MILITARY AND JUDICIAL INTERVENTION: THE WAY FORWARD IN HUMAN RIGHTS ENFORCEMENT?

March 24, 1999 marked the dawn of two important developments in the enforcement of international human rights law. First, the North Atlantic Treaty Organization (NATO) launched aerial attacks against the Federal Republic of Yugoslavia (FRY) purportedly to alleviate the humanitarian crisis in the republic of Kosovo. Second, the House of Lords issued its decision that, in principle, denied the former Chilean Head of State, General Augusto Pinochet, immunity from extradition for crimes committed under his authoritarian regime.[1] Ostensibly, both events symbolize a significant shift away from the traditional international law impetus on the sovereignty of the state in favor of the greater protection of human rights norms. Prior to the interventions in Kosovo and Chile, the enforcement of substantive human rights was criticized as inadequate and even non-existent. This paper analyses the efficacy of the military intervention in the former Yugoslavia and of the judicial intervention in Chile on the enforcement of human rights and assesses the significance of each event for future enforcements. This inquiry is particularly relevant because state sovereignty, although weakened, continues to play a role in international legal and political relations.

I. MILITARY INTERVENTION IN KOSOVO

The crisis in Kosovo threatened humanitarian disaster: daily news reports documented the FRY's employment of artillery, tanks, and anti-aircraft guns to commit human rights atrocities against its own people on the basis of ethnicity and race. The media recounted the FRY's attempts to ethnically cleanse whole peoples and continuously relayed visual images of the forceful removal of Kosovar Albanians from their homes. Reports of violent attacks by the Kosovo Liberation Army (KLA) paralleled those of the FRY. In the wake of Bosnia, few disagreed that the crisis necessitated some form of response from the international community.

A. Attempts to Resolve the Crisis Through Peaceful Means

The Contact Group[2] and the European Union consistently called upon the FRY and KLA to end the violence and reach a political solution. As tension between the FRY security forces and the KLA mounted, the United Nations Security Council (Council) adopted Resolution 1160 in March 1998, which both mirrored the attempts of the Contact Group to secure a peaceful

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1. R. v. St. Metro Stipendiary Magistrate and Others, *ex parte* Pinochet Ugarte (No. 3) 2 WLR 827 (H.L. 1999).

2. Composed of Great Britain, France, Germany, Italy, Russia and the United States.

resolution and imposed an arms embargo on the FRY.[3] Notably, the Council did not declare the situation a threat to peace and security in the region, whereby its Chapter VII[4] powers would be formally invoked, until its later adoption of Resolution 1199.[5] The FRY's failure to comply with the demands of Resolutions 1160 and 1199 resulted in the Contact Group supporting a United States led envoy, led by Richard Holbrooke, United States Ambassador to the United Nations, that secured the agreement of Yugoslavian President Slobodan Milosevic to comply with the resolutions. To enable monitoring of such compliance, Milosevic agreed to a NATO-led air verification mission and an unarmed ground mission of the Organization for Security and Cooperation in Europe (OSCE). The Council adopted resolution 1203[6] to formally endorse the Holbrooke agreement and to demand its full and prompt implementation. However, the agreements were only temporarily effective. Milosevic's co-operation soon lapsed and violence erupted once again. The Contact Group then agreed on the "basic elements for a political settlement"[7] and talks between the FRY and the Kosovar Albanians opened on February 6, 1999 in Rambouillet, France. When Milosevic refused diplomacy, NATO determined that sufficient grounds existed for the use of force.

B. The Potential for the Adoption of Sanctions with Teeth

The failure of efforts to secure a peaceful resolution and consolidate peace in the Balkan region compelled the international community to seek stronger means of redress, specifically in the form of military intervention. Arguably, the call for the adoption of military measures followed logically from the failure of the more pacific resolutions to impact the crisis. Nevertheless, recourse to military action to end human rights abuses is an uncertain area due to concerns of legality and legitimacy.

The international community traditionally recognizes the United Nations Charter (Charter) as the instrument most closely resembling a written international constitution. Article 2(4) prohibits "the threat or use of force against the territorial integrity or political independence of any state." One of the two exceptions to this prohibition lies within the collective security

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3. *See* S.C. Res. 1160, U.N. SCOR, 3868th mtg, U.N. Doc. S/RES/1160 (Mar. 31, 1998), *available at* http://www.un.org/Docs/scres/1998/sres1160.htm.

4. See infra Part I.B., *The Potential for the Adoption of Sanctions with Teeth.*

5. S.C. Res. 1199, U.N. SCOR, 3930th mtg, U.N. Doc. S/RES/ 1199 (Sept. 23, 1998), *available at* http://www.un.org/Docs/scres/1998/sres1199.htm.

6. S.C. Res. 1203, U.N. SCOR, 937th mtg, U.N. Doc. S/RES/ 1203 (Oct. 24, 1998), *available at* http://www.un.org/Docs/scres/1998/sres1203.htm.

7. Foreign & Commonwealth Office, *Kosovo: Chronology March 1998-March 1999*, Focus International at 9 and Annex A (28 July 1999), *available at* http://www.fco.gov.uk (last visited Jan. 28, 2002).

provisions of Chapter VII.[8] Chapter VII permits the Council to use force itself or to authorize its members to use force in the fulfillment of its responsibility to maintain and protect international peace and security under Article 24(1). It essentially assigns to the Council the role of international police officer.

In theory, the Council's determination that the situation in Kosovo constituted a threat to international peace and security[9] paved the way for the adoption of a resolution on the use of force. In reality, such a resolution was unforeseeable given the Council's perceived inability to agree upon sanctions with bite and thus effectively fulfil its role as international police officer. Past experience predicted that the Council would not agree upon the use of force in Kosovo. Since 1990, the Council had authorized the use of force in only three instances[10] - a small number compared to the number of situations in which the Council has failed to act or plainly ignored. Further, none of the crises that the Council declared to constitute a Chapter VII situation, were fully resolved.[11] Thus, if negotiation and possibly the application of less coercive Chapter VII sanctions failed, the situation was left to fester.

True to form, in responding to the crisis in Kosovo, the Council followed its trend of adopting ineffectual sanctions. The Council responded to the situation with a weak and half-hearted array of sanctions, predictably meeting cynical global expectations by failing to agree upon the use of force after Russia indicated that it would veto such a proposal. The inability of the Council to maintain peace and security in the region reflects the inherent conflict within the Council between the traditional conception of state sovereignty and the nature of contemporary warfare, which predominantly takes place within state borders. The change in the nature of international conflicts coupled with the increasing focus on the value of human rights presents an enormous difficulty for the Council in the fulfillment of its mission. Critics cannot condemn the Council for its failure to authorize a military intervention without acknowledging the historical and political obstacles facing the Council. These obstacles generally highlight the intrinsic difficulty of enforcing human rights norms through military intervention when the violations occur within a state's borders. Further, analysis of the obstacles reveals that the Council can never be the appropriate body to enforce human rights norms through the use of force.

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8. The other exception is the right of self-defense under Article 51.

9. *See supra* note 5.

10. The 28 nation military coalition against Iraq led by the United States and the authorization of regional delegations in Bosnia and East Timor.

11. Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN – A Dialectical View*, at http://www.ejil.org/journal/Vol6/No3/art2.html (last visited Jan. 28, 2002).

C. *The Difficulty of Reaching Agreement on the Use of Force: The History of the United Nations Charter*

Although Article 2(4) of the Charter exempts the Council from the general prohibition against the use of force, the exception only applies in so far as it meets the responsibility of Article 24(1) to maintain and protect international peace and security.[12] Thus, the Council's crucial challenge is to determine the types of situations that demand the intervention of the Council in order to maintain or protect international peace and security. The Charter was created towards the end of World War II. Under such circumstances, the drafters of the Charter regarded state sovereignty as a key factor in maintaining international peace and security as evinced by Article 2(4). Clearly, the drafters intended that force be used only in limited circumstances. However, the problem of defining the parameters of these limited circumstances continues to provoke aggressive debate as no instrument provides a guide to the extent of the exceptions. Thus, the proper method of interpretation of the exceptions is unclear, and the result is the promotion of unequal voting power among member nations.

1. *The Unclear Scope of the Exception to the Use of Force*

The unclear scope of the exception presents two problems. First, the lack of specificity regarding the parameters of collective defense compels certain members of the Council to adopt a narrow interpretation of the Council's authorization to use force. This narrow interpretation results in the failure to consider protection of human rights. The Charter itself embodies the principle of non-intervention in the affairs of sovereign states and makes scarce reference to substantive human rights.[13] This lack of focus on human rights reflects the time during which the Charter was adopted - towards the end of World War II when human rights did not feature very high on the drafters' agenda.[14]

Nevertheless, the Charter does not exist in a vacuum, but rather in a constantly evolving system of international law in which the promulgation of human rights norms has rapidly come to the forefront. The result has been controversially wide interpretation of the Council's authorization to use force and involves the enforcement of new and developing norms. Such norms include international human rights in so far as they fall under the umbrella of the Council's primary responsibility for the maintenance and protection of

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12. *See supra* Part I.B.

13. U.N. CHARTER art. 2(7), art. 55, and Preamble.

14. *See,* Koskenniemi *supra* note 11, at 4 n. 45 (discussing the failed attempt by the United States to incorporate the protection of basic human rights into the Council's mandate).

international peace and security.[15] Inevitably, the two disparate schools of interpretation produce huge conflicts and contribute greatly to the Council's inability to agree on the situations that require collective intervention.

2. *Political Paralysis and Arbitrary Decision Making*

A second issue constraining the effective enforcement of international human rights norms through the Council is the superpower balance inherent in the Permanent Five membership. The members of the Permanent Five consistently fail to act in the best interests of the global community. Instead, these nations prefer to act only in situations that are compatible with, or promise to promote their own nation's foreign policy and will issue a veto or an abstention in situations that are not favorable to their own foreign relations. The lack of a legal culture within the Council is characteristic of an entity that has been described as, "an elitist, political organ whose primary responsibility is the maintenance of a political conception of international ordering."[16] This unfortunate situation inevitably occasions the risk that the political will of one state may determine the outcome of a specific crisis.

The crisis in Kosovo was shocking but not unique. The Council's political and arbitrary decision-making is a subject of major concern when considering the expansion of the Council's authority to include humanitarian considerations under the umbrella of Chapter VII. This type of extension could risk the manipulation of such authority by the members of the Council in order to pursue political objectives under the façade of human rights protection. In particular, powerful Western states are often perceived to abuse humanitarian considerations in order to forcefully coerce sovereign states to adopt the democratic model or with the intent of overthrowing a dictator.[17] The risk, and some argue the reality, of such institutional abuse further polarizes the Council, thus preventing it from focusing on the immediate crisis. The collision of political wills may lead members to lose sight of their original mandate to maintain or restore international peace and security. This result calls into question whether the Council can ever be used as a body genuinely interested in the enforcement of international human rights norms. Many

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15. U.N. CHARTER art. 24. *See also,* THE ROLE OF LAW IN INTERNATIONAL POLITICS, ESSAYS IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 276 (M. Byers ed., Oxford Univ. Press 2000).

16. THE ROLE OF LAW IN INTERNATIONAL POLITICS, ESSAYS IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 272 (M. Byers ed., Oxford Univ. Press 2000).

17. *See* Koskenniemi, *supra* note 11, at 4 (claiming that the motivation of the Council, when it authorized the United States to use force against Iraq, was not of a humanitarian nature, but for the purpose of overthrowing the Iraqi political order).

expect Chapter VII's enforcement provisions to remain a dead letter.[18] Hence, the question of how international human rights are to be enforced in the twenty-first century, if the Council cannot guarantee their adequate protection arises. In the exemplary situation of Kosovo, the Council's inaction left the international community with two choices: to continue encouraging negotiations and apply economic sanctions or to allow another actor to assume the role the Council was unable to fill. The void left by the Council motivated NATO, under the rubric of humanitarian intervention, to authorize the use of military action by its members in order to compel compliance with the Council resolutions.

D. NATO's Intervention

1. The Legality of NATO's Use Of Force

International law does not readily recognize the doctrine of humanitarian intervention as evidenced by its absence from the general corpus of international law, specifically the Charter; the minimal evidence of its adoption in state practice; and the dangerous and uncertain precedent such a doctrine sets.[19] Most importantly, the concept of humanitarian intervention lies in direct conflict with the black letter law of the Charter, which only permits the use of force in two instances.[20] NATO's unilateral intervention fell into neither category, therefore, the unilateral use of force constituted a clear breach of the Charter.[21] Additionally, the intervention was a breach of NATO's founding document - Articles 1 and 7 bind the members to act with the UN Charter and Article 5 endorses the use of force only to respond to an armed attack against a NATO member.

Accepting that international law coupled with the paralysis of the Council denied any foreseeable stronger legal remedy than the existing Council resolutions, should the matter have ended there? Many answered no. The rapidly deteriorating situation in Kosovo demanded some form of response in order to contain and prevent further escalation of the humanitarian crisis and to stabilize the peace and security in the region. Clearly, such action

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18. *See* Helmut Freudenschub, *Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council, at* http://www.ejil.org/journal/Vol5/No4/art2.html (last visited Jan. 28, 2002).

19. *See* Brunno Simma, *NATO, the UN and the Use of Force: Legal Aspects, at* http://www.ejil.org/journal/Vol10/No1/ab1.html (last visited Jan. 28, 2002).
(quoting the United Kingdom Foreign Office).

20. *See* Part I.B, *The Potential for the Adoption of Sanctions with Teeth.*

21. *See also,* Robert Hayden, *Humanitarian Hypocrisy, at* http://jurist.law.pitt.edu/hayden.htm (last visited Sep. 23, 2001) (claiming that, at worst, the unilateral use of force actually constituted an act of aggression against the FRY).

would not be strictly legal, but some "hard cases"[22] may necessitate derogation from the legal constraints in order to meet the moral and political exigencies of a situation. Nevertheless, whether NATO's actions adequately rose to such a demand is more than questionable.

2. *The Legitimacy of NATO's intervention*

Some commentators argue that NATO's attempt to align itself with the spirit of the Charter somewhat legitimizes the unilateral use of force and renders it a negligible breach of the Charter. In authorizing military action, NATO's reasoning mirrored, in form and in substance, the style of a Council resolution. This presented an attempt to persuade the international community that the intervention was prompted by the inaction of the Council, and that it only acted in order to further United Nations' interests where the Council was unable to act. Simma argues that there was only a "thin red line"[23] between the legality and illegality of NATO's action, and that such efforts to get as close to the law as possible should distinguish NATO's actions from other instances of blatant unilateral use of force.

However, Simma fails to recognize that NATO's ability to embark on its quest of humanitarian intervention, thereby unilaterally extending its traditional territorial reach, rested with the fact that it had the sheer brute power to do so. No matter how much NATO dresses its actions in legal clothing, power does not, and should not, equate to legitimacy: "power is distinct from authority: a gunman's orders do not turn into law merely because there happens to be no police around."[24] The lack of authority, on the part of the Council, in the Kosovo crisis shatters the prospects of the effective legal enforcement of international human rights law by effectively rendering its enforcement at the hands of political superpowers.

In any case, NATO's concerns with legitimizing its actions by shrouding its actions in legal language failed to move beyond its initial authorization to use force. In actually carrying out the unilateral humanitarian intervention, NATO proved ill prepared to rise to the challenge of focusing on the narrow task of the enforcement and protection of human rights norms. Not only did NATO breach the Charter, it also committed textbook war crimes, thus contributing further to human suffering: the aerial attacks focused on civilian targets, destroying water and electricity supplies as well as killing a huge number of citizens.[25] The commission of war crimes directly conflicts with the very nature of humanitarian intervention, which places upon the intervening

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22. *See also,* Simma *supra* note 19.

23. *Id.*

24. Koskenniemi, *supra* note 11, at 3 (the quote is out of context but captures the nature of NATO's actions).

25. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM.JUR.INT'L L. 628, 632 (1999).

parties a duty not to aggravate the suffering.[26] Essentially the collateral damage disproportionately outweighed military damage.[27] As a result of NATO's "humanitarian intervention", Serbia and Kosovo face reconstruction costs estimated at $10 billion.[28]

The purity of NATO's motives clouded further as the stated aims of the intervention appeared to change daily, thus calling into question the true motivation of the military action. "[T]he campaign aimed variously to force Milosevic to accept the Paris peace deal; to prevent a humanitarian catastrophe in Kosovo; to degrade and destroy the Yugoslav army; to weaken Milosevic's grip on power; and to stop the spreading of conflict beyond Kosovo."[29] The range of aims raises the more ominous question of whether humanitarian considerations even lay at the heart of the motivation to intervene. Speculation as to whether the motivation was "prompted by extra-Balkan considerations[,] the place and future of Nato [sic], the role of the United States as the global military superpower and especially its strategic stake in European affairs,"[30] appears cynical, but not unfathomable. Even if such ulterior motives did not lie at the heart of NATO's bombing campaign, some authorities believe that, at the very least, its aims were ill-conceived. One such authority argues: "NATO's leadership highlighted the humanitarian issue, less to cover up any ulterior motives it may have had in waging war than to camouflage its own deep confusion regarding its aims and tactics."[31]

Further, the public refusal of NATO members to commit to a comprehensive military intervention, including the deployment of ground forces if needed, showed NATO to be as flawed as the Council in its inability to adequately commit to a crisis. The FRY intensified its onslaught against the Kosovar Albanians following the aerial attacks, a predictable reaction as Milosevic was assured that an intervening ground force would not follow the aerial attacks. This knowledge "gave Milosevic an enormous tactical advantage."[32]

3. *Prospects for Future Enforcement of Human Rights Norms*

The experience in Kosovo demonstrates that the enforcement of human rights norms in the form adopted by NATO is ineffective and dangerous. The precedent set in Kosovo, not only does little for human rights, but also

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26. *See* Christine M. Chinkin, *Editorial Comments: NATO's Kosovo Intervention: Kosovo: A "Good" or "Bad" War?*, 93 AM.JUR.INT'L L. 841, 843 (1999).

27. *See* Hayden, *supra* note 21 at 4.

28. MISHA GLENNY, THE BALKANS: NATIONALISM, WAR AND THE GREAT POWERS 1804 -1999 660 (2000).

29. *Id.* at 657-58.

30. *Id.* at 659 (quoting Maria Todorova).

31. *Id.* at 660.

32. *Id.* at 658.

threatens peace, which is ultimately the overriding concern of the international community.[33] The situation cannot be left as it stands. NATO has sent a message that should the Council fail to act in a situation that falls within the ambit of Chapter VII, a state or group of states with the power to respond to a situation will do so in whatever manner it sees fit. This message creates a slippery slope considering that "an illegitimate order is an unstable order."[34] If humanitarian intervention is set to become a reality, strict guidelines need to be devised in order to create a legitimate and effective system.

PART II: THE PINOCHET CASE

The beginning of NATO's military intervention marked the end of the judicial intervention of the United Kingdom in the legal proceedings against General Augusto Pinochet. Asmal summarises the significance of the House of Lords decision:

> It was the first time that a former head of state was subjected to extradition proceedings in a country of which he was not a national in response to a request for extradition from a country of which he was not a national and where his own State had granted him amnesty from prosecution during the transition.[35]

Again, the judicial intervention in a state's internal affairs denoted the erosion of national sovereignty. The combination of military and judicial intervention marks a wholesale attack on state sovereignty. The simultaneous timing of the two events sends the message that no state stands above the law for past or present human rights infringements.

A. *The Legal Proceedings*

The Metropolitan Police arrested Pinochet in response to an extradition request from Judge Garzon, a Spanish Magistrate. The accusation against the former Chilean head of state involved authorizing human rights abuses against his political opponents during his 1973 to 1990 military government. The alleged abuses included *inter alia,* torture, hostage taking and disappearances. International law recognizes that some crimes are of such an egregious nature as to invoke universal jurisdiction. Under such jurisdiction, states may

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33. *See,* Antoino Cassesse, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?, at* http://www.ejil.org/journal/Vol10/No1/com.html (last visited Jan. 28, 2002).

34. *Id.*

35. Kader Asmal, MP, *International Law and Practice: Dealing With the Past in the South African Experience,* 15 Am. U. Int'l L. Rev. 1211, 1213 (2000).

proscribe and prosecute certain offences recognized by the international community as of universal concern. Article VII of the Convention against Torture and Other Cruel and Degrading Treatment or Punishment, as well as customary international law, dictate that the alleged perpetrators of such crimes should either be prosecuted, extradited to another state for trial, or surrendered to an international criminal court. Until the Pinochet case, the promulgated rules remained firmly theoretical. Pinochet's arrest marked the first time a state had ever invoked its power to arrest a foreign state official for human rights atrocities committed within his own state. Like Kosovo, this step signifies a remarkable move away from the primacy of state sovereignty as a consequence of the elevation of human rights norms.

The Pinochet case presented complex and conflicting principles of international law. On one side, universal jurisdiction urged the extradition or prosecution of Pinochet by the United Kingdom. On the other, head of state immunity, and, to a lesser degree, the requirement of double criminality, impeded the exercise of universal jurisdiction. Lord Steyn, Nicholls and Hoffman reversed the decision of the lower court[36] by concluding that head of state immunity did not extend to the alleged crimes under international law and consequently Pinochet was subject to extradition. Lord Nicholls, in the majority opinion, wrote: "[I]nternational law has made plain that certain types of conduct ... are not accepted conduct on the part of anyone. This applies as much to heads of states, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law."[37] Proponents of the enforcement of human rights norms celebrated the decision as a triumph towards greater enforcement.

Nevertheless, celebration was short-lived. An appearance of bias in the initial proceedings caused by Lord Hoffman's failure to reveal his position as a director of Amnesty International Charity Ltd., [38] forced the House of Lords to hear the pleadings of both sides once again before a newly composed panel of seven Law Lords. The new panel of Law Lords, more conservative than their predecessors, upheld the denial of immunity.[39] However, the ruling focused on much narrower grounds than the first. In Pinochet 1, the Law Lords based their denial of immunity upon customary international law. In contrast the Law Lords in Pinochet 3 determined that the recognition of the principle of universal jurisdiction only occurred once the Criminal Justice Act 1988 came into force. Thus, all of the alleged criminal acts, committed before September 29, 1988, fell outside the scope of universal jurisdiction. The result

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36. Composition of lower court: Lord Bingham CJ, sitting with Collins and Richards JJ

37. R v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte, 4 All E.R. 897, 905 (H.L. 1998).

38. R v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 2) 1 All E.R. 577 (H.L. 1999).

39. R v. Bow St. Metro. Stipendiary Magistrate *et al, ex parte* Pinochet Ugarte (No. 3) 2 All E.R. 97 (H.L. 1999).

was that the thirty-two criminal charges were reduced to only three: conspiracy to commit torture; conspiracy to commit torture in an unspecified number of murders in various countries, including Spain; and an official act of torture.[40] Section twelve of the Extradition Act of 1989 vested the Home Secretary, Jack Straw, with the duty to decide the ultimate fate of General Pinochet. Following the House of Lords' reduction of the number of charges, and the analysis of various medical reports indicating that Pinochet may be unfit to stand trial, Pinochet was released and returned to Chile.[41]

B. The Impact of the Case for Human Rights

Although Pinochet eventually secured release, the procedural and substantive precedent set by his case, in principle, foreshadows more far-reaching enforcement of human rights norms. The House of Lords' decision established that no one stands above the law in two respects. First, the holding reaffirms the principle that the alleged perpetrators of torture must be prosecuted or extradited in any state in the world. Second, former heads of state are not immune from the application of universal jurisdiction over such egregious crimes. In contrast to NATO's response to the crisis in Kosovo, the disposition of the Pinochet case illustrates a much stricter legalist approach to the enforcement of the human rights norms in question. This result was partly due to the inherent legalistic character of a judicial, as opposed to a military, intervention. Nevertheless, the Pinochet proceedings were subject to great political pressure, which both the judiciary and the United Kingdom government fought to resist.

The governments of the United Kingdom and Spain did not share the verve for extradition with their respective judiciary.[42] Both governments' reservations on the matter were over general concerns of state sovereignty following from the idea that governments do not want their former heads of state to be subjected to extradition and prosecution proceedings abroad. Given the extent of the United Kingdom's participation in international conflicts, the issue of protecting heads of state presented a serious concern. Further, the United Kingdom enjoys tight political and economic ties with Chile. Baroness Thatcher fervently campaigned for her political ally's release, while Pinochet tacitly supported Thatcher's government in the Falklands War of 1982. In a letter to the London Times Newspaper, Baroness Thatcher highlighted the perceived indebtedness of the United Kingdom to General Pinochet in stating,

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40. *See,* Frances Gibb, *Straw Must Clear New Legal Hurdles,* THE TIMES OF LONDON, Mar. 25, 1999, at 10, *available at* http://www.times-archive.co.uk.

41. Home Office News Release, *Senator Augusto Pinochet Ugarte,* COMMUNICATION DIRECTORATE OF HER MAJESTY'S GOVERNMENT – UNITED KINGDOM, Mar. 2, 2000, (attached answer to a written Parliamentary Question), *available at* http://www.homeoffice.gov.uk/oicd/jcu/pinochet.htm.

42. The British government did not take a stance on the issue of immunity.

"by his actions the [Falklands] war was shortened and many British lives were saved."[43] Thus, judicial intervention threatened diplomatic ties between the two countries. This threat also extended to economic pressures. Many British companies operate in Chile, and Chile is of significance importance for the British arms industry.[44] Economically, for the United Kingdom, the case constituted a dangerous embarkation.[45]

Even in light of these political issues, the Home Secretary, Jack Straw, determined the issue a judicial matter in a move intended to depoliticise the issue. Further, the assertion that Lord Hoffman's connections with Amnesty International Charity Ltd. constituted the appearance of bias, sufficient enough, to compose a new panel to hear the case reflected a strong effort to exclude political motivations from the legal proceedings.

C. The Potential Danger for Human Rights

The principle of the Pinochet case symbolizes a huge achievement for the prospective enforcement of core human rights through prosecution. Among the core objectives of universal jurisdiction over the perpetrators of human rights atrocities lies the value of the deterrent effect of prosecution on those who might violate human rights in the future. The hope is that other dictators will refrain from committing human rights abuses for fear that universal jurisdiction will be exercised against them.[46] However, this argument is somewhat ideological and practically tenuous. Recent history speaks for itself - the threat of prosecution did not halt any of the official actors in their horrific activities in the Former Yugoslavia.[47]

Perhaps more important is the effect potential extradition or prosecution has on the state in which the atrocities were committed. In contrast to NATO's military intervention, judicial intervention necessarily occurs post-crisis. Indeed, the newly democratized state of Chile intervened in Pinochet's case, advocating his release. Thus, the legal proceedings in the United Kingdom

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43. *Pinochet – Thatcher's ally*, BBC ONLINE NETWORK: BBC NEWS, *available at* http://news.bbc.co.uk/hi/english/uk/newsid_198000/198604.stm. *See also, Thatcher Stands by Pinochet*, BBC ONLINE NETWORK: BBC NEWS, March 26, 1999, *available at* http://news.bbc.co.uk/hi/english/uk/newsid_304000/304516.stm.

44. *See also, Business: The Economy, Pinochet Saga Bad for Business*, BBC ONLINE NETWORK: BBC NEWS, December 9, 1998, *available at* http://news.bbc.co.uk/hi/english/uk/newsid_222000/222899.stm (discussing the impact of Chilean customer boycott on British business).

45. *See*, Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415, 421 (2000).

46. *See*, David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473 (1999).

47. *See*, Jonathon I. Charney, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452, 459 (1999).

potentially threatened the stability of the new democracy.[48] Asmal asserts that, "[w]here, as in Chile. . . a state declines to prosecute past despots as a result of democratic, conscious, public decision widely seen as fundamental to the implementation of democracy, [it is doubtful] that other states are, or ought to be, free to take up the task."[49] He suggests a new interpretation of state sovereignty built on the premise that, in the case where a newly democratic state democratically decides to grant amnesty to a former state official, the decision should be respected internationally.[50] The extradition proceedings compelled the sovereign state of Chile to rehash old ground and forced ordinary Chileans to deal with the past - a past which some would prefer to leave behind in order to concentrate on the future.

The actions of the United Kingdom and Spain nullified the amnesty law and pressured Chile to return to the issue of how to deal with the atrocities of Pinochet's authoritarian regime. Such a command failed to recognize that dealing with large scale human rights violations while attempting to move towards democracy requires a sensitive balancing act, which only the individual state involved can fully appreciate under the particular circumstances of the transition. Therefore, in the future, states' intent on the exercise of universal jurisdiction should be mindful of the balance between punishing a perpetrator and possibly deterring others in the future on the one hand, and, the sensitive nature of a new democracy on the other. The enforcement of human rights norms should not produce further human suffering by stirring unrest or spurring regression to the former authoritarian regime.

Further, the exercise of universal jurisdiction necessitates careful examination as it may threaten the move from an authoritarian regime to democracy itself. The authoritarian regime may refuse to relinquish power on the basis that the precedent of the Pinochet case permits any other state to exercise its right of universal jurisdiction for human rights abuses committed by its regime, even with the offer of immunity by the prospective democratic government. If states frequently invoke universal jurisdiction to extradite or prosecute violators of human rights, the inability of states to move away from an authoritarian regime becomes a real threat.[51] The political pressure imposed upon the Chilean government to annul the amnesty law, granted to Pinochet as part of the transitional agreement, illustrates the lack of guarantee such amnesty agreements ensure. On Pinochet's return to Chile, he was met with more legal proceedings for acts committed during his period as head of state. The Santiago Appeals Court recently held General Pinochet fit to stand trial on reduced charges of the attempt to conceal crimes and human rights abuses

48. *Id.* at 458.
49. Asmal, *supra* note 35, at 1222.
50. *Id.* at 1228.
51. *See,* Charney, *supra* note 47.

committed after 1973. This decision awaits appeal. Fortunately, the overturn of Pinochet's self-imposed amnesty did not jeopardize Chile's democracy, but the same may not hold true for other transitional states in the future.

D. The Precedential Value of the Pinochet Case

Theoretically, the Pinochet case facilitates the enforcement of human rights law through extradition or prosecution. However, reality suggests that the case will not hold as strong a precedent as human rights proponents might hope. Granted, the so-called "Pinochet Precedent" has been invoked in a small number of cases. For example, a Senegalese judge recently used the precedent to indict the former Chadian dictator Hissein Habre on charges of torture.[52] Nevertheless, the world continues to be governed by sovereign states, each tending to react to an inherent dilemma. A state will be cautious to actively exercise its universal jurisdiction for fear that other states will exercise their jurisdiction upon its officials. Further, the diplomatic and economic considerations underlying the Pinochet proceedings dictate that states will seek to avoid such imbalances if possible. The harsh truth is that, "states wish to avoid complications in their political and economic relations that may be produced by these prosecutions despite the gravity of the crimes and their adverse impact on international peace and security."[53]

CONCLUSION

While the military intervention in Kosovo and the judicial intervention in Chile symbolize the increasing importance of human rights protection against traditional doctrines of sovereignty and immunity, the execution of both events foreshadows the restricted application of such intervention in the enforcement of human rights in the future. The combined experience points to the danger of creating adverse humanitarian effects in the quest to relieve the situation in hand. In Kosovo, NATO's bombing caused further human suffering, and in Chile, judicial intervention threatened the young democracy. Further, the risk of double functioning results in state reluctance to enthusiastically pursue any form of intervention. States will seek to prevent a strong precedent authorizing military or judicial intervention in order to protect their territory and the freedom of their former and current officials travelling abroad.

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52. *See, More "Pinochet Style" Prosecutions Urged: Senegal's Habre Arrest a Precursor, Says Rights Group*, HUMAN RIGHTS WATCH, March 3, 2000, *at* http://www.hrw.org/press/2000/02/pin0303.htm.

53. Charney, *supra* note 47 at 458.

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