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I had searched for him so much. I went down to the beach to cry, and there he was, all swollen with bullet wounds. They had taken out his teeth.[1]
We don't want revenge. We just ask for truth and justice.[2]
I ask myself: What are human rights? Why don't they explain them to me?[3]
The men behind this are nothing more than criminals.[4]

I INTRODUCTION — A MOST UNUSUAL CASE

Two stubborn and closely interrelated characteristics of the application of international law are selectivity and hypocrisy. The former arises out of states' reluctance to obey principles of world order if they impede the pursuit of power.[5] The latter derives from the same states' efforts to maintain legitimacy by professing their adherence to international law, while denouncing their enemies' perfidious illegal conduct.[6] If the tension between the pursuit of power and the requirements of international law becomes too great, states can: (a) attempt to invoke international law as the rationale for the pursuit of power;[7] (b) ignore international law altogether; or (c) comply with international law.[8]

Option (a) is difficult unless the legal principles in question are ambiguous and the fact situation novel. Option (b) frequently follows if option (a) fails, but is generally the prerogative of only the most powerful states and their allies.[9] And, every so often, states will choose option (c) as the path least detrimental to their interests.

Justice in accordance with international law is thus a rare event. But justice dispensed against the former head of a US client state in the courts of the US' closest ally almost defies belief. For this reason alone, the efforts to extradite former Chilean dictator Augusto Pinochet from the UK to Spain deserve careful analysis by political scientists and scholars of international relations. For lawyers, the series of cases leading to UK Home Secretary Jack Straw's authorisation of extradition proceedings against Pinochet on 15 April 1999,[10] represents an extensive ventilation of issues surrounding the application of international human rights norms in common law courts. The case was also procedurally dramatic, with the House of Lords taking the unprecedented step of setting aside its initial finding on the grounds of apprehended bias.[11]

This note reviews the long, and still incomplete, history of the case against Augusto Pinochet. Part II situates attempts to prosecute Pinochet in the context of the legacy of authoritarian rule and the struggle against impunity in Latin America. Part III reviews the Spanish indictments that are the basis for the extradition proceedings in the UK. Part IV considers the four decisions of UK courts concerning former head of state immunity, and the application of international criminal law in domestic jurisdictions. Part V briefly reflects on the 'Pinochet Precedent',[12] and the prospects for using domestic courts to pursue those responsible for grave human rights crimes.

II PUTTING PINOCHET IN HIS PLACE — DICTATORSHIP, DEMOCRACY AND THE STRUGGLE AGAINST IMPUNITY IN LATIN AMERICA

A *National Security Doctrine and State Violence in Latin America*

The post-World War II history of many Latin American nations is characterised by extraordinary levels of state-sponsored violence, often directed against popular-democratic movements demanding fundamental social change. In Guatemala, the Central Intelligence Agency-assisted[13] overthrow of Jacobo Arbenz's reformist government in 1954 initiated forty years of civil conflict, in which the armed forces and state-sanctioned death squads were responsible for approximately 90 per cent of the 200,000 fatalities.[14] In El Salvador, the state was found responsible for 90 per cent of human rights violations recorded by the United Nations-sponsored Truth Commission, in a twelve year conflict which claimed an estimated 75,000 lives.[15] Over the 1970s, military dictatorships seized power in Brazil, Honduras, Uruguay, Argentina, Chile and many other nations of the Southern Cone,[16] conducting a 'dirty war' against 'subversives' and other opponents of the regime, real or imagined. Abduction, torture, rape, extrajudicial execution and 'disappearance' (*desaparecidos*) were weapons of choice against the civilian populace, justified by the military's professed conviction that they were saving the homeland and its 'Christian values'[17] from atheistic and degenerate forces, such as Marxism. Adolfo Scilingo, a former officer in the Argentine military who participated in the regular navy flights used to 'disappear' alleged subversives by casting them, alive but drugged, into the ocean, describes the fanatical sense of 'higher purpose':

> I think that [society] appealed to the armed forces or that it backed what they did. A certain excessiveness in the procedures, as it was called at the time, was not rejected. ... At that time we were totally convinced of what we were doing. The way we internalized it, with the situation we were living through in this country, it would be a total lie if I told you that I wouldn't do it again under the same conditions. I would be a hypocrite. When I did what I did I was convinced they were subversives.[18]

The ideological bedrock of the military's messianic self-image as protectors of social order was the 'Doctrine of National Security' ('DNS'), variations of which pervaded most of the region's authoritarian regimes. As the Guatemalan Truth Commission observed, the DNS was endogenous to the US, formulated as part of its hemispheric 'anti-communist' strategy.[19] After the 'loss' of Cuba to an indigenous revolutionary movement, the Kennedy administration revised its military objectives from 'external defence' to 'internal security,' cultivating close links between Latin American military and police groups and US security forces, through financial assistance, joint training exercises, weapons transfers and exchanges with US military academies.[20] 'National security' was defined in terms of an internal enemy (subversion) and an external friend (the US),[21] with repression effectively directed against 'popular classes ... [in order to] ... destroy permanently a perceived threat to the existing structure of socioeconomic privilege by eliminating the political participation of the numerical majority'.[22] The DNS 'fell on fertile ground'[23] among elites whose traditions, conservative values and economic interests had been threatened by populist movements associated with the left from the beginning of the twentieth century.[24]

Under Cold War doctrines, 'communist' was broadly understood to include nationalist regimes that may have been responsive to popular pressures for improved living standards and the redistribution of wealth and income.[25] According to a State Department planning document authored by George Kennan, encouraging a 'national security' mindset may result in 'police repression by the local government' or other 'harsh government measures of repression' but ultimately 'it is better to have a strong regime in power than a liberal government if it is indulgent and relaxed and penetrated by Communists'.[26] Tactics used to prevent 'indulgent and relaxed' attitudes among the populace of Guatemala, for example, included 'abductions, bombings, street assassinations, and executions of real and alleged communists and other ... vaguely defined "enemies of the government"'.[27] The terror targeted 'an alarmingly broad range of Guatemalans of all social sectors and political persuasions. Labor leaders, businessmen, students and intellectuals, government officials, and politicians have all been included'.[28]

B *Pinochet's Rise to Power*

It is within this historical context of counterinsurgency and US-sponsored authoritarianism that Pinochet's rise to power, and the human rights violations which characterised his regime, must be situated. The Allende government was the apotheosis of a threat to 'national security', as understood through the ideological prism of the DNS. In September 1970, Salvador Allende, a veteran of the Chilean Socialist Party and presidential candidate of Unidad Popular ('UP') (a fractious coalition of left-wing parties),[29] came to power with a narrow plurality of the vote.[30] The report of the Chilean National Commission on Truth and Reconciliation records that Chilean politics was increasingly polarised over the 1960s,[31] reflecting what some have argued was a fundamental crisis of legitimacy for a liberal-democratic order that had functioned without direct military rule since the 1930s.[32] Allende was committed to the 'Chilean Road to Socialism', his description of a program of ending capitalist relations of production and ownership through democratic means. The UP itself was deeply divided about the meaning of this phrase, with the polarisation between moderate and radical camps intensifying during Allende's government.[33] A key feature of Allende's program was the creation of a socialised sector of the economy (*área de propiedad social*) which would coexist with a mixed sector and a private sector. However, the government's program of nationalising certain critical industries (mining, banking, telecommunications and petrochemicals), combined with its efforts to mobilise mass support among the working class, urban poor and peasantry, would bring the UP into direct conflict with Chile's industrial elites, landowners and foreign investors.[34]

The US had resolved to oppose Allende before the Chilean Congress confirmed his appointment as President.[35] On 16 September 1970, CIA Director Richard Helms told a meeting of CIA Division Chiefs that:

> President Nixon had decided that an Allende regime in Chile was not acceptable to the United States. The President asked the Agency to prevent Allende from coming to

> power or to unseat him. The President authorized ten million dollars for this purpose. [36]

Handwritten notes taken by Helms, during his meeting with President Nixon the day before, record instructions to use ‘the best men we have’ to prepare a ‘game plan’ and to ‘make the economy scream’.[37] On 9 November 1970, President Nixon resolved to ‘maximize pressures on the Allende government to prevent its consolidation and limit its ability to implement policies contrary to US and hemisphere interests’.[38] The Secretary of State, Secretary of Defense and Director of the CIA were directed to ‘establish and maintain close relations with friendly military leaders in the hemisphere’ while steps were taken to block existing and new loan guarantees and other forms of financial assistance.[39] According to an internal CIA report, between 15 September and 3 November 1970, the CIA assembled a Chilean Task Force to initiate a ‘two track operation’ against Allende. Track one attempted to block Allende’s confirmation by Chile’s Congress through propaganda and political action in concert with Chilean opposition parties, while track two ‘focused on provoking a military coup’.[40] Plans to launch a coup before Allende’s inauguration on 3 November 1970 were abandoned because they were deemed unlikely to succeed, but National Security Adviser Henry Kissinger instructed a CIA division chief to ‘preserve Agency assets in Chile, working clandestinely and securely to maintain the capability for Agency operations against Allende in the future’.[41] The CIA was particularly concerned to find ways of overcoming the ‘apolitical, constitutional-oriented inertia of the Chilean military’.[42]

The economic crisis caused by nationalisation measures and the US’ ‘invisible’ economic blockade alienated the Chilean middle class, culminating in a mass mobilisation of small business owners against Allende. The parliamentary opposition used its narrow majority to block legislative proposals, and removed the entire Cabinet on more than one occasion, provoking a constitutional crisis and paralysing the government. During 1973, a radical polarisation of Chilean society, combined with crippling copper and transport strikes, added credence to the belief that there was no political solution to the crisis. From the time of his inauguration, groups on the far right had been conducting a terror campaign intended to destabilise Allende’s rule.[43] They were now openly supported by the parliamentary right and the Christian Democrats, while on the left demands for a popular militia to combat a possible right wing coup were more insistent.

C *Human Rights Violations in Pinochet’s Chile*

Internal and external factors thus combined to create the conditions for Pinochet’s coup of 11 September 1973. With ‘the voice of Allende silenced by Air Force rockets’ (as the US military attaché in Chile rather gleefully observed),[44] the governing junta took over executive, constituent and legislative power. Political parties were outlawed, electoral rolls destroyed, municipal authorities disbanded and a state of emergency declared. The judiciary formally retained its independence, but did not act as a check on the activities of the military regime.[45] The Constitution was unilaterally varied, and personal freedoms suspended.[46] The official state of siege would continue until 1978.

September to December 1973 witnessed some of the most intense repression of the military government’s rule. Between 11 September and 15 November 1973, 13,500 people were arrested, with perhaps 1,500 killed.[47] Makeshift internment camps were created throughout Chile and torture was an ‘almost universal feature of detentions’.[48] A program of political executions was conducted against members of the former government and activists of parties supporting it, as part of a ‘cleanup’ operation against those regarded as dangerous because of their ideas and activities, and to instill fear into their colleagues.[49] Many others appear to have been killed because of their affiliations with popular movements supporting UP.[50]

Pinochet assumed the newly created position of President of the Republic/Commander-in-Chief, wielding legislative, administrative and military powers.[51] In 1974, a National Intelligence Directorate (‘DINA’) was created by decree, and became the focal point for counterinsurgency strategy and operations.[52] The DINA was directly under the President, and its head, Colonel

Manuel Contreras, 'reported exclusively to, and received orders only from President Pinochet'.[53] According to the report of the Chilean National Commission on Truth and Reconciliation, the DINA was responsible for most of the political repression from 1974 to 1977.[54] The DINA maintained clandestine detention and torture centres throughout Chile, abducting, torturing, executing and concealing the bodies of hundreds of alleged subversives. The Directorate also established links with the security services of other dictatorships in the Southern Cone, formulating 'Operation Condor' in conjunction with counterparts in Argentina, Bolivia, Paraguay, Uruguay and Brazil. The aim of Operation Condor was to gather and exchange information about 'Communists and Marxists' and provide 'for joint operations against terrorist targets in member countries'.[55] Part of the operation also involved the 'formation of special teams from member countries to carry out sanctions up to assassination against terrorists' residing in non-member countries.[56] The DINA was linked to the assassination of several members of the Allende government who had sought refuge in exile, including former Minister of Defense Orlando Letelier, who was killed (with his assistant, US citizen Ronnie Moffitt) by a car bomb in Washington DC on 21 September 1976. In one documented case, DINA was assisted in searching for leftists living in the US by the US Federal Bureau of Investigation.[57] The DINA also developed links with ultra right terrorist groups in Latin America and Europe, using them to conduct attacks in other countries.[58]

In August 1977, the DINA was dissolved and replaced with the National Centre for Information ('CNI').[59] Human rights violations declined between 1977 and 1980, with a repeal of the state of siege. However, the CNI returned to counterinsurgency tactics from mid-1980, after armed attacks by leftist groups. The CNI engaged in the surveillance, detention, torture and disappearance of alleged subversives.[60] With a return to mass protest against the regime after the 1983 economic crisis (and the reimposition of a state of siege) the CNI and other government agents were involved in the use of excessive force to put down demonstrations.[61] In 1985, the Inter-American Commission for Human Rights concluded that the Government of Chile had

> in practice used all known methods for the physical elimination of dissidents, including disappearances, summary executions of individuals and even of groups of defenceless persons, executions ordered in trials without legal guarantees, torture and indiscriminate violence against persons in public demonstrations.[62]

Overall, the Chilean National Commission on Truth and Reconciliation found what it regarded as convincing evidence that 2,115 people had been killed in violation of their human rights and an additional 164 had been victims of political violence. Approximately 50.2 per cent of persons whose deaths were deemed 'human rights violations' were sentenced to death by military tribunals in the months after the coup (59), killed supposedly attempting to escape prison (101), killed during protests (93) or killed by 'other executions and torture' (815).[63] 45.2 per cent (957) were disappearances attributable to state agents. Most victims were under 30 years of age, and 46 per cent had no political affiliations. Leftist armed groups are held responsible for 4.3 per cent (90) of deaths examined by the Commission. The Chilean non-governmental organisation Comite Nacional de Defensa de los Derechos del Pueblo records 11,536 human rights violations over the period 1984-88, including 163 murders, 446 acts of torture and 1,927 arrests.[64]

D *Amnesty and Impunity in Post-Transition Chile*

Decree Law No 2191 of 19 April 1978 granted amnesty to those who had committed criminal actions between 11 September 1973 and 10 March 1978. In 1981, a new Constitution was inaugurated providing for 'protected democracy' over a 16 year transition period. In 1988, a plebiscite was held giving Chileans the opportunity to confirm or reject a presidential candidate nominated by the military. Predictably, the candidate was Pinochet. The plebiscite was intended to legitimise another eight years of military rule,[65] but despite electoral procedures favouring the government and a climate of censorship and intimidation,[66] 55.4 per cent voted against Pinochet. In 1989, the last year before ceding power to a freely-elected government, Pinochet rushed through numerous laws intended to circumscribe the authority of the President and legislature, consolidate

the conservatism of the Supreme Court and expand military power.[67] Many of the structures, institutions and personnel of the authoritarian state remained in place under the successor civilian regime, a product of the 'negotiated transition' between the military and the electoral opposition.[68]

After the report of the Chilean National Commission on Truth and Reconciliation,[69] a number of measures were taken in accordance with its recommendations to provide reparations for victims of Pinochet's repression.[70] However, legal and institutional continuities with the former government obstructed efforts at justice and accountability. Before he stepped down in March 1990, Pinochet warned that 'the army will always cover my back'[71] and infamously threatened that the rule of law would end if anyone tried to touch his people.[72] In 1993, when government auditors were investigating corruption allegations involving military-run businesses and implicating Pinochet's son, Pinochet mobilised the army in a 'war simulation exercise' in the streets of Santiago.[73] The government of President Eduardo Frei was obliged to close the case.

The 1978 amnesty was upheld by the Supreme Court in 1990 as constitutionally valid,[74] and it has been applied consistently to prevent prosecution of human rights violations falling within the amnesty's time limitations. Out of nearly 5,000 human rights cases presented to Chilean courts, sentences have been issued in only 12.[75] Some lower courts have ruled that the amnesty does not preclude judicial investigation of the former regime's crimes and the attribution of responsibility without criminal sanctions, but this remains contested.[76] Military courts have often successfully asserted jurisdiction over complaints against former or serving members of the armed forces accused of human rights crimes, with the Supreme Court taking a wide view of when an act is committed in the course of military service.[77] Military tribunals are staffed by former and serving military officers, and are unlikely to convict army members accused of human rights violations under Pinochet.[78] Pinochet enjoys senatorial immunity from prosecution within Chile, assuming the self-created position of 'Senator-for-Life'[79] after retiring as Commander-in-Chief on 10 March 1998. The immunity can be abrogated only by a decision of the Supreme Court,[80] an institution which has a long record of support for the military government.[81] As former congressman Jorge Schaulsohn concluded in November 1998, '[e]veryone knows that in Chile [Pinochet] will never be tried'.[82]

Chile's experience in confronting the problems of justice and accountability for grave human rights violations has been shaped by its unique social and historical circumstances, but has elements in common with other transitional governments in Latin America. Amnesty laws, and the institutionalised power of collaborators or supporters of the previous regime, have hitherto proscribed accountability in El Salvador, Uruguay, Argentina, Guatemala and Honduras.[83] However, national and international civil society actors, such as human rights NGOs, churches and organised groups of victims' families, have refused to accept the impunity mandated by amnesty laws, and have endeavoured to find ways of holding accountable those responsible for grave human rights violations.[84] The Pinochet prosecution is just such a case.

III SPANISH PROCEEDINGS AGAINST PINOCHET

More than 300 Spanish citizens were killed in Argentina and Chile during the military rule and counterinsurgency terror.[85] Legal action was initiated in Spain through a popular action (*accion popular*), which permits private citizens to begin criminal actions in the public interest, whether or not the complainant is a victim of the crime.[86] Based upon the work of former Allende adviser Juan Garcés, the *accion popular* was lodged in April 1996 by the Salvador Allende Foundation, Izquierda Unida and thousands of Chilean citizens. It was joined with a complaint filed a month earlier by the Union of Progressive Prosecutors, alleging that members of the Argentine and Chilean military (including Pinochet) were responsible for the torture and murder of Spanish citizens, and for genocide, terrorism and crimes against humanity.[87] Jurisdiction was accepted by Judge Manuel Garcia-Castellon in July 1996. During 1998, the Spanish Public Prosecutor attempted to close the case, arguing that the court lacked jurisdiction. In September 1998, Castellon held that he had jurisdiction to hear the case, but later ordered that the cases against Argentine and Chilean

citizens be consolidated under the supervision of Judge Baltazar Garzon, who until then had been investigating charges of terrorism and genocide against only Argentine military personnel.

The Spanish Public Prosecutor appealed the finding of jurisdiction, and the question was considered by the Spanish National Audience sitting *en banc*. The Court held on 30 October 1998, that Spanish courts had jurisdiction in respect of both Argentine and Chilean military personnel accused of genocide, torture and terrorism. Article 23(4) of Spain's *Organic Law of Judicial Power* gives Spanish courts criminal jurisdiction in respect of genocide, terrorism and any other crime that 'according to international treaties or agreements must be prosecuted in Spain'. The crime of genocide was incorporated into the Spanish *Penal Code* in 1971, and was interpreted by the Court as including an intent to destroy a 'distinct human group characterised by something, integrated into a larger community'.[88] Accordingly, attempts to destroy a group of people deemed not to fit in with the project of 'national reorganisation' conducted by the Argentine and Chilean dictatorships constituted an attempt to destroy a 'national group',[89] even if that group included Spanish citizens.

The Court also found that acts allegedly committed in pursuance of Operation Condor were within the meaning of 'terrorism', and although not aimed at the subversion of Spain's political order, could be tried in Spain as international crimes. Finally, the Court held that claims of torture were a constituent of the larger crime of genocide, and thus were within its jurisdiction. In an earlier decision, Judge Castellon had reasoned that the *Torture Convention*[90] provided that a state has jurisdiction when the victim is a national of that state.[91]

Pinochet arrived in England on 22 September 1998 and checked into a London hospital for an emergency operation on a herniated disc on 9 October 1998.[92] The General was particularly fond of Britain, where he would visit Madam Tussaud's, shop at Burberry's and take tea with Baroness Thatcher,[93] who remains grateful for Chile's support during the Falklands War.[94] The United Kingdom was also one of the few countries in Europe which had not barred his entry. In late September, however, Amnesty International became aware of the General's presence in London and informed Spanish lawyers at the Salvador Allende Foundation in Madrid, who in turn alerted the investigating magistrates. On 13 October 1998, Judge Garzon issued a provisional international arrest warrant, requesting Scotland Yard to detain Pinochet pending a formal extradition request. At 6.00pm on 16 October 1998, Pinochet was arrested at his hospital bed as he recovered from surgery.[95]

IV PROCEEDINGS IN THE UNITED KINGDOM

The Metropolitan Magistrate issued a provisional warrant under s 8(1)(b) of the *Extradition Act 1989* (UK). The Act permits provisional detention of a person accused of 'extradition crimes' within the meaning of s 2(1) of the *Extradition Act 1989* (UK) where that person 'is or is believed to be in ... the UK'.[96] The warrant of 16 October 1998 alleged that 'between the 11th September 1973 and the 31st December 1988 ... [the defendant] ... did murder Spanish citizens in Chile within the jurisdiction of the Government of Spain'.[97] A second provisional warrant was issued on 22 October 1998, charging Pinochet with torture, conspiracy to torture, hostage taking and conspiracy to commit murder in European Union countries. Pinochet applied for judicial review of both warrants, and for habeas corpus. His application was first heard in the High Court of Justice, Queen's Bench Division.

A R v Evans and Bartle; Ex parte Augusto Pinochet Ugarte[98]

The High Court struck out the first warrant on the grounds that it did not disclose an 'extradition crime'. An application under the *Extradition Act 1989* (UK) can only be entertained where it alleges that the defendant has committed a crime which:

1. is committed in the requesting state's territory, and, if it had occurred in the UK, would be an offence punishable by a prison term of at least 12 months;[99] or

2. is an extraterritorial offence against the requesting state's law, and would be an extraterritorial offence in the UK punishable by imprisonment for at least 12 months;[100] or
3. is an extraterritorial offence where jurisdiction is asserted on the basis of the offender's nationality, and, if the act occurred in the UK, would be a crime punishable by imprisonment for at least 12 months.[101]

The *Extradition Act 1989* (UK) thus creates three categories of extradition crime: crimes committed within the territory of the requesting state; extraterritorial crimes under the requesting state's laws; and, extraterritorial crimes based on jurisdiction over the acts of nationals.[102] The second limb which must be satisfied in each of these categories is that the acts alleged are also offences under UK law, punishable with imprisonment for 12 months or more. This is known as the 'double criminality' rule and was the focus of much scrutiny in the third House of Lords decision.[103]

The first warrant alleged Pinochet's responsibility for the murder of Spanish citizens in Chile. This offence was clearly not committed within the territory of the requesting state, nor was it an extraterritorial offence under British law because 'the murder of a British citizen by a British non-citizen outside the UK would not constitute an offence in respect of which the UK could claim extraterritorial jurisdiction'.[104] Finally, jurisdiction was self-evidently not based on the offender's citizenship but on the nationality of the victim, and thus fell outside s 2(3) of the *Extradition Act 1989* (UK).

The second provisional warrant was found to disclose extradition crimes,[105] subject to a question of retrospectivity. Counsel for Pinochet argued that many of the acts alleged were not crimes under British law at the time they were committed. This argument was not considered by Lord Bingham CJ, who regarded it as matter for the magistrate to consider during extradition proceedings. However, his Lordship commented that 'in my judgment [conduct] need not have been criminal here at the time the alleged crime was committed abroad'.[106]

The decisive issue in the High Court proceedings was whether Pinochet could claim sovereign immunity in respect of crimes allegedly committed while he was Chilean head of state. Section 1 of the *State Immunity Act 1978* (UK) confers on states immunity from the jurisdiction of British courts, subject to certain exceptions. Section 14(1) extends state immunity to 'the sovereign or other head of that state in his public capacity',[107] and s 20(1) applies the privileges and immunities conferred by the *Diplomatic Privileges Act 1964* (UK) to 'a sovereign or other head of State' subject to 'any necessary modifications'.[108] The *Diplomatic Privileges Act 1964* (UK) incorporates into British law the *Vienna Convention on Diplomatic Relations* ('*VCDR*'),[109] article 29 of which provides that 'the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention'.[110] Article 39 states that a person entitled to diplomatic privileges will enjoy them from the moment she or he enters the territory of the receiving state, and that when his or her public functions come to an end, immunity subsists 'with respect to acts performed by such a person in the exercise of his functions'.[111]

Lord Bingham CJ held that the underlying rationale for sovereign immunity is a 'rule of international comity restraining one sovereign state from sitting in judgment on the sovereign behaviour of another'.[112] His Lordship reasoned that the combined effect of articles 29 and 39 of the *VCDR* (as incorporated in British law by the *Diplomatic Privileges Act 1964* (UK)) clearly entitled a former head of state to immunity in relation to criminal acts performed while exercising public functions. That the acts alleged were particularly egregious crimes, or were otherwise a 'deviation from good democratic practice', did not place them outside the scope of immunity provided for in British law.[113] In his concurring judgment, Collins J similarly found that head of state immunity

> is an immunity which attaches to him by virtue of his office, absolute while he is head of state and limited thereafter to acts done in the exercise of his functions as head of state. ... [H]istory shows that it has indeed on occasions been state policy to exterminate or to oppress particular groups. ... There is in my judgment no justification for reading any limitation based on the nature of the crimes into the immunity which exists.[114]

Accordingly, the second provisional warrant of arrest was quashed. However, the court immediately stayed the order of certiorari, granting the Crown Prosecution Service leave to appeal to the House of Lords and certifying that

> a point of law of general public importance is involved in the court's decision, namely the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the UK in respect of acts committed while he was head of state.[115]

B R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte[116]

With the commencement of the first case before the House of Lords, Amnesty International and a number of groups representing victims of disappearance and torture were given leave to intervene, and the assistance of an amicus curiae was also sought. This would be a feature of the third House of Lords hearing, in which the Government of Chile and Human Rights Watch were permitted to intervene.

On 25 November 1998, by a narrow majority of three Law Lords to two, their Lordships reversed the High Court's finding that Pinochet was entitled to head of state immunity in respect of the crimes alleged. The question to which the court addressed itself was: what are the limits, if any, to the principle of head of state immunity, as it applies in British law?

1 *Minority Judgments*

The answer of the dissentients, Lord Slynn and Lord Lloyd, was that, in the absence of express international *and* domestic derogation, head of state immunity continued to apply to all acts committed by Pinochet while exercising the public functions of a head of state.

In separate judgments, their Lordships rejected the argument that the legitimate 'public functions' of a head of state within the meaning of article 39 of the *VCDR* are prescribed by international law, and thus necessarily excludes such international crimes as torture, terrorism and genocide.[117] Heads of state may engage in illegal conduct in the ostensible exercise of public functions,[118] and claim head of state immunity in respect of that conduct[119] — even if the illegal act is genocide.

Neither Law Lord was willing to find a clear norm requiring that the well-established principle of head of state immunity be overridden *domestically* where certain crimes are alleged:[120]

> The fact even that an act is recognised as a crime under international law does not mean that the courts of all states have jurisdiction to try it, nor in my view does it mean that the immunity recognised by states as part of their international relations is automatically taken away by international law. There is no universality of jurisdiction for crimes against international law: there is no universal rule that all crimes are outside immunity ratione materiae.[121]

Head of state immunity must be either expressly abrogated or waived by the state of nationality.[122]

Lord Slynn set a high threshold for the abrogation of immunity. He required that the alleged crime be clearly defined in an international convention to which both the state asserting and the state being asked to refuse head of state immunity are parties. The convention must also unambiguously empower states parties to prosecute heads of state accused of the crime, wherever committed, in national courts, and expressly or impliedly abrogate head of state immunity. Finally, the convention must have the force of law in the state's courts, requiring implementing legislation in Britain's case.[123]

One convention which appears to meet these requirements is the *Torture Convention*,[124] which

creates an obligation for all states parties to prosecute public officials (of whatever nationality) accused of torture (wherever committed), or extradite them to a convention country which intends to prosecute.[125] The *Torture Convention* was incorporated into British law by s 134 of the *Criminal Justice Act 1988* (UK), and thus seems to meet Lord Slynn's test for crimes of universal jurisdiction. His Lordship argued, however, that a 'public official' for the purposes of the *Torture Convention* and the *Criminal Justice Act 1988* (UK) did not mean a head of state or former head of state without express incorporation of the term. The *International Convention Against the Taking of Hostages*[126] failed for the same reason, while article 4 of the *Genocide Convention*[127] — which *does* expressly refer to heads of state — is not incorporated into British law.

Lord Lloyd similarly resolved that 'there is nothing in the Torture Convention which touches on state immunity',[128] and argued that the express provisions denying head of state immunity found in the constitutive instruments of various international tribunals[129] were evidence that heads of state cannot ordinarily be tried in the domestic courts of states.[130]

As an alternative basis for dismissing the appeal, their Lordships relied on a variation of the 'Act of State' doctrine.[131] It is asserted that adjudicating upon acts committed by a person, within her or his own territory and in purported exercise of her or his public functions as the head of a foreign power, would breach a principle of 'judicial restraint or abstention' which governs the consideration of foreign sovereigns' acts of state.[132] Under private international law and out of an obligation not to upset the 'comity of nations', acts of state are non-justiciable. Lord Lloyd registers particular concern that by allowing the extradition to proceed, British courts would be disregarding Chile's 1978 amnesty law and undermining the Chilean Supreme Court's control over its interpretation and application.[133] This, he argued, is outside the competence of domestic courts,[134] and intrudes upon a state's discretion to manage its transitional process.[135]

2 *Majority Judgments*

In contrast, the answer of the majority was that international laws proscribing torture, hostage-taking and other grave crimes limit the legitimate functions of a head of state and circumscribe the acts to which immunity attaches. Lord Nicholls (with whom Lord Hoffman concurred) distinguished between immunity *ratione personae* and immunity *ratione materiae*. The former applies to a serving head of state, protecting her or him as the embodiment of the state. The immunity is thus absolute, and not concerned with whether the acts were committed in a public capacity.[136] The immunity afforded by article 39 of the *VCDR*, however, is restricted to 'acts performed by [a protected official] in the exercise of his functions', and is thus closer to immunity *ratione materiae*. In both Lord Nicholls' and Lord Steyn's assessment, the 'functions of a head of state' within the meaning of article 39 must be understood as 'functions which international law recognises as functions of a head of state'.[137] *Pace* the dissentients, their Lordships accept that international law as it has developed since World War II does not permit individuals to invoke their official position as a defence to grave international crimes:[138]

> Acts of torture and hostage-taking, outlawed as they are by international law, cannot be attributed to the state to the exclusion of personal liability. ... It is not consistent with the existence of these crimes that former officials, however senior, should be immune from prosecution outside their own jurisdictions. The two international conventions made it clear that these crimes were to be punishable by courts of individual states.[139]

Lords Steyn and Nicholls declined to apply the 'Act of State' doctrine, arguing that the incorporation of the *Torture Convention* and the *International Convention Against the Taking of Hostages* demonstrates the legislative intention that domestic courts take jurisdiction over conduct which may involve foreign governmental acts.[140] In addition, Lord Steyn took the broader position that 'it would be wrong for the UK courts now to extend the act of state doctrine in a way which runs counter to the state of customary international law as it existed in 1973'.[141] The international law of human rights contemplates the external scrutiny of acts such as torture and genocide, and so would not be defeated by the 'Act of State' doctrine.[142]

C R v Bow Street Magistrate Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)[143]

On 9 December 1998, UK Home Secretary Jack Straw issued an authority to proceed with extradition pursuant to s 7(1) of the *Extradition Act 1989* (UK). However, on 17 December, the first House of Lords decision was set aside by the unanimous decision of five Law Lords, after it was disclosed that Lord Hoffman was an unpaid director of a charity arm of Amnesty International. In separate judgments, their Lordships concurred that the relationship between the charity (Amnesty International Charity Ltd) and Amnesty International was such that Lord Hoffman could be considered to have an interest in the proceedings to which Amnesty International was a party.[144] Although not pecuniary, Lord Hoffman's interest violated the absolute principle of *nemo debet esse judex in propria causa* (no one may be judge in his own cause), and he was disqualified as a matter of law.[145] All judges stressed that no allegation of actual bias had been made against Lord Hoffman, but that the disqualification was automatic, flowing from the need to maintain the judiciary's appearance of impartiality.

D R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)[146]

A new panel of seven Law Lords convened in late January 1999 to rehear the case. With an additional two interveners, an amicus curiae and the two parties, oral argument ran for over fourteen days. On 24 March 1999, a second judgment was handed down allowing the appeal by a majority of six to one, but on different bases to those of the first panel of Law Lords. It seems that with each rehearing, the parties further refined the questions under review, such that the treatment of legal issues in the final decision diverged from the two previous judgments in terms of structure and analysis. The two questions for determination were: (a) which of the alleged offences were extradition crimes; and, (b) in respect of which extradition crimes could head of state immunity be claimed?

1 *Extradition Crimes and Retrospectivity*

In order to clarify the offences under consideration, Counsel for the Crown Prosecution Service and the Government of Spain prepared a schedule of 32 UK criminal charges which corresponded to the allegations made against Pinochet under Spanish law (excluding genocide). Broadly, the categories of offence were torture, conspiracy to torture, conspiracy to take hostages, conspiracy to murder in Spain and other European countries, and attempted murder in Italy.

As noted above,[147] an 'extradition crime' must have the quality of 'double criminality'. That is, it must be conduct which is criminal in both the UK and the requesting state. However, it is unclear whether the *Extradition Act 1989* (UK) requires the conduct to be criminal in the UK at the time of the extradition request ('request date') or at the time the conduct was committed ('conduct date'). Lord Bingham CJ,[148] in the High Court, and Lord Lloyd,[149] in the first Appellate Committee, had rejected the argument that 'double criminality' required the conduct alleged to be a crime under UK law at the time it was committed. Lord Browne-Wilkinson,[150] however, interpreted s 2(1) to 2(3) of the *Extradition Act 1989* (UK) as mandating extradition proceedings only if 'the conduct [was] criminal under UK law at the conduct date not at the request date'.[151] Accordingly, only that conduct which would have been an offence under UK law at the time it was committed could be the basis for extradition proceedings.

Lord Hope took primary responsibility for applying this rule to the charges,[152] finding that torture became an extraterritorial offence in the UK with the incorporation of the substantive provisions of the *Torture Convention* in s 134 of the *Criminal Justice Act 1988* (UK).[153] Section 134, which came into effect on 29 September 1988, provides that counselling, procuring, commanding and aiding or abetting torture[154] forms part of the offence of torture. Torture is deemed an extraterritorial offence, punishable in the UK regardless of the nationality of the perpetrator or the place of commission. While physical torture was criminal before September 1988,

it was not an extraterritorial crime and so would not be an extradition offence unless committed in the requesting state.[155] Subject to the question of immunity, acts of torture after September 1988, wherever committed, are extradition crimes.[156]

The *International Convention Against the Taking of Hostages*[157] was enacted into UK law in 1982 by the *Taking of Hostages Act 1982* (UK), and hence hostage-taking within the meaning of the Act after that time is an extradition crime. However, s 1(1) of the Act defines the offence as the detention of any other person, who is threatened with death, injury or continued detention 'in order to compel a State, international governmental organisation or person to do or abstain from doing an act'. In Lord Hope's opinion, the abduction and torture of persons to terrify political opposition and obtain information about dissidents in Pinochet's Chile did *not* amount to a threat to kill, injure or detain those already detained in order to compel others to do or abstain from doing any act.[158] The conduct was aimed at harming persons already detained and threatening others with detention and torture, and thus, was not an offence under the *Taking of Hostages Act 1982* (UK).

The allegation of conspiring *in Spain* to murder someone in Spain was upheld as an extradition crime because under s 1(4) of the *Criminal Law Act 1977* (UK) a person who conspires in the UK to murder someone in the UK or abroad can be prosecuted for conspiracy to murder.[159] However, allegations of conspiring *in Chile* to commit murder in France, Spain, the US, Portugal and Chile were held not to be extradition crimes. These charges relied on extraterritorial jurisdiction conferred by s 4(1) of the *Suppression of Terrorism Act 1978* (UK), which enacted into UK law the *European Convention on the Suppression of Terrorism*.[160] The Act gives UK courts jurisdiction over, inter alia,[161] a conspiracy to murder committed in a convention country. But Chile is not a convention country, and hence a conspiracy undertaken in Chile falls outside the Act.[162] Similarly, as an extraterritorial offence under the Act, attempted murder in Italy would have been an extradition crime but for the fact that the alleged crimes were committed in October 1975, three years before the Act came into effect.

Having narrowed the crimes for which Pinochet could be extradited to (a) torture and conspiracy to torture after September 1988; and (b) conspiracy in Spain to murder in Spain, the remaining question was whether these offences were subject to head of state immunity.

2 *Former Head of State Immunity*

With the exception of Lord Goff in dissent, all six Law Lords found that Pinochet could not claim immunity in respect of the crimes alleged. However, the paths by which this conclusion is reached differ significantly. It is heuristically useful to divide their Lordships' reasoning between those who took a restrictive view of the limits to immunity (Lord Browne-Wilkinson, Lord Hope and Lord Saville) and those who adopted a more expansive position (Lord Hutton, Lord Millett and Lord Phillips). The 'narrow view' declined immunity after examining the wording of positive sources of law and inferences concerning the obligations assumed by the states under the *Torture Convention*. By contrast, the 'broad view' is distinguished by a greater willingness to rely on general principles of international criminal law from a variety of sources which have not necessarily been enacted into UK law.

(a) The 'Narrow View'

Accepting the distinction between immunity *ratione personae* and immunity *ratione materiae* as forming part of the common law,[163] Lord Browne-Wilkinson and Lord Hope regarded it as uncontroversial that if Pinochet were a serving head of state, he would enjoy absolute immunity in UK courts for acts committed anywhere in the world.[164] As a former head of state, he was also deemed to retain immunity *ratione materiae* for acts committed in performance of his functions while in office.[165] Critically, neither judge regarded torture or conspiracy to murder as *necessarily* outside the scope of the functions of a head of state which are protected by immunity *ratione materiae*:

> [T]he functions of the head of state are those which his own state enables or requires

> him to perform in the exercise of government. ... These may include instructing or authorising acts to be done by those under his command at home or abroad in the interests of state security. ... The fact that acts done for the state have involved conduct which is criminal does not remove the immunity ... The principle of immunity ratione materiae protects all acts which the head of state has performed in the exercise of the functions of government.[166]

Lord Hope expressly adopted Lord Slynn's reasoning in the first Appellate Committee, denying that there is a general loss of immunity from the jurisdiction of foreign national courts,[167] and setting a high threshold for the abrogation of immunity *ratione materiae* by domestic courts. Those seeking to implead a former head of state must show:

1. a crime clearly defined by an international convention to which all states relevant to the proceedings are a party;
2. the express conferral by the convention of extraterritorial jurisdiction in respect of the crime;
3. clear authority to prosecute a head of state or former head of state, and the express or implied abrogation of immunity by the convention; and
4. that the convention has the force of law in domestic courts, according to the law of the state.

His Lordship argued that the literal wording and *travaux préparatoires* of the *Torture Convention* are inconclusive as to whether immunity *ratione materiae* is removed.[168] Unlike other international instruments conferring jurisdiction over human rights crimes, there is no express annulment of head of state immunity.[169] However, three factors seem to have pushed his Lordship to the conclusion that immunity cannot be invoked. First, he acknowledged that when the *Torture Convention* was enacted into UK law in 1988, the law against torture had already attained the status of a *jus cogens* norm[170] — an international legal principle of such importance that it cannot be derogated from by states.[171] Second, he noted that Pinochet is alleged to have pursued a policy of *systematic* torture which would be regarded by customary international law as an international crime.[172] Finally, and perhaps most importantly, it was not open to Chile as 'a *signatory to the [Torture] Convention* to invoke the immunity ratione materiae in the event of allegations of systematic or widespread torture committed' after the convention entered into force.[173] Hence, a former head of state whose nation is a state party to the *Torture Convention* cannot rely on immunity *ratione materiae* in the domestic courts of another state party, if she or he is accused of conduct amounting to a policy of systematic torture.

Lord Browne-Wilkinson had 'no doubt that long before the *Torture Convention* ... state torture was an international crime in the highest sense',[174] but did not consider its *jus cogens* status a conclusive rebuttal of the immunity claim.[175] Rather, he based his finding against immunity on the terms and intent of the *Torture Convention*, by which Chile, the UK and Spain have bound themselves. Article 1 of the Convention defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for ... [certain purposes] ... when such pain or suffering is inflicted *by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*.[176]

His Lordship held that a head of state is undoubtedly a public official or person acting in an official capacity within the meaning of article 1, and that articles 5 and 8 of the Convention create 'worldwide universal jurisdiction'.[177] If the Convention creates jurisdiction to punish conduct which, by definition, is committed by persons acting in an official capacity, then allowing the accused to claim immunity on the grounds that they were exercising 'public functions'[178] renders 'the whole elaborate structure of universal jurisdiction over torture ... abortive'.[179] By ratifying the Convention, Chile was '"contractually" bound'[180] to outlaw torture and had agreed to allow all state parties to exercise jurisdiction over torture as defined in article 1.

Lord Saville adopted the reasoning of Lord Browne-Wilkinson and Lord Hope,[181] emphasising that a head of state is a 'prime example of an official torturer'.[182] States who have become parties

to the *Torture Convention* 'have clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an interference in their sovereignty'.[183]

Accordingly, under the 'narrow view', Pinochet can claim no immunity in respect of extraditable torture offences, but retains immunity in respect of the alleged conspiracy to commit murder in Spain.

(b) The 'Broad View'

Lords Hutton, Millett and Phillips displayed, to varying degrees, a less positivistic approach to the question of whether immunity *ratione materiae* subsists for acts of torture and other international crimes. Lord Hutton was perhaps closest to the 'narrow view', basing his finding against immunity primarily on the terms of the *Torture Convention*.[184] However, his Lordship also extensively reviewed sources of international law mandating individual responsibility, irrespective of official capacity, for certain grave crimes[185] and concluded that:

> [S]ince the end of the second world war there has been a clear recognition by the international community that certain crimes are so grave and so inhuman that they constitute crimes against international law and that the international community is under a duty to bring to justice a person who commits such crimes.[186]

Lords Millett and Phillips also took cognisance of the development of international law since 1945, referring to numerous sources of international law within the meaning of article 38 of the *Statute of the International Court of Justice*.[187] Lord Millett was particularly sensitive to the post-World War II transformation in international legal approaches to state sovereignty[188] initiated by the Nuremberg Tribunal and continued through United Nations organs such as the General Assembly, the International Law Commission and bodies established under human rights treaties. The cumulative development of international criminal law and human rights law had made the 'way in which a state treated its own citizens within its own borders ... a matter of legitimate concern to the international community'.[189] Hence, in Lord Millett's view, by the time Pinochet seized power '[l]arge scale and systematic use of torture and murder by state authorities had come to be regarded as an attack upon the international order'.[190]

Customary international law has reached a stage of development whereby states may exercise universal jurisdiction in respect of crimes which: (a) contradict a peremptory norm of international law; and (b) are so serious and on such a scale that they can be regarded as an attack on the international legal order.[191] A fortiori, immunity *ratione materiae* cannot be invoked to bar the prosecution of such crimes.[192] Arguing that customary international law is part of the common law,[193] his Lordship reached the sweeping conclusion that

> English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law. ... [T]he systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984.

Accordingly, Lord Millett expressed a preference for allowing extradition in respect of *all* acts of torture alleged, irrespective of when they were committed, but deferred to Lord Hope's view.

Lord Phillips distinguished between civil and criminal proceedings against a head of state, and concluded that there is no general immunity in international law in respect of criminal proceedings against heads of state.[194] Rather, he adopted a narrow reading of the *State Immunity Act 1978* (UK) extension of article 39 of the *VCDR* to heads of state,[195] restricting its conferral of diplomatic immunity to acts committed by a head of state in the UK, while visiting at the invitation or with the consent of the UK government.[196] All other conduct by a head of state is governed by international law principles which, in Lord Phillips' view, accord no immunity in respect of recognised international crimes:

> International crimes and extraterritorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity *ratione materiae* can coexist with them. The exercise of extraterritorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. ... An international crime is as offensive, if not more offensive, to the international community when committed under colour of office. Once extraterritorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.[197]

To the extent that Pinochet's entire campaign against political opposition violated the norms of international law, he could claim no immunity for any crime that formed part of that campaign.[198]

3 *Minority Judgment*

Lord Goff addressed himself primarily to head of state immunity. He differed from all members of the majority by accepting the respondent's[199] and the Government of Chile's[200] contention that immunity (whether *ratione personae* or *ratione materiae*) must be expressly waived.[201] His Lordship treated head of state immunity as coterminous with, or a variety of, state immunity, and thus relied on authorities stipulating the necessity of an express waiver of immunity where legal action is pursued against *states*.[202] In his view, the *Torture Convention* both failed to secure an express waiver, and did not contain one by implication.[203] Noting the absence of any reference to heads of state in the Convention's *travaux préparatoires*, his Lordship inferred that this evidenced an unwillingness by negotiators to make heads of state subject to the treaty.[204] Also weighing heavily among his reasons were policy considerations against excluding immunity:

> [I]f immunity ratione materiae was excluded, former heads of state and senior public officials would have to think twice about travelling abroad, for fear of being the subject of unfounded allegations emanating from states of a different political persuasion. ... Preservation of state immunity is therefore a matter of particular importance to powerful countries whose heads of state perform an executive role, and who may therefore be regarded as possible targets by ... states which, for deeply felt political reasons, deplore their actions while in office.[205]

V THE PINOCHET PRECEDENT

Subsequent to the House of Lords' third decision, Judge Garzon added 11 post-1988 cases of torture to the indictment.[206] In a letter to Home Secretary Jack Straw, Human Rights Watch claimed to have evidence of 111 alleged cases of torture in the 18 months between September 1988 and March 1990 committed by Chilean authorities under Pinochet's command.[207] On 15 April 1999, the Home Secretary issued an authority to proceed under s 7(4) of the *Extradition Act 1989* (UK).[208]

The decision of the third Appellate Committee is by no means the end of the case. The extradition proceedings will be trenchantly litigated, and it may be over a year before the question is finally determined.[209] Regardless of whether the General is ultimately sent to Spain, the decision has been greeted with enthusiasm by human rights activists and NGOs.[210] The post-World War II international legal order inaugurated by the creation of the United Nations and its organs has witnessed an unprecedented development in the international law of human rights.[211] State conduct which systematically violates the basic human rights of life and bodily integrity has come to be regarded as a threat to the international order, and is subject to prohibitions considered to be *jus cogens* norms. The prohibitions against genocide, crimes against humanity (including systematic torture)[212] and slavery thus attract *jus cogens* status,[213] preempting any inconsistent law and arguably casting upon all states a duty to prevent and prosecute such crimes in the interests of the peace and security of humankind.[214] The crimes are of such a grave nature that statutes of limitations do not apply,[215] and the constitutional authority or official position (including status

as head of state) of the perpetrators are not defences.[216] International criminal law thus proscribes certain gross human rights violations irrespective of where they occur, and in principle enables states to prosecute individuals accused of these crimes even if the prosecuting state has no territorial or national nexus with the alleged perpetrator or victim.

Yet despite widespread acceptance of the *jus cogens* status of certain crimes, the consistent enforcement of these principles against individuals whose crimes 'shock the conscience of mankind' has been absent. In an international legal framework historically derived from contractual relations between amoral actors (states), who are presumed to act in concert only when mutual minimum self-interest requires, there has long been a tension between the prerogatives of states and the status of individuals as the beneficiaries of 'natural' rights.[217]

During an earlier epoch, the tension emerged in the 'natural law' jurists' view of international society as consisting not only of states (although the latter are the dominant actors), but also of individual humans.[218] Consent manifested in the practice of states was acknowledged as *a* basis of international obligation, rather than the singular one. The 'ever-present source for supplementing the voluntary law of nations' remained natural law,[219] which governed the conduct of states and individuals alike; all creatures endowed with reason are taken to know, *a priori*, the precepts of natural law, and are able to derive them, *a posteriori*, from the inherent desire to lead a moral life and by learning from experience.[220] To the extent that there can be no states without the individual human beings that lead and serve them, the individual is the ultimate unit of international law

> in the double sense that the obligations of international law are ultimately addressed to [her or] him and that the development, the well-being, and the dignity of the individual human being are a matter of direct concern to international law.[221]

The natural law discernable in the soul and intellect of humanity is the standard against which the will or practice of states can be measured.

The modern theory and practice of international human rights can be regarded as the inheritor of this tradition, which may be termed 'the law of peoples',[222] to the extent that it takes individual human beings (and occasionally, human collectivities)[223] as the addressees and subjects of international law. By deeming systematic human rights violations to be crimes which threaten world order, concepts such as *jus cogens* crimes and universal jurisdiction exemplify attempts to place human dignity at the apex of the legal order's hierarchy of values. Traditional state prerogatives such as nationality or territorial jurisdiction and sovereign immunity purportedly yield to the duty and right of every state to try those whose crimes make them *hostes humani generis* (enemies of the human race). Nevertheless, the tension between the 'law of peoples' and the traditional rights of states remains unresolved in practice.[224] Outside the rarefied atmosphere of United Nations organs and diplomatic working groups, the enforceability of 'universal justice' is subject to political convenience and the expediency of the powerful — to the growing frustration of those, such as human rights NGOs, who purport to represent the 'conscience of the world'.[225]

The 'Pinochet precedent' has therefore been seen as a 'ray of hope'[226] in efforts to circumscribe the impunity enjoyed by those accused of grave human rights violations in many parts of the world. Until the International Criminal Court envisaged by the *Rome Statute* comes into effective operation, prosecutions in the domestic courts of other states appear to be the only consistent mechanism for bringing grave human rights violators to justice in conflicts and regions not subject to the jurisdiction of ad hoc tribunals.[227] One major human rights organisation has already established a special task force to assist 'governments, victims and lawyers ... in securing extradition and impartial trials of rights violators in their countries of origin or third-party countries'.[228]

There are, however, a number of reasons to remain cautious about the prospects of 'Pinochet-style' prosecutions. The final judgment of the House of Lords is open to restrictive interpretation, and it is not difficult to imagine future courts seeking refuge from political controversy by adopting the positivistic approach of Lord Browne-Wilkinson and Lord Hope. Their Lordships' judgments invite

narrow application, and could easily be restricted to the specific terms of the *Torture Convention*. The willingness of Lord Millett and Lord Phillips to rely on 'soft' law sources[229] is encouraging, but may not be considered conclusive in a legal system where international law must generally be legislatively incorporated before it gives rise to rights and obligations. The arcane technicality of the final decisions also reveals the difficulties of relying on trials in third countries, where an action's success will depend upon the scope of domestic legislation and other institutional contingencies. In most common law countries, final discretion over extradition remains with the executive, subjecting any action to the political expediencies of the serving government.

The problem of selectivity should be taken seriously. The high degree of dependence of 'Pinochet-style' prosecutions on the cooperation of third or even fourth states allows those states an effective veto, curtailing the promise of 'universal justice'. It raises the concern that adequate assistance would only be forthcoming where 'politically acceptable' defendants would proceed to trial, while others would continue to enjoy impunity. The US, for example, has thus far refused to support Pinochet's prosecution and is withholding documentary evidence which may be critical in establishing the guilt or innocence of their former ally.[230] At the same time, the Clinton administration has vociferously demanded the establishment of an ad hoc tribunal to try former Khmer Rouge leaders for genocide and cooperated with Turkey's kidnapping of Kurd separatist leader Abdullah Ocalan, arguing that the latter 'is a terrorist, and he, therefore, should receive no safe haven'.[231] It would be ironic and inconsistent with the jurisprudential foundations of universal jurisdiction if, in the pursuit of justice, only those out of favour with powerful states were able to be tried.

A final concern arises in relation to countries making the transition from authoritarian to democratically elected governments. A frequently reiterated reason for opposing the extradition, and one adverted to by Lord Lloyd in the first Appellate Committee decision,[232] is that prosecuting General Pinochet threatens to destabilise Chile's successful transition from military rule to civilian government. There is no doubt that Pinochet's arrest has generated polarised responses in Chile, with the General's right wing supporters and former members of the military government denouncing it as a threat to Chile's sovereignty. It has also placed under strain relations between members of the ruling centre left coalition, many of whom were persecuted under Pinochet's rule, and still-powerful military institutions. Nevertheless, the polarised response itself raises questions about the 'success' of Chile's transitional process in dealing with its past. As noted above, the transition was a product of negotiation *and* coercion, with the military and its supporters determined to maintain leverage over a fragile elected government. The amnesty was presented to the populace as a fait accompli, not open to derogation or democratic review upon pain of renewed violence. Unsurprisingly, in a context where the perpetrators of atrocities and their supporters retain positions of power and influence, many victims' sense of injustice is unresolved, and Pinochet's arrest is felt as a vindication of their suffering.

But in circumstances where the amnesty process has greater moral and democratic legitimacy, such as in South Africa,[233] it is an open question whether a 'Pinochet-style' prosecution will undermine 'reconciliation'. Moreover, will future courts hearing such a case effectively be required to assess the legitimacy and applicability of an amnesty law passed in another country? Are they entitled to ignore the 'political settlement' that characterises another state's transitional process, and consider only legal issues? The tension between the purported international legal duty to prosecute certain crimes[234] and the inevitability of political compromise during transitions, can perhaps be mediated by clear international guidelines concerning limits of amnesty laws.[235] International actors are increasingly participants in transitional processes[236] and are thus in a position to shape the parties' consensus on an 'acceptable' amnesty. In Guatemala, for example, the activities of MINUGUA appear to have been influential in excluding acts of genocide, torture and disappearance[237] from the *National Reconciliation Law* passed in December 1996. Individuals who benefit from amnesties wider than the prescriptions of international law may be considered on notice that they are not beyond the reach of 'justice without borders'.

NEHAL BHUTA[*]

[*] (Unreported, UK Court of Appeal, Lord Bingham CJ, Collins and Richards JJ, 28 October 1998) (High Court proceedings).

[†] [1998] 4 All ER 897 (Lord Slynn, Lord Lloyd, Lord Nicholls, Lord Steyn and Lord Hoffman).

[‡] [1999] 2 WLR 272 (Lord Browne-Wilkinson, Lord Goff, Lord Nolan, Lord Hope and Lord Hutton).

[§] [1999] 2 WLR 827 (Lord Browne-Wilkinson, Lord Goff, Lord Hope, Lord Hutton, Lord Saville, Lord Millett and Lord Phillips).

[1] Testimony given by a relative of a 'disappeared' detainee: *Report of the Chilean National Commission on Truth and Reconciliation* (1992) 782.

[2] Testimony of a Chilean national: ibid 800.

[3] Spanish television, interview with Augusto Pinochet, 4 June 1988, quoted in Americas Watch, *Chile: Human Rights and the Plebiscite* (1988) 1.

[4] *The Sunday Mirror*, interview with Augusto Pinochet, cited in Arturo Valenzuela, 'Judging the General: Pinochet's Past and Chile's Future' (1999) 98 *Current History* 99, 103.

[5] See *National Security Council Memorandum*, No 5432/1 (1954), cited in Noam Chomsky, *Year 501: The Conquest Continues* (1993) 33.

[6] Note Theodore Roosevelt's observations concerning Woodrow Wilson, the 'father' of the principle of self-determination:

They keep portions of their conscience in separate watertight compartments. They wish one compartment in which to stow all the phrases about 'absolute self-determination for all peoples.' In a totally different compartment they stow the actual facts of the treatment of those peoples, which, more or less justly, are in the event found unfit for self-determination. They love the fine language; they know it cannot be translated into fact; and so they applaud hypocritical promises, and cynical repudiation of promises. To propose in any real sense to give African savages more than a consultative and subordinate share in their own affairs is, at present, simply silly. Yet, there are any number of people, including Wilson very often, and Lloyd George not infrequently, who like to use language which means this or nothing. In the same way at this moment the United States has deprived and is depriving Haiti and Santo Domingo of self-determination. It has destroyed democracy in these two little festering black republics. It is ruling them by marines, and you don't find, and no-one else can find, a published word from ... President [Wilson] even relating to what has been done.

Elting Morison (ed), *The Letters of Theodore Roosevelt* (1951) 1400–1, cited in Norman Finkelstein, *The Rise & Fall of Palestine* (1996) 144–5. Compare also Australia's response to Iraq's invasion of Kuwait with its historical defence of Indonesia's invasion of East Timor: Catholic Institute for International Relations and the International Platform of Jurists for East Timor, *International Law and the Question of East Timor* (1995); Geoffrey Gunn with Jefferson Lee, *A Critical View of Western Journalism and Scholarship on East Timor* (1994); John Taylor, *Indonesia's Forgotten War: The Hidden History of East Timor* (1991).

[7] See, eg, efforts by United States State Department legal advisors to defend the unilateral bombing of Iraq on legal grounds, in Michael Glennon (Chair) and Thomas Franck, Michael Matheson and Paul Szaz (Panelists), 'Legal Authority for the Possible Use of Force Against Iraq', *American Society of International Law: Proceedings of the 92nd Annual Meeting* (1998) 136; Jules Lobel and Michael Ratner, 'Bypassing the Security Council: Ambitious Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime' (1999) 93 *American Journal of International Law* 124; and attempts to justify the bombing of a civilian pharmaceutical factory in Sudan: Richard Becker, Sara Flounders and John Parker, 'Sudan: Diversionary Bombing' (1999) 66 *Covert Action Quarterly* 12; Editorial, 'What Terrorist Link?', *The Guardian Weekly* (*Washington Post* section)

(Manchester, UK), 16 May 1999, 15.

[8] I owe the form of this framework to Noam Chomsky: see Noam Chomsky, 'The Current Bombings: Behind the Rhetoric' [1999] *Z Net, Z Magazine* <http://www.zmag.org/crises

curevts/current_bombings.htm> (copy on file with author).

[9] See, eg, the US' refusal to comply with the judgment of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14; Israel's refusal to comply with Security Council Resolutions concerning the Occupied Territories (SC Res 237, 242, 248, 338, 446, 465, 468, 469, 471, 484, 497, 592, 605, 607, 608, 636, 672, 681, 694 and 726) and Lebanon (SC Res 425 and 509); Turkey's recent border incursion against Kurdish guerillas in the 'no-fly zone' imposed to protect Iraq's Kurdish population, and its campaign of terror against Kurds during the 1990s (see Wendy Kristiansen, 'Between the Generals and the Islamists', *Le Monde Diplomatique* (Paris, France), 12 February 1999 (copy on file with author)); Pierre Lefevre, 'Better to be Albanian than Kurdish', *Le Soir* (Brussels, Belgium), 25 February 1999 (copy on file with author); Selcan Hacaoglu, 'Turkish Troops Chase Kurdish Rebels', *Washington Post* (Washington DC, USA), 19 February 1999 (copy on file with author); 'Turkish Troops Attack Kurdish Bases', *ABC News* (Australia), 20 February 1999 <http://www.abc.net.au/news/newslink/weekly/newsnat-20feb1999-29.htm> (as at 21 February 1999) (copy on file with author); Human Rights Watch, *The Kurds of Turkey: Killings, Disappearances and Torture* (1993); Human Rights Watch, *Weapons Transfers and Violations of the Laws of War in Turkey* (1995); Human Rights Watch, *Forced Displacement of Ethnic Kurds from Southeast Turkey* (1994); Human Rights Watch, *Kurds Massacred: Turkish Forces Kill Demonstrators* (1992); China's invasion of Vietnam, approved and assisted by the US (see James Mann, *About Face: A History of America's Curious Relationship with China, from Nixon to Clinton* (1998) 99–100 for discussion of recently declassified documents evidencing the extent of US involvement in China's invasion); Indonesia's refusal to comply with Security Council Resolutions concerning East Timor for 23 years (SC Res 384 and 389).

[10] 'Letter from Jack Straw about the Extradition of Pinochet', Equipo Nizkor and Derechos Human Rights <http://www.derechos.org/nizkor/chile/juicio/straw.html> (copy on file with author).

[11] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272. See below Part IV(D) for further discussion.

[12] Michael Ratner, 'In Focus: The Pinochet Precedent' (1999) 4(6) *Foreign Policy in Focus* 1 <http://www.foreignpolicy-infocus.org/briefs/vol4/v4n06pin.html> (copy on file with author).

[13] See Gerald Haines, *CIA and Guatemala Assassination Proposals, 1952–1954*, CIA History Staff Analysis, June 1995 <http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB4/ciaguatemala1_

1.html>; Nicholas Cullather, *Operation PBSUCCESS: The United States and Guatemala, 1952–1954*, CIA History Staff Document, 1994 <http://www.seas.gwu.edu/nsarchive/NSAEBB/

NSAEBB4/cia-guatemala5_a.html>.

[14] Commission for Historical Clarification, *Guatemala: Memory of Silence* (24 February 1999). The Commission was part of the UN-sponsored peace process: see *Agreement on the Establishment of the Commission for the Historical Clarification of Human Rights Violations and Incidents of Violence that Have Caused Suffering to the Guatemalan Population*, UN GASC (48th session), UN Doc A/48/954, Annex II, 23 June 1994.

[15] See generally Commission on Truth for El Salvador, *From Madness to Hope: The 12-Year War in El Salvador* (1993) extracted in Neil Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (1995) vol 3, 177.

[16] In 1973, there were 15 military dictatorships in Latin America: Jorge Nef, 'Demilitarization and Democratic Transition in Latin America' in Sandor Halebsky and Richard Harris (eds), *Capital, Power and Inequality in Latin America* (1995) 81, 88.

[17] See, eg, *Nunca Más: Report of the Argentine Commission on the Disappeared* (1986) pt I.

[18] Horacio Verbitsky, *The Flight: Confessions of an Argentine Dirty Warrior* (1996) 23.

[19] Commission for Historical Clarification, above n 14, pt I, [14].

[20] This modus operandi continues today, but under the rationale of the 'War on Drugs': see Human Rights Watch, *Colombia's Killer Networks: The Military-Paramilitary Partnership and the United States* (1996); Center for International Policy, *Just the Facts: A Civilian's Guide to US Defense and Security Assistance to Latin America and the Caribbean* (1998); Colletta Youngers, *US Policy in Latin America: Problems, Opportunities, Recommendations* (1999) (copy on file with author); Ted Robberson, 'US Launches Covert Program to Aid Colombia', *Dallas Morning News* (Dallas, USA), 19 August 1998 (copy on file with author); Frank Smyth, 'Still Seeing Red: The CIA Fosters Death Squads in Colombia', *The Progressive* (USA), June 1998, (copy on file with author).

[21] Jean-Louis Weil, Joseph Comblin and Judge Senese, *The Repressive State: The Brazilian National Security Doctrine and Latin America* (1979); Nef, above n 16, 87. Over 60,000 security force agents and civilian personnel have been trained at the US Army's School of the Americas since 1946. Numerous graduates of the School have been linked with massacres and disappearances in many countries in Latin America: see Roy Bourgeois, 'School of the Assassins', *Z Magazine* (Boston, USA), September 1994, 14-16. On 20 September 1996, the US Department of Defense circulated information on several manuals that have been used to train Latin American Security Force Agents. The manuals describe torture, executions and beatings as useful tools in certain circumstances: see Amnesty International, *Guatemala: State of Impunity* (1996) ch I, fnn 38–42 and accompanying text.

[22] Lars Schoultz, *Human Rights and United States Policy Toward Latin America* (1981) 7, cited in Noam Chomsky, *Deterring Democracy* (1991) 51.

[23] Commission for Historical Clarification, above n 14, pt 1, [14].

[24] See Edwin Williamson, *The Penguin History of Latin America* (1992) 313–567.

[25] See Joyce and Gabriel Kolko, *The Limits of Power: The World and United States Foreign Policy, 1945-1954* (1972); Gabriel Kolko, *Confronting the Third World: United States Foreign Policy, 1945-1980* (1988). Perhaps the clearest example of this was the Arbenz government of Guatemala, a reformist social-democratic regime which had introduced democratic legal and constitutional reforms (while banning the Communist Party). Arbenz was branded 'Communist' by the Eisenhower administration when efforts to redistribute landholdings to the dispossessed peasantry threatened the estates of the United Fruit Company, a US agribusiness corporation which controlled 40 per cent of Guatemala's economy at the time: see Stephen Schlesinger and Stephen Kinzer, *Bitter Fruit: The Untold Story of the American Coup in Guatemala* (1982); Susanne Jonas, *The Battle for Guatemala: Rebels, Death Squads and US Power* (1991) ch 2.

[26] *National Security Council Memorandum*, No 5423 (18 August 1954), cited in Chomsky, *Deterring Democracy*, above n 22, 49.

[27] Thomas Hughes to US Secretary of State, *US Department of State Intelligence Note* (23 October 1967, declassified document) <http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB11/

docs/04-01.htm>, <http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB11/docs/04-02.htm> (copy on file with author).

[28] Ibid <http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB11/docs/04-03.htm>. Another State Department official working in Guatemala at the time concluded in a memorandum to his superior that:

We *have* condoned counter-terror; we may even in effect have encouraged and blessed it ... This is not only because we have concluded we cannot do anything about it, for we never really tried.

Rather we suspected that maybe it is a good tactic, and that as long as Communists are being killed it is alright. Murder, torture and mutilation are alright if our side is doing it and the victims are Communists.

Memorandum from Mr Viron Vaky to Mr Oliver, Department of State, Policy Planning Council (29 March 1968, declassified document) <http://www.seas.gwu.edu/nsarchive/NSAEBB/

NSAEBB11/docs/05-04.htm> (emphasis in original) (copy on file with author).

[29] Unidad Popular was comprised of the Socialist Party, the Communist Party, the Movement of Popular Unity Action, the Christian Left, the Radical Party, the Social Democratic Party and the Independent Popular Action Party.

[30] Allende won 36.3 per cent of the vote; Jorge Alessandri, for the right, won 34.9 per cent; Radomiro Tomic, the Christian Democratic candidate, won 27.8 per cent.

[31] *Report of the Chilean National Commission on Truth and Reconciliation*, above n 1, 48.

[32] Ronaldo Munck, *Latin America: The Transition to Democracy* (1989) 36.

[33] Edy Kaufman, *Crisis in Allende's Chile: New Perspectives* (1988) 207–27.

[34] Ibid; Lois Oppenheim, *Politics in Chile: Democracy, Authoritarianism and the Search for Development* (2nd ed, 1999) 35–86.

[35] A very detailed, two volume study of US intervention in Chile is Poul Jensen, *The Garotte: The United States and Chile, 1970-1973* (1988). See Jensen, ch 2, for a review of the role played by telephone multinational ITT Industries in advocating US intervention in Chile, after its assets had been nationalised. For an overview of the role of different actors in the US in bringing about Allende's overthrow, see Kaufman, above n 33, 3–37.

[36] William Broe, Chief, Western Hemisphere Division, CIA, *Memorandum for the Record: Genesis of Project FUBELT* (16 September 1970, declassified document) <http://seas.gwu.edu/nsachive/

NSAEBB/NSAEBB8/ch03-01.htm> (copy on file with author).

[37] Richard Helms, Director, CIA, *Meeting with President on Chile at 15:25, 15 September 1970* (15 September 1970, declassified document) <http://www.seas.gwu.edu/nsarchive/NSAEBB/

NSAEBB8/ch26-01.htm> (copy on file with author).

[38] Henry Kissinger, *National Security Decision Memorandum 93* (9 November 1970, declassified document) <http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB8/ch09-01.htm> (copy on file with author).

[39] Ibid. See also John Crimmins, Acting Chairman, Ad Hoc Interagency Working Group on Chile, *Memorandum for Mr Henry Kissinger: Chile* (4 December 1970, declassified document) <http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB8/ch20-01.htm> (copy on file with author).

[40] CIA, *Report on CIA Chilean Task Force Activities, 15 September to 3 November 1970* (18 November 1970, declassified document) <http://www.seas.gwu.edu/nsarchive/NSAEBB/

NSAEBB8/ch01-01.htm> (copy on file with author) ('*Chilean Task Force Activities*').

[41] *Memorandum of Conversation, Dr Kissinger, Mr Karamessines, Gen Haig, at the White House* (15 October 1970, declassified document) <http://www.seas.gwu.edu/nsarchive/NSAEBB/ NSAEBB8/ch06-01.htm> (copy on file with author). CIA agents did, however, collaborate in the assassination of General Rene Schneider, the neutralist Chief of Chile's Armed Forces, by right-wing extremists. See CIA, *CIA Guidance Cables* (16–18 October 1970, declassified documents) <http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB8/ch05-01.htm> and <http://www.seas.

gwu.edu/nsarchive/NSAEBB/NSAEBB8/ch27-01.htm> (copy on file with author).

[42] CIA, *Chilean Task Force Activities*, above n 40.

[43] For evidence of CIA involvement in support of the 1973 transport strike, and the role played by agents in disseminating anti-Allende propaganda and cultivating 'assets' within the armed forces, see generally Jensen, above n 35, vol 2. Memoirs by American officials are somewhat misleading in their recollection of events. For example, in the last volume of his soon-to-be released memoirs, Kissinger states that when he met Pinochet in June 1976

[a] considerable amount of time in my dialogue with Pinochet was devoted to human rights, which were, in fact, the principal obstacle to close United States relations with Chile. I outlined the main points of my speech to the OAS [Organization of American States] which I would deliver the next day;

cited in Peter Kornbluh, 'Kissinger and Pinochet', *The Nation* (New York, USA), 29 March 1999, 5. The recently declassified memorandum of this conversation, however, presents a different picture. In it Kissinger is recorded as saying: 'In the United States, as you know, we are sympathetic with what you are trying to do here. ... We wish your government well.' Concerning the OAS speech, he says: 'I will treat human rights in general terms and human rights in a world context ... I will say that the human rights issue has impaired relations between the US and Chile. This is partly the result of congressional actions', cited in Lucy Kosimar, 'Chile Torture Covered Up by Kissinger', *The Guardian Weekly* (Manchester, UK), 7 March 1999, 4.

[44] Patrick Ryan, United States Military Group, Chile, *Sitrep #2: Valparaiso, Chile* (1 October 1973, declassified document) <http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB8/ch21-01.htm>, <http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB8/ch21-03.htm>.

[45] See *Report of the Chilean National Commission on Truth and Reconciliation*, above n 1, 117–26.

[46] See ibid ch 2 for a detailed consideration of the legal changes effected by the junta.

[47] *Memorandum to Secretary of State from US Embassy Staff in Chile* (16 November 1973, declassified document) <http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB8/ch10-01.

htm> (copy on file with author).

[48] *Report of the Chilean National Commission on Truth and Reconciliation*, above n 1, 133-6.

[49] Ibid 137.

[50] See the hundreds of cases detailed in ibid 146–461. See also Pinochet's characterisation of the conflict as a crusade against depravity, degeneracy and unholy evil: Alexandra Barahona de Brito, *Human Rights and Democratisation in Latin America* (1997) 54.

[51] *Report of the Chilean National Commission on Truth and Reconciliation*, above n 1, 64.

[52] Ibid 62.

[53] US Department of Defense, *DINA Expands Operations and Facilities* (15 April 1975, declassified document) <http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB8/ch25-01.

htm> (copy on file with author).

[54] *Report of the Chilean National Commission on Truth and Reconciliation*, above n 1, 469.

[55] FBI Attache, Buenos Aires, FBI, *Operation Condor Cable* (28 September 1976, declassified document) <http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB8/ch23-01.htm> (copy on file with author).

[56] Ibid.

[57] Weekly News Update on the Americas, <wnu@igc.apc.org> 'US Admits FBI Aided Chilean Murder Units', mailing list <hurinet-americas@mail.comlink.apc.org> (14 February 1999) (copy on file with author).

[58] *Report of the Chilean National Commission on Truth and Reconciliation*, above n 1, 478.

[59] Ibid 635.

[60] Ibid 643–5; Amnesty International, *Chile: Evidence of Torture* (1982).

[61] *Report of the Chilean National Commission on Truth and Reconciliation*, above n 1, 712.

[62] Inter-American Commission for Human Rights, *Report on the Situation of Human Rights in Chile*, OAS/Ser.L/V/II.66 (1985) 82.

[63] *Report of the Chilean National Commission on Truth and Reconciliation*, above n 1, app II.

[64] James Petras, Fernando Leiva and Henry Veltmeyer, *Democracy and Poverty in Chile: The Limits to Electoral Politics* (1994) 21. The National Reparation and Conciliation Corporation, appointed by the Chilean government on 8 February 1992 to continue the work of the Rettig Commission, found, after further investigation, that the number of victims was 3,197.

[65] Fernando Villagran, 'Me or Chaos', *NACLA Report on the Americas* (March/April 1988) 14.

[66] See generally Americas Watch, above n 3, for detailed reporting.

[67] Barahona de Brito, above n 50, 104ff; Americas Watch, *Chile in Transition* (1989) 48ff.

[68] See Petras, Leiva and Veltmeyer, above n 64, 1-6; Steven Volk, 'Chile: The Right to Coup', *NACLA Report on the Americas*, (September/October 1988) 4; Barahona de Brito, above n 50, 106; Claudio Fuentes, 'Military and Politics: Weaknesses in Chilean Democracy' [1999] *Information Services Latin America, Institute for Global Communications* <http://www.igc.org/

isla/chile5.html> (copy on file with author). An important feature of 'pact transitions' is a tacit or express consensus among elites that neo-liberal economic policies will be 'locked in', and that populist political forces will be excluded from wielding significant power or attempting to reverse the regressive socioeconomic policies implemented under authoritarian rule: see Nef, above n 16, 92; see Petras, Leiva and Veltmeyer, above n 64, chh 2 and 3.

[69] The Commission was created by President Patricio Aylwin in April 1990.

[70] See Barahona de Brito, above n 50, 153.

[71] Ibid 103.

[72] Augusto Pinochet, Press Conference, 13 October 1989, cited in Americas Watch, *Chile in Transition*, above n 67, 73.

[73] Tomas Moulian, 'A Time of Forgetting: The Myths of Chilean Transition', *NACLA Report on the Americas* (September/October 1998) 16.

[74] The Court rejected arguments that the amnesty was constitutionally invalid because of its inconsistency with international law obligating the prosecution of certain conduct. Constitutional amendments enacted in 1988 require the government to act in conformity with international human rights instruments ratified by Chile (see Americas Watch, *Chile in Transition*, above n 67, 57), but the Court held that the international conventions relied upon in the petition did not apply to annul the amnesty law: Human Rights Watch, *Human Rights and The Politics of Agreements: Chile During President Aylwin's First Year* (1991) 44–5 ('*Politics of Agreements*'). The relevant international conventions were the *Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October); and the *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide*

Convention').

Nevertheless, the Inter-American Commission on Human Rights has concluded that the Chilean government's failure to repeal the amnesty law and its failure to prosecute cases of disappearance, extrajudicial execution and torture violated Chile's obligations under the *American Convention on Human Rights*: Inter-American Commission on Human Rights, *Report No 36/96 (Chile)*, 95th Sess, OEA/Ser.L/V/II.95 (15 October 1996) 157–83.

[75] Valenzuela, above n 4, 101.

[76] See Human Rights Watch, *Pinochet in Chile: Guaranteed Impunity* (1998) <http://www.igc.org/

hrw/campaigns/chile98/chile-justice-anly1.htm>. See also Barahona de Brito, above n 50, 172–87.

[77] Human Rights Watch, *Politics of Agreements*, above n 74, 40–2.

[78] Inter-American Commission for Human Rights, above n 62, [180]. Nigel Rodley, *Report on Visit by the Special Rapporteur to Chile*, Special Rapporteur on the Question of Torture of the United Nations Commission on Human Rights, UN Doc E/CN.4/1996/35/Add.2, [62], [68], [74] and [76]. See the notorious cases of 'The Case of the 70' and 'The Case of the 13', summarised in Human Rights Watch, *Politics of Agreements*, above n 74, 45–8 and see also Americas Watch, above n 67, 78–89 for obstacles to prosecution and conviction.

[79] *Chilean Constitution* art 58.

[80] *Penal Procedure Code* (Chile) arts 611-18.

[81] See *Report of the Chilean National Commission on Truth and Reconciliation*, above n 1, 117–26.

[82] Human Rights Watch, *Pinochet in Chile*, above n 76, <http://www.igc.org/hrw/campaigns/

chile98/chile-justice.anly6.htm>.

[83] See Margaret Popkin and Nehal Bhuta, 'Latin American Amnesties in Comparative Perspective: Can the Past Be Buried?' (1999) 13 *Ethics and International Affairs* 99; Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 *Human Rights Quarterly* 843.

[84] Popkin and Bhuta, above n 83, 103–20.

[85] Peter Kornbluh, 'Prisoner Pinochet: The Dictator and the Quest for Justice', *The Nation* (New York, USA), 21 December 1998, 12. Other criminal proceedings have been filed against Pinochet in Switzerland, France, Belgium, Italy, Luxembourg, Norway, Sweden and the USA. France and Switzerland issued extradition requests after Pinochet's detention in London: Amnesty International, *The Pinochet Case: Universal Jurisdiction and the Absence of Immunity for Crimes Against Humanity*, annex to the written submission to the House of Lords, *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)*, on behalf of Amnesty International, The Medical Foundation for the Care of Victims of Torture, The Redress Trust, Mary Ann and Juana Francisca Beausire, Dr Sheila Cassidy, Association of Relatives of Disappeared Persons (intervenors), (14 January 1999) (copy on file with author) 1–2.

[86] Nizkor International Human Rights Team, Derechos Human Rights and Serpaj Europe, *Information and Urgent Solidarity* (2 April 1999); Kornbluh, above n 85, 12.

[87] This account relies heavily on Margarita Lacabe, 'The Criminal Procedures Against Chilean and Argentinean Repressors in Spain: A Short Summary' (11 November 1998) <http://www.

derechos.net/marga/papers/spain.html> (copy on file with author). Ms Lacabe, of Derechos, a Spanish human rights organisation, has performed an invaluable service by translating critical portions of materials relating to the Spanish proceedings into English.

[88] Ibid.

[89] See definition of genocide: *Genocide Convention*, above n 74, art II.

[90] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, 23 ILM 1027 (1984) with changes at 24 ILM 535 (1985) (entered into force 26 June 1987) ('*Torture Convention*').

[91] Audencia Nacional, Central Investigatory Court Number Six, Madrid, Summary Proceeding 1/98-J, 20 September 1998 <http://www.derechos.org/nizkor/chile/juicio/jurie.html> (copy on file with author).

[92] Valenzuela, above n 4, 100.

[93] At an April meeting with Pinochet (under house arrest at a modest four bedroom mansion in Surrey) Baroness Thatcher told him: 'I know how much we owe to you for your help during the Falklands campaign ... We are also very much aware that it was you who brought democracy to Chile'. Amelia Gentleman, 'Thatcher Takes Tea with Old Ally', *The Guardian Weekly* (Manchester, UK), 4 April 1999, 8.

[94] Valenzuela, above n 4, 100.

[95] Ibid.

[96] *Extradition Act 1989* (UK) s 8(1)(b).

[97] Copy on file with author.

[98] (Unreported, UK Court of Appeal, Lord Bingham CJ, Collins and Richards JJ, 28 October 1998).

[99] *Extradition Act 1989* (UK) s 2(1)(a) and (b).

[100] *Extradition Act 1989* (UK) s 2(2).

[101] *Extradition Act 1989* (UK) s 2(3).

[102] It is a well-accepted principle of international law that a state has jurisdiction to prescribe, adjudicate and punish the extraterritorial conduct of its nationals: see Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (2nd ed, 1995) 326.

[103] See below Part IV(D)(1).

[104] *R v Evans and Bartle*; *Ex parte Augusto Pinochet Ugarte* (Unreported, UK Court of Appeal, Lord Bingham CJ, Collins and Richards JJ, 28 October 1998) [33] (Lord Bingham CJ).

[105] Ibid [40]-[42] (Lord Bingham CJ).

[106] Ibid [42]. The third House of Lords decision would take a radically different view. See below Part IV(C).

[107] *State Immunity Act 1978* (UK) s 14(1).

[108] *State Immunity Act 1978* (UK) s 20(1).

[109] Opened for signature 14 April 1961, 500 UNTS 95 (entered into force 24 April 1964).

[110] Ibid art 29. Article 31.1 provides that 'a diplomatic agent shall enjoy immunity from the criminal jurisdiction of receiving state'.

[111] Ibid art 39.1.

[112] *R v Evans and Bartle*; *Ex parte Augusto Pinochet Ugarte* (Unreported, UK Court of Appeal, Lord Bingham CJ, Collins and Richards JJ, 28 October 1998) [63] (Lord Bingham CJ).

[113] Ibid (Lord Bingham CJ).

[114] Ibid [79]–[80] (Collins J).

[115] Ibid [131] (Lord Bingham CJ). The order was made under the *Administration of Justice Act 1960* (UK) 8 & 9 Eliz 2, c 65, s 5(1).

[116] [1998] 4 All ER 897.

[117] Ibid 906–8 (Lord Slynn), 926-9, 931-3 (Lord Lloyd).

[118] See Sir Arthur Watts, 'The Legal Position in International Law of Heads of State, Heads of Governments and Foreign Ministers' (1994) 247 *Recueil des Cours* 9, 56-7.

[119] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [1998] 4 All ER 897, 908 (Lord Slynn), 927–9 (Lord Lloyd).

[120] Ibid 913–14 (Lord Slynn), 927–8 (Lord Lloyd).

[121] Ibid 914 (Lord Slynn).

[122] Ibid 929-30 (Lord Lloyd).

[123] Ibid 915-16 (Lord Slynn).

[124] The provisions of the *Torture Convention*, above n 90, will be discussed in greater detail below Part IV(D)(1).

[125] *Torture Convention*, above n 90, arts 5, 7 and 8.

[126] Opened for signature 18 December 1979, 18 ILM 1456 (entered into force 2 June 1983).

[127] *Genocide Convention*, above n 74.

[128] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [1998] 4 All ER 897, 928 (Lord Lloyd).

[129] *Genocide Convention*, above n 74, art 6; *Charter of the International Military Tribunal* annexed to *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 UNTS 279, 284; *Statute of the International Tribunal for the Former Yugoslavia*, SC Res 827, 48 UN SCOR (3217th mtg), UN Doc S/Res/827 (1993), 32 ILM 1203, art 7; *Statute of the International Tribunal for Rwanda*, SC Res 955, 49 UN SCOR (3452nd mtg), UN Doc S/Res/955 (1994), 33 ILM 1598, art 6.2; *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 37 ILM 999 (not yet in force) ('*Rome Statute*').

[130] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [1998] 4 All ER 897, 929-30 (Lord Lloyd).

[131] Ibid 918-19 (Lord Slynn), 933-5 (Lord Lloyd).

[132] Ibid 918-19 (Lord Slynn). See also the authorities cited therein.

[133] Ibid 933-5.

[134] Ibid 934-5.

[135] Ibid.

[136] Ibid 936–7 (Lord Nicholls).

[137] Ibid 939–40 (Lord Nicholls), 944–6 (Lord Steyn).

[138] Ibid 939–40 (Lord Nicholls), citing *Charter of the International Military Tribunal*, above n 129, and *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, GA Res 95(I), UN Doc A/64/Add.1 (1946).

[139] Ibid 941 (Lord Nicholls).

[140] Ibid 938 (Lord Nicholls), 946–7 (Lord Steyn).

[141] Ibid 947.

[142] American Law Institute, *Restatement (3rd) of the Law: The Foreign Relations Law of the United States* (1987) vol 1, 370, adopted by Lord Steyn in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [1998] 4 All ER 897, 947.

[143] [1999] 2 WLR 272 (Lord Browne-Wilkinson, Lord Goff, Lord Nolan, Lord Hope and Lord Hutton).

[144] Ibid 281 (Lord Browne-Wilkinson), 287 (Lord Goff), 290–1 (Lord Hope), 294 (Lord Hutton).

[145] Ibid 284 (Lord Browne-Wilkinson).

[146] [1999] 2 WLR 827.

[147] Above nn 99-101 and accompanying text.

[148] *R v Evans and Bartle*; *Ex parte Augusto Pinochet Ugarte* (Unreported, UK Court of Appeal, Lord Bingham CJ, Collins and Richards JJ, 28 October 1998) [44].

[149] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [1998] 4 All ER 897, 921.

[150] All majority judges concurred with Lord Browne-Wilkinson on this point, not expressing additional reasons in their separate judgments.

[151] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, 839 (Lord Browne-Wilkinson).

[152] Ibid 869ff (Lord Hope). Lord Millett and Lord Phillips expressed a preference for including other crimes as extradition offences, but deferred to the judgment of Lord Hope: ibid 914 (Lord Millett), 924–5 (Lord Phillips).

[153] Ibid 875.

[154] The definition of torture in art 1 of the *Torture Convention*, above n 90, is adopted:

For the purposes of this Convention, 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.

[155] See *Extradition Act* 1989 (UK) s 2(1)(a) and (b), and text accompanying above n 99.

[156] See *Extradition Act* 1989 (UK) s 2(2).

[157] Opened for signature 18 December 1979, 18 ILM 1456 (entered into force 2 June 1983).

[158] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, 870–1.

[159] Ibid 872–3 (Lord Hope). See *Extradition Act 1989* (UK) s 2(1)(a) and (b), and text accompanying above n 99.

[160] Opened for signature 27 January 1977, 15 ILM 1272 (entered into force 4 August 1978).

[161] See *Suppression of Terrorism Act 1978* (UK) sch 1.

[162] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, 874 (Lord Hope).

[163] See above n 136 and accompanying text.

[164] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, 844 (Lord Browne-Wilkinson), 880 (Lord Hope).

[165] Ibid 845 (Lord Browne-Wilkinson), 880 (Lord Hope).

[166] Ibid 846–7 (Lord Browne-Wilkinson), 880–1 (Lord Hope).

[167] Ibid 881.

[168] Ibid 886.

[169] Cf *Genocide Convention*, above n 74, art 6; *Charter of the International Military Tribunal*, above n 129; *Statute of the International Tribunal for the Former Yugoslavia*, above n 129; *Statute of the International Tribunal for Rwanda*, above n 129; *Rome Statute*, above n 129.

[170] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, 887 (Lord Hope).

[171] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14; *Prosecutor v Anton Furundzija*, Case No IT-95-17/1-T; 38 ILM 317 (1999); *Siderman de Blake v Republic of Argentina*, 965 F 2d 699, 714–8 (9th Cir, 1992).

[172] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, 887 (Lord Hope).

[173] Ibid 886 (emphasis added).

[174] Ibid 841.

[175] Ibid 847.

[176] *Torture Convention*, above n 90, art 1 (emphasis added). For a review of the negotiating history of this and all other terms, see J Burgers and Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988).

[177] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, 847 (Lord Browne-Wilkinson). Article 5 of the *Torture Convention*, above n 90, states:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

1. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
2. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

[178] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, 847.

[179] Ibid.

[180] Ibid 844.

[181] Ibid 902.

[182] Ibid 903.

[183] Ibid 904.

[184] Ibid 899 (Lord Hutton).

[185] *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, above n 138; International Law Commission, 'Draft Code of Offences Against the Peace and Security of Mankind' [1954] *Yearbook of the International Law Commission*

151; *Statute of the International Tribunal for the Former Yugoslavia*, above n 129, art 7.2; *Statute of the International Tribunal for Rwanda*, above n 129, art 6.2; *Rome Statute*, above n 129, art 27; *Draft Code of Crimes Against the Peace and Security of Mankind* in *Report of the International Law Commission on the Work of Its Forty-Eighth Session* (1996) UN Doc A/51/10.

[186] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, 897.

[187] Ibid 904-15 (Lord Millett), 917-20 (Lord Phillips).

[188] Ibid 907, 914.

[189] Ibid 911.

[190] Ibid.

[191] Ibid 912 (Lord Millett).

[192] Ibid 914 (Lord Millett).

[193] This is known as the 'incorporation' approach: see Lord Denning in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529, 548–72 and Kristen Walker, *International Law in the Jurisprudence of the High Court* (LLM thesis, The University of Melbourne, 1995).

[194] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, 919.

[195] See above nn 107–111 and accompanying text.

[196] This was argued in the appellants' submissions but not addressed by any other judge: *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)*, submission on behalf of the Crown Prosecution Service (appellant), [79]–[90] (copy on file with author).

[197] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, 924.

[198] Ibid.

[199] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)*, submission on behalf of Augusto Pinochet Ugarte (respondent), app [113] (copy on file with author).

[200] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)*, submission on behalf of the Republic of Chile (intervenor), [34] (copy on file with author).

[201] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, 856–7.

[202] See, eg, International Law Commission, 'Jurisdictional Immunities of States and Their Property' [1991] 2(2) *Yearbook of the International Law Commission* art 7(1); *Argentine Republic v Amerada Hess Shipping Corporation*, 488 US 428 (1989).

[203] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, 859–60.

[204] Ibid 861.

[205] Ibid.

[206] 'Spanish Judge Adds 11 Pinochet Torture Cases', *Reuters* (Newswire), 7 April 1999, 4 (copy on file with author).

[207] Letter from Reed Brody, Advocacy Director, Human Rights Watch to Jack Straw, Secretary of State for the Home Department, 7 April 1999 <http://www.hrw.org/hrw/press/1999/apr/pinolet.

htm> (copy on file with author).

[208] See ‘Letter from Jack Straw’, above n 10.

[209] See Alan Travis, ‘The Slow Road to Extradition’, *The Guardian Weekly* (Manchester, UK), 29 November 1998, 15.

[210] See, eg, ‘Human Rights: After Pinochet, Idi Amin and Duvalier’s Turn’, *Inter Press Service* (Newsfeed), 7 April 1999 (copy on file with author); ‘Torture Law Gets Boost from Pinochet Ruling, Experts Say’, *Associated Press* (Newsfeed), 5 April 1999 (copy on file with author); Lawyers’ Committee for Human Rights, *Lawyers’ Committee Welcomes Jack Straw Decision*, Press Release (15 April 1999).

[211] M Cherif Bassiouni, ‘The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights’ (1982) 9 *Yale Journal of World Public Order* 193; Myres McDougal, Harold Lasswell and Lung-Chu Chen, *Human Rights of an International Law of Human Dignity* (1980) 3–7.

[212] Well-accepted definitions of these crimes can be found in both versions of the International Law Commission’s *Draft Code of Crimes Against the Peace and Security of Mankind*, above n 185.

[213] Jordan Paust et al, *International Criminal Law: Cases and Materials* (1996) 12–13; M Cherif Bassiouni, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’ (1996) 59(4) *Law and Contemporary Problems* 63, 70.

[214] Jordan Paust, ‘Universality and Responsibility to Enforce International Criminal Law’ (1989) 11 *Houston Journal of International Law* 337, especially 337–40.

[215] See *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, opened for signature 16 December 1968, 754 UNTS 73 (entered into force 11 November 1970).

[216] See *Genocide Convention*, above n 74, art 4; *Draft Code of Crimes Against the Peace and Security of Mankind* (1996), above n 185, art 2; Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, GA Res 95(I), 1 UN GAOR (55th plen mtg), UN Doc A/64/Add.1, 188 (1946); Lyal Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (1992).

[217] R Falk, *Revitalizing International Law* (1989) 199.

[218] Benedict Kingsbury and Adam Roberts, ‘Introduction: Grotian Thought in International Relations’ in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (1990) 1, 12.

[219] H Lauterpacht, ‘The Grotian Tradition in International Law’ (1946) 23 *British Yearbook of International Law* 1, 21–2.

[220] Hedley Bull, ‘The Importance of Grotius in the Study of International Relations’ in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (1990), 64, 78; Lauterpacht, above n 219, 21–2.

[221] Lauterpacht, above n 219, 27.

[222] Falk, above n 217, 200ff. See also McDougal, Lasswell and Chen, above n 211, 368ff for an example of the ‘New Haven School’ attempt to derive a foundation for human rights from common values and principles of human dignity.

[223] See, eg, James Crawford (ed), *The Rights of Peoples* (1988).

[224] Indeed, the divergence between the ‘narrow’ and ‘broad’ views on state immunity in the second Appellate Committee decision reflects this tension, with Lord Browne-Wilkinson and Lord Hope unwilling to derogate from the long-established principle of head of state immunity without express terms or necessary implication.

[225] See, eg, essays collected in Peter Willetts (eds), *The Conscience of the World: The Influence of Non-Governmental Organisations in the UN System* (1996); Thomas Weiss and Leon Gordenker,

NGOs, the UN, and Global Governance (1996).

[226] Kenneth Roth, 'For Justice without Illusions', *Newsweek* (Washington, USA), 28 March 1999 (copy on file with author); see also Diane Orentlicher, 'Putting Limits on Lawlessness: From Nuremberg to Pinochet', *The Washington Post* (Washington, USA), 25 October 1998, C1 (copy on file with author); Editorial, *Taiwan Daily* (Taipei, Taiwan), 28 November 1998 (copy on file with author). See also Interview with Wilder Tyler, General Counsel, Human Rights Watch (New York, 11 February 1999).

[227] *Statute of the International Tribunal for the Former Yugoslavia*, above n 129; *Statute of the International Tribunal for Rwanda*, above n 129. The reach of the International Criminal Tribunals for the Former Yugoslavia and Rwanda is, as the titles suggest, limited to violations occurring within their territorial jurisdiction, and the tribunals' respective fortunes appear to wax and wane in accordance with changing diplomatic agendas.

[228] 'Human Rights: After Pinochet, Idi Amin and Duvalier's Turn', above n 210, referring to Human Rights Watch's 'Justice Counsel Project'.

[229] For discussion of the distinction between 'hard' and 'soft' sources of international law, see Donald Grieg, 'Sources of International Law' in Sam Blay, Ryszard Piotrowicz and B Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (1997) 58, 85–9**.**

[230] Ratner, above n 12, 2; Kornbluh, above n 85, 22-4. On 30 June 1999, at the direction of the President, the National Security Council and the Department of State declassified a further 5,000 documents from the period 1973 to 1978. The estimated 20,000 pages of classified documentation is the first tranche in a series of releases planned by the US administration. It is unclear what proportion of the CIA's files on Chile have been released. The files can be viewed at <http://foia.state.gov>.

[231] US Department of State spokesperson, cited in Ratner, above n 12, 3.

[232] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [1998] 4 All ER 897, 934-5.

[233] See David Crocker, 'Reckoning with Past Wrongs: A Normative Framework' (1999) 13 *Ethics and International Affairs* 43; David Little, 'A Different Kind of Justice: Dealing with Human Rights Violations in Transitional Societies' (1999) 13 *Ethics and International Affairs* 65; Susan Dwyer, 'Reconciliation for Realists' (1999) 13 *Ethics and International Affairs* 81.

[234] See Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537; Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law* (1995); Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 *California Law Review* 451; Michael Scharf, 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?' (1996) 31 *Texas International Law Journal* 15.

[235] See, eg, Douglass Cassel, 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities' (1996) 59(4) *Law and Contemporary Problems* 197.

[236] For example, United Nations Observer Mission in El Salvador ('UNOSAL'), United Nations Human Rights Observer Mission in Guatemala ('MINUGUA'), and United Nations Transitional Authority in Cambodia ('UNTAC').

[237] See Margaret Popkin, 'Guatemala's National Reconciliation Law: Combating Impunity or Continuing It?' (1997) 24 *Revista Instituto Interamericano de Derechos Humanos* 173.

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