g), of the Organic Law of Judicial Power, in relation with the 1984 Convention against torture. Nevertheless, they affirmed that:

[N]ot only in the case of victims of Spanish origin, as could be the result from Article 5, section 1(c), of the 1984 Convention, that does not constitute an inevitable obligation for the signatory States. Spain would have proper jurisdiction as derived from an international agreement in the case of Section 2, Article 5, of the 1984 Convention. However, the question is legally irrelevant to the effects of the appeal and the indictment.⁵⁰

48. A.N., *supra* (i) note 7.

49. Penal Code, art. 174 (1) (1995).

50. B.O.E., 1987, n 268, Convención Contra la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes (i), p. 2405 (in effect on Jun. 26, 1987; in force in Spain on Nov. 20, 1987; in force in Chile on Oct. 22, 1987; in force in U.K. on Dec. 8, 1988).

The March 24, 1999 decision of the Judicial Committee of the House of Lords limited the crimes susceptible to extradition to those of torture committed subsequent to December 8, 1988. The presiding judge focused his investigation on new cases within the specified time frame — despite the fact that a single case would have been sufficient to obtain the extradition — and he produced various orders extending the charges, including 1,198 cases of abduction. This did not mean to say, however, that those acts committed before the specified time period were not mentioned. This led the Public Prosecutor's Office to make fresh appeals that refuted the legal basis of these charges, among other reasons because they included new acts that were prior to the period established by the House of Lords. And for the first time, the competence of Spain to know about the tortures was questioned: it was alleged that Article 5 of the Convention Against Torture of December 10, 1984, did not give competence to Spain since the events had not occurred in Spain and neither the presumed criminal nor the victims were Spanish nationals.

The National Court twice rejected the first argument in the orders issued on September 24, 1999, and November 19, 1999.⁵¹ For this judicial decision, in an opinion that we share, Spain's criminal extradition process and the extradition process of the United Kingdom are independent procedures. The principle of speciality that governs the extradition process, according to Article 14 of the European Treaty on Extradition, solely "deploys its effects from the moment in which the person indicted has been extradited, and not prior to, as claimed by the appellant."⁵² In any case, the Tribunal continues, that "the limits of the eventual prosecution have not been established by the declaration of the House of Lords, but rather, has to be specified in the final resolution that in Pinochet's case, should accompany the effective transfer to the Spanish authorities."

The Court also did not accept the premise proposed by the Prosecutor, to the extent that the second authorization granted by the British Secretary of State, to initiate the extradition trial. The authorization also includes crimes that occurred prior to December 8, 1988:

The Home Secretary considered the accusations contained in the petition with respect to presumed acts that occurred before December

51. Note that in resolution 47/133 of the General Assembly of the United Nations, Dec 18, 1992, the Declaration on the Protection of All Against Abductions, established in Art. 17 that the acts of abductions be considered permanent crimes, while its perpetrators continue to conceal the fate of the missing persons and until relevant acts are discovered and that Art. 18 excludes for its authors whatever procedural benefits of law meant to exonerate them from judicial process or criminal sanctions. G.A. Res. 47/133, U.N. G.A.O.R. 47th Sess., Supp. No. 49, U.N. Doc. A/47/49 (Vol. 1) (1992).

52. National Assembly, September 24, 1999 (No. 80/99); National Assembly, November 19, 1999 (No. 77/99).

8, 1988, but only to the extent that these acts relate to the criminal character of what is alleged to have transpired after that date, with regards to an inquiry of whether the acts of torture, after that date, were executed in the course of an earlier conspiracy. The effect, according to Article 7 of the Law, would constitute an accusation of conspiracy to commit torture that was prolonged longer than that date.⁵³

The previous acts are pertinent, as the Court indicates, "so long as these acts are considered part of the criminal plan, which are essential to England's substantive definition of conspiracy, which of course does not correspond with Spain's definition of conspiracy."⁵⁴

In relation with the second argument, the lack of Spanish jurisdiction by virtue of the 1984 Convention, the Court limits itself to reaffirming the position set forth by the National Appellate Court of Ordinary Jurisdiction in the order dated November 5, 1988. To the extent that it deals with independent judicial proceedings, and the Spanish jurisdiction for the crimes of genocide and terrorism has been evaluated, and since torture forms part of these other more serious crimes, it is not considered necessary to discuss the objection.⁵⁵

On this issue, the caution of the Court is understandable. The 1984 Convention, establishes specific obligations and rights: an obligation for each State that is a party to it (as in the case with the United Kingdom, Chile, and Spain) to always judge or extradite a presumed perpetrator of torture when the crime has been committed in the territory under the jurisdiction of that State (Article 5.1(a)), whenever the presumed perpetrator is a national of that State (Article 5.1(b)); or whenever the victim is a national of that State or the state considers it appropriate (Article 5.1(c)); but also the right of any State party to the Convention to bring in its penal jurisdiction on the subject, as is specified by its national laws (Article 5(3)). The meaning of this last disposition is very simple: what is logical, and desired, is that the punishment for torture be carried out by those States that have a direct connection with the crime. If, for whatever reason, these States do not comply with their obligations, any other

53. In effect, the mentioned article 14 sets forth that:
a person who is turned over by a foreign State through extradition proceedings, would not be persecuted, nor sentenced, nor detained by implementation of a sentence, or security measure, or subjected to any other restriction of her freedom, for any act done prior to the delivery different from those which had motivated the extradition.

See *Convention Européenne D'extradition*, Council of Europe, European Treaties, 24 Sess. (1957).

54. JACK STRAW, *Letter form Jack straw about the Extradition of Pinochet* (visited April 15, 1999) <<http://www.derechos.org/nizkor/chile/juicio/straw.html>>.

55. In Spanish law the British "conspiracy" would be equivalent to the "induction" or the "cooperation necessary." National Assembly (No. 77/99) *supra* note 52.

state acting in defense of the victims and in the interest of the international community for the eradication of torture has a right to so act.⁵⁶

The issue, then, is to determine whether the penal jurisdiction established in Spanish law includes torture. But torture is only expressly mentioned in the much-quoted Article 23.4 of the Organic Law of Judicial Power, in connection with the crimes of genocide and terrorism. To be able to apply clause (g), which refers to any crime that, "according to international treaties or agreements should be pursued in Spain", it must first be demonstrated that this obligation is established in the 1984 Convention Against Torture. In principle, the assumptions of Parts (a) and (b) of Article 5.1 are discounted, so if it is taken into account that Spanish Law does not envisage the principle of passive personality — even though there are numerous Spanish victims in the indictment — Article 5.3 could lead to nothing, unless Clause 5.1(c) of the Convention is considered "self-executing." But this does not appear to be the interpretation of the National Court, which specifying that: "And not only in the case of the victims of Spanish nationality, as Article 5, Section 1(c) of the 1984 Convention suggests. The content of this article is not an unavoidable obligation for the signatory states."

On the other hand, it is said: "Spain would have proper jurisdiction as derived from an international treaty in the case of Section 2 of Article 5 of the Convention mentioned." Article 5.2 of the Convention establishes that:

Every party State shall undertake the necessary measures for establishing their own jurisdiction over these crimes in cases where the presumed perpetrator is found in any territory under its jurisdiction and said State does not grant extradition, pursuant to Article 8, to any of the States foreseen in paragraph 1 of the present Article.

In turn, Article 8 facilitates the extradition for the crime of torture among all the party States, indicated in paragraph 4, to that which perhaps the Spanish tribunal wanted to refer to:

56. "The tortures charged would form part of the major crime group of genocide or terrorism. As a result it is moot to examine if the crime of torture under our law a crime of universal persecution by way of Article 23, section 4, letter g, of the Natural Law of Judicial Power, put in reallion with Article 5 of the December 10, 1984 Convention against Torture, and other treatment or crimes which are inhumane or degrading. If Spain has jurisdiction for the prosecution of genocide abroad, the investigation and trial must necessarily reach the crimes of torture integrated in genocide. And not only in the case of victims of Spanish nationality, conformity could result from Article 5, section 1, letter c, of the cited Convention that does not constitute a inevitable obligation for the member States. Spain would have proper jurisdiction as derived from an international treaty in the case of Article 5, section 2, of the Convention mentioned." *Id.*

At the end of the extradition among Party States, it will be considered that the crimes have been committed, not only in the place where they occurred, but also in the territory of the States obligated to establish their jurisdiction in accordance with paragraph 1 of Article 5.

This leads us back to the assumption of Article 5.1(a) of the Convention. In any case, despite its lack of clarity, the statement of the Criminal Section of the National Court that "Spain would have its own jurisdiction derived from an international treaty in the case of Section 2 of Article 5" is recognized by the court.

D. The Question of Pinochet's Immunity in the Spanish Jurisdiction

Pinochet's presumed immunity has not been a central aspect in the judicial procedure in Spain. There are two claims that have been plead, repeatedly, before the Spanish courts, by the Public Prosecutor's office: the privileged position in Chile of General Pinochet, as a senator with a lifetime appointment, and his rank as the former chief of state.

As for the privileged position of Augusto Pinochet Ugarte, the presiding judge already estimated that the requirements demanded by the Spanish legislation are not satisfied. Article 69 of the Spanish Constitution mandates that the Senator be of Spanish origin, that he exercise his position in Spain in accordance with the Spanish norm, "that within other extremes, does not accept the concept of a senator with a lifetime appointment, that distorts the very constitutional and legal system of democratic elections with its parliamentary representatives for the citizens." On the other hand, it responds to the extravagant reference of the Public Prosecutor's office to Article 606 of the Criminal Code (crimes against protected persons), in connection with the Convention for the Prevention and Punishment of crimes against internationally protected persons, including the diplomatic agents which was signed in New York on December 4, 1973, that "it is absolutely unfortunate, because this Convention is applicable when the interested one is the subject of a crime in the past, but not when he is the subject of an active crime. The victim is protected because of their special position, but not the criminal."⁵⁷

57. Order of November 3, 1998, First Legal Finding.

The National Court, in its rulings of February 1, 1999, announced identical terms in its two orders⁵⁸, and the Third Criminal Section of the National Court, in its September 24, 1999 order.⁵⁹

With respect to Pinochet's former chief of state position, which presumably immunizes him from criminal liability, the court issued an order on November 3, 1998 declaring that immunity does not exist in Spanish law, or International law, which ties equally to Spain and the United Kingdom.

Among other precedent, the judge invoked the Statute of Military International Court of Nuremberg, approved in London in 1945, whose Article 7 establishes that the "official position of the accused, whether as Chief of State or as a responsible official in governmental capacity, should not be considered as exemption from responsibility or as a reason for a lesser punishment," remember that the court was presided over by British judge, Sir Geoffrey Lawrence, and that case involved the Admiral Karl Doenitz, Chief of State after the death of Hitler.⁶⁰ Likewise, it brings back the British practice of objecting to do reserves in the multilateral agreements, which exclude the heads of state from liability.⁶¹

Consider the instructor judge who stated:

It is undisputed that the chief of state in his capacity enjoys immunity for the same reason that the foreign states enjoy sovereign immunity

58. Resolving each appeal interposed by the Public Prosecutor's Office against orders dictated by Fifth Central Court of Instruction for which they accorded in the first, admit to process the complaint presented against Augusto Pinochet, March 20, 1998, by the Group of Detained Family and Missing Persons, and the amended complaint of October 15, 1998, following the Left United; and in the second, free the International Rogatory Commission to the authorities of the United Kingdom, to interrogate Augusto Pinochet Ugarte.

59. Fourth Legal Finding.

60. Here the reference to the sentence of the Nuremberg Tribunal is pertinent, cited by Lord Millet: ...the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates *the rules of war cannot obtain immunity while acting in pursuance of the authority of the state* if the state in authorizing action moves outside its competence under international law...The principle of international law, which under certain circumstances protects the representatives of a state, *cannot be applied to acts which are condemned as criminal by international law*

(The script is from Lord Millet); Opinions of the Lords of Appeal for Judgment in the Cause: Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appellants) Ex Parte Pinochet (Respondent) (on Appeal from a Divisional Court of the Queen's Bench Division); Regina v. Evans and Another and the Commissioner of the Police for the Metropolis and Others (Appellants) Ex Parte Pinochet (Respondent) (on Appeal from a Divisional Court of the Queen's Bench Division), March 24, 1999.

61. Second Legal Finding: it mentions the objection to Burundi's reservation about the Convention of Prevention and Punishment of Crimes Against Internationally Protected Persons of 1973 and the objection to the Philippines' reservation about Article Four of the Convention About Genocide. In fact, this article was not included in the corresponding law in the United Kingdom, *Genocide Act of 1969*.

for the acts of the government agents acting in their capacity. The situation is very different, with respect to former chiefs of state. International law does not demand its protection, and for the same principles applicable to state action, that does not extend to those crimes under international law. In this sense, all modern international criminal law clearly rejects, be it expressly or implicitly, the defenses based on doctrines relating to official acts and immunity of chiefs of state or those similarly situated.⁶²

In the same sense, the National Court declared in its orders of February 1, 1999, and the Third Criminal Section of the National Court, in its September 24, 1999 order.⁶³

IV. THE PETITION FOR EXTRADITION TO THE UNITED KINGDOM

On November 11, 1998, the petition for extradition by the Spanish government was formalized.⁶⁴ A detailed analysis of the legal aspects treated by the different British judicial agencies would go beyond the scope of this Article, for which we will limit the focus to the basic core of the decisions that are now in force.⁶⁵

There are two main questions that have been raised. The first question relates to the prior extradition, which has been the issue of Pinochet's possible immunity. This question was resolved by the decision of the judicial committee of the House of Lords on March 24, 1999. The second question involves the determination of whether the necessary requirements exist to proceed with the extradition and has also been resolved by the October 8, 1999 decision, of Judge Ronald D. Bartle.

A. Pinochet's Possible Immunity

The question of Pinochet's immunity as Chile's former Head of State has been the center of judicial debate in the United Kingdom.

62. Fourth Legal Finding. The judge added a call to the British courts:

It is given that the British courts have a long tradition of interpreting that the local law is compatible with the applicable rules of International Law, it is perfectly possible that they interpret that the Act of Immunity of the State is compatible with the contemporary International Criminal Law, so much the traditional as the conventional, and arrive at the conclusion that the Act does not protect ex heads of state accused of crimes against the humanity and like serious crimes under international law.

63. Third Legal Finding.

64. At the Spanish request they continued other petitions for extradition of Pinochet, from Belgium, France and Switzerland.

65. See REMIRO BROTONS, Antonio, *El caso Pinochet. Los limites a la impunidad*, op. cit.

During October 16 through 20 of 1998, the United Kingdom witnessed the development of two international orders issued by Judge Garzón, with the authority of magistrates Nicholas Evans and Ronald Bartle, respectively, demanding the arrest of Pinochet. However, on October 22nd through the 26th of 1998, Pinochet's defense team requested, among other things, an appeal for judicial review before the Queen's Bench Divisional Court, requesting the annulment of the aforementioned orders.

On October 28, 1998, London's High Court, pursuant to a decision by the magistrates, Lords Bingham of Cornhill, C.J. Collins and J.J. Richards, nullified the detention orders. One of the orders referred to the assassination of Spanish citizens residing in Chile, a crime not subject to extradition.⁶⁶ In the second order the Court points out that General Pinochet enjoyed penal immunity, derived from his position as Head of State, at the time the alleged crimes occurred. It was agreed that Pinochet would remain under arrest pending the appeal.

On November 25, 1998, a Judicial Committee of the House of Lords, made up of five judges (Lord Slynn of Hadley, Lord Lloyd of Berwick, Nicholls of Binkerhead, Lord Steyn and Lord Hoffmann) decided by a three to two vote, to admit the appeal against nullification of the order requesting temporary arrest, denying Pinochet immunity.⁶⁷

On December 9, 1998, Jack Straw of the United Kingdom's Home Secretary decided in accordance with the jurisdiction granted to him by the extradition process, to commence the judicial proceedings, with certain limitations. The proceedings began on December 11, 1998 at the Central Penal Court on Bow Street, before the Honorable Graham Parkinson, which left the process suspended when the decision of the judicial committee of the House of Lords was challenged with the filing of the revised petition that was based on the bias of one of its members (Lord Hoffman).⁶⁸

On December 17, 1998, a new judicial committee (Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Nolan, Lord Hope of Craighead, Lord Hutton) decided to annul the prior order and to reinstate the litigation.⁶⁹

The new decision was announced on March 24, 1999. This was a majority decision, made by six of its seven members (Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Nolan, Lord Hope of Craighead, Lord Hutton, Lord Saville of Newdigate, Lord Millett, and Lord Phillips of Worth Matravers). In

66. ANTONIO R. BROTONS, *supra* note 1.

67. *Id.* 49-50.

68. *Regina v. Bartle v. ex parte Pinochet*, *supra* note 57.

69. For its prior involvement, for free title, with the organization Amnesty International, that has participated as an intermediary in the procedures. One resource that, apart from other considerations of funding that could be made, was commuted once the decision was produced, something that would be totally nonviable, as extemporaneous, in the Spanish judicial system.

its decision, the committee decided to allow partially the appeal to those acts of torture and conspiracy committed after December 8, 1988, the date that the 1984 Convention entered in force for U.K.⁷⁰

The majority of the new judicial committee (four of its current members had participated in the prior decision to annul the initial order) completely restructured their argument. This argument has been described as "intelligent and perverse."⁷¹ And that is expressed about the awareness of those crimes susceptible to the extradition, like a preliminary condition to the examination of immunity question.⁷²

In the words of the Committee's president, Lord Browne-Wilkinson:

Our job is to decide two questions of law: (1) are there any extradition crimes, and if so, (2) is Senator Pinochet immune from trial for committing those crimes. If, as a matter of law, there are no extradition crimes or he is entitled to immunity in relation to whichever crimes there are, then there is no legal right to extradite Senator Pinochet to Spain, or indeed, to stand in the way of his return to Chile. If, on the other hand, there are extradition crimes in relation to which Senator Pinochet is not entitled to state immunity, then it will be open to the Home Secretary to extradite him.

Undoubtedly, the immediate consequence of this approach was to prejudge the task that should have been that of a judge who was competent to resolve the case of extradition, when dealing with a recourse that was exclusively to do with the immunity of Pinochet as a former head of state. Likewise, this approach reopened a debate that was presumed closed by the first committee, affirming that the criteria for incrimination should be proving at trial and not at the time of filing a petition for extradition.⁷³

To it was added a narrow interpretation to the effectivity of the general international and restrictive of the principle of universal jurisdiction, connecting its validity in the United Kingdom to the date of the formal incorporation of the international treaties that, in this case, would establish it.⁷⁴

70. House of Lords (H.L.) Jan. 15, 1999 (Opinions of the Lords of Appeal for Judgment in the Cause *In Re Pinochet*).

71. *Regina v. Bartle v. ex parte Pinochet*, *supra* note 57.

72. ANTONIO R. BROTONS, *supra* note 67, at 95.

73. The President of the first Committee, Lord Slynn of Hadley, had stated precisely that: "The sole Question is whether he is entitled to immunity as a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of acts alleged to have been committed whilst he was Head of State." *See supra* note 68.

74. What grants to the states an incompatible discretion with the universal nature of the concepts of international crime and norm of *jus cogens*?

From the sum of these factors, the majority of the committee eliminated other charges⁷⁵ and drew the conclusion that the acts of torture committed abroad are not pursuable in the United Kingdom prior to the Convention Against Torture being incorporated into British Law (by virtue of the Criminal Justice Act of 1988).⁷⁶ And this in spite of the fact that, as Lord Browne-Wilkinson himself recognized, the convention was held "not with the purpose of creating an international crime that had not previously existed but rather to articulate an international system in which the international delinquent, the torturer, would not be able to find a safe refuge." In other words, there is some considerable confusion between grounds for jurisdiction and crime.

Once substantially shortened, the crimes susceptible to extradition and the scope of the principal of universal jurisdiction, the majority of the committee did not have any objections, although with distinct arguments, in asserting such a principle and confirming the denial of immunity to Pinochet. Only one of the judges (Lord Goff) manifested himself as a follower of the immunity, as did the three judges of the High Court and the two judges of the minority in the first judicial committee.

The majority of arguments offered by the judges extraordinarily varied and it allowed them to sustain recognizable positions, for what we would conform to here, with highlighting the principle elements of the discussion on the immunity of the president of the second committee, Lord Browne-Wilkinson.⁷⁷

1) In the United Kingdom, the immunity of the state is regulated by the State Immunity Act of 1978. Its first part is concerned with the judicial procedures in the United Kingdom for or against other states. It accepts the principle of jurisdictional immunity, but with certain restrictions. Section 14 indicates that the references to the state include the sovereign, another head of state, in the exercise of its public functions, to the government of that state and to whichever of the executive entity of that government. Notwithstanding, Section 16(4) establishes that all of part I of the law does not apply to the criminal procedures, and because of the extradition procedure has a criminal nature, its allegation is not relevant.

2) Part III of the Act refers to the immunities and privileges of the heads of state. In Section 20(1), it is established that:

75. See the speech by Lord Hope of Craighead, who was responsible for applying the criteria adopted to the specific charges.

76. The date of September 29, 1988 was to be delayed until December 8, 1988, which was when the Convention came into force for the United Kingdom.

77. An opinion which is more in accord with present-day international law and which we share, is the one expressed by Lord Millet. He disagreed with most of the substantial aspects of this reasoning, although he began his exposition with the phrase: "Apart from one point, I agree with the reasoning and conclusions of Lord Browne-Wilkinson." *Regina, supra* note 68.

Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to (a) A sovereign or other head of State; (b) members of his family forming part of his household; and (c) his private servants, as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.⁷⁸

The adoption to which such disposition refers is pertinent in relation to Articles 29 and 32, relative to the personal inviolability and criminal immunity, like Article 39, that establishes the period from the moment the diplomatic agent enters a receptor state to the end of his mission, substantiating his immunity with posterity, for the acts realized in the exercise of his functions. It is concluded that a former head of state enjoys immunity in relation to the acts committed during his official capacity.

3) To stop the use of such immunity, accepted as a general principle, should be abolished. Before the absence of such revocation for the crimes of assassination and conspiracy to assassinate, Pinochet is immune with respect to the same.

4) In the case of the Convention against Torture: (a) Article 1 of the Convention mentions public figures, including heads of the state; (b) The existence of the Convention and its definition of torture make it impossible to consider the acts of torture, such as acts done during the exercise of official capacity as head of state. That is why in these type of crimes, the immunity does not apply to a former head of state.

B. The Requirements of the Extradition

The consequences of the second committee's judicial decision were immediate and notorious. From the crimes of attempted assassination, conspiracy to assassinate, torture, conspiracy to torture, kidnapping, and conspiracy to kidnap, contained in the first authorization issued by the Minister of Interior, it will have only been appropriate to consider the crimes of torture and conspiracy to torture committed after December 8, 1988.

Nevertheless, in its second authorization to proceed, on April 14, 1999, the Home Secretary of the United Kingdom, Jack Straw, estimated that the United Kingdom "has the obligation of extraditing Senator Pinochet in accordance with the European Agreement on Extradition" and highlighted that the crimes of torture and conspiracy to torture as of December 8, 1988, are "serious."⁷⁹

78. The Diplomatic Privileges Act of 1964 incorporates the Vienna Convention of 1961 on diplomatic relations to British law.

79. "Neither does the Minister believe that the passage of time makes it unjust or oppressive to issue an authorization to proceed in this case. It does not appear that Senator Pinochet in those circumstances, such

Against the arguments of Pinochet's defense team and of the Chilean government, in that perhaps the trial could have been conducted in Chile, the Minister insisted on the criteria already announced in the first authorization. In the absence of a formal petition of extradition:

[T]here does not exist a petition of extradition by the Chilean Government that the Minister could consider pursuant to British law. Furthermore, there is no provision in international law that excludes the jurisdiction of Spain in this situation. The Minister does not consider that the possibility of a trial in Chile would be a factor that compensates the obligations of the United Kingdom under the European Agreement of Extradition to extradite Senator Augusto Pinochet of Spain.

Once formalized, the Minister's authorization gave course to the extradition process. On April 30, Judge Graham Parkinson granted Spain a continuance to gather new information with a deadline of May 24.

On the other hand, on May 27, Magistrate Harry Ognall, of the High Court of London, dismissed the motion for judicial review of the Interior Minister's judgment.

The Extradition trial took place before Bow Street Tribunal (London), concluding with magistrate Ronald D. Bartle's judgment on October 8, 1999, which considered that all the necessary requisites to proceed with General Pinochet's extradition to Spain were met.

The applicable law is the European Convention on Extradition, in which Spain and the United Kingdom are parties,⁸⁰ and the Extradition Act of 1989, which incorporates the Convention to the British Juridical System.

In no case, as magistrate Bartle points out, it corresponds to check the imputed facts; it is enough to reach to a conviction that the presumed conduct constitutes a serious crime in the two implicated countries. The facts and the defense discussion, repeat in several occasions, is a business for the tribunal that hears the trial. In its decision, it answers two basic questions:

First, it considers that there is no inconvenience derived from the Convention or from the British law to consider new information given after

that he cannot endure a trial. Although, the Minister has valued the effect of the Lord's last resolution, at the reduction of the number and the extent of the potential accusations, for the crimes that have survived and for the ones that solicit extradition are serious, and its naturalism is such that the passage of time is not a restriction to be followed."

80. Besides the bilateral agreement of 1981, between the United Kingdom and Spain, which is in force since July 22, 1985, and which has a complementary character by virtue of article 28 of the *Convencio n Europea de Extradicio n* [European Extradition Convention], B.O.E. n 102, 1986.

April 14, 1999, the date on which the Interior Minister formulated his authorization to proceed.⁸¹

Second, it approaches the question of the double incrimination, that is to say that the imputed facts constitute a crime in both countries,⁸² although they have different denomination, matter that the decision of the Chamber of Lords Judicial Committee had discussed in a decisive manner, as we have indicated. With this result, magistrate Bartle hardly had margin to maneuver to move away from what was established by that tribunal. In connection with the torture, and in accordance with section 134 of the Criminal Justice Act of 1988, which incorporates the Convention of 1984 to the British Law, the magistrate points out "respectfully, I adopt the Lord's point of view, that Senator's Pinochet alleged conduct, would be an extraditable crime under the English law if the actions were substantiated. Even without the direction of the country's highest tribunal he would have arrived to the same conclusion." In connection with the Spanish Law, the magistrate broadly refers to *In Re Evans*, in which Lord Templemann asserts:

[I]f the magistrate in charge of the process would not be limited to consider the behavior of the accused in the extradition claim, then, in the United Kingdom no one would ever be extradited until the person would have already been tried and found guilty of a crime against a foreign state committed in a foreign country.

Furthermore, Bartle asserts:

The Spanish Supreme Tribunal has ruled in two occasions that under the Spanish law the pursued behavior is considered criminal. In regards to the decisions about a certain law of their own country, could I, a magistrate without any special knowledge or frankly, any knowledge of the Spanish law, contradict the judges in the Spanish Supreme Tribunal? I do not believe so.

81. The magistrate asserts: "Section 7(2)(b) of the Extradition Law which refers to "details of the crime that is being charged" which "will be included with the complaint", in my opinion, it does not limit the Court to those details that were given with the original complaint, or that were in the domain of the Interior Minister when he granted the authorization to proceed. The additional material, alleged by the defense, in my opinion, records and broadens senator Pinochet's alleged known conduct in his participation in the torture acts and the conspiracy to commit such acts. If this material would describe totally different crimes, the position would be different.

82. Section 2(1) of the Extradition Law of 1989, defines an extraditable crime as the "conduct in a foreign territory, which if occurred in the United Kingdom, will constitute a punishable crime with jail, with a minimum time served of 12 months, or whatever greater punishment, and which, described in whatever manner by the foreign law, would also be punishable the same way."

Consequently, he concludes "I am bound by the Spanish arguments in regards to the law of their own nation and therefore, I determine that the double incrimination law is satisfied."

In the same manner, Magistrate Bartle considers that the information available shows "a line of conduct equivalent to torture and torture conspiracy, for which senator Pinochet does not have immunity," that is why he understands that "the information pertaining to the conspiracy allegations prior to December 8, 1998 can be considered by the tribunal since the conspiracy is a continuous crime." Finally, the magistrate does not close the doors to the analysis of the missing person's cases: "The question of whether the missing persons issue constitute torture; whether the effects on the families of the missing persons may constitute mental torture; which was Senator Pinochet's regime intention, is in my opinion, a question for the trial."

Magistrate Bartle's conclusion is then favorable to the extradition, because all the conditions established in the Extradition Act of 1989 are met. The appeal to the High Court is still pendant, the hearing is scheduled for March 20, 2000, and then, if proper, the appeal to the Chamber of Lords. If Magistrate Bartle's decision is confirmed, as it reasonably can be expected, the Interior Minister will hold in his hands the final decision to grant Pinochet's extradition to Spain.⁸³

In any event, if Pinochet is either finally transferred to be tried in Spain, or if his return to Chile is granted, based on the considerations regarding his age or his health situation, his moral condition -of more than a presumed international criminal in the eye's of humanity- will not be substantially altered. In addition, the enormous space of impunity for international crimes will have decreased a little more.⁸⁴

83. Furthermore, consider that the Interior Minister does not have an unlimited discretionary margin, because the extradition is an obligation derived from the European Convention, which is in force between Spain and the United Kingdom. Nevertheless, the defendant's health situation, whose examination was also ordered by the Minister himself, can be deemed relevant at the time of his decision making.

84. Once this article is finished, Jack Straw decided to interrupt the extradition process on medical grounds. On March 2, 2000 Pinochet was released and he returned to Chile on the same day. At present, he is being accused before the Chilean justice of more than a hundred claims.