

claim as a matter of customary international law. More defensible was the approach of those Law Lords who analyzed the immunity claim by reconciling statutory and treaty provisions in a matter similar to statutory construction. I will refer to this as my “statutory construction” argument.

Summary.

My principal claims are (1) that it would have been in the best interest of the U.K. judiciary to have employed separation of powers principles in the *Pinochet* judgments; (2) the abstention argument—that when first presented with Pinochet’s claim of sovereign immunity, the courts should have held the claim to be nonjusticiable on grounds that it was a question with significant foreign relations implications that should be addressed first by the executive; and (3) the statutory construction argument—that to the extent later called upon to decide a properly presented sovereign immunity claim, the courts should have employed principles of statutory construction and not customary international law to decide the claim.

PART I: *PINOCHET* CHRONOLOGY

A. *Chilean Prologue.*

Augusto Pinochet Ugarte came to power in Chile in a military coup in September 1973. It is well beyond the scope of this article to assess the events in Chile that preceded the coup or Pinochet’s record in power thereafter. There is much debate about both, which I will attempt to summarize using two opposing viewpoints—those of Hugh O’Shaughnessy, a journalist who was working in Chile in 1973 and who has remained intensely interested in Chilean affairs, and of Henry Kissinger, the former U.S. National Security Advisor and Secretary of State.

Chile had held presidential elections in the fall of 1970. The leftist candidate, Salvadore Allende Gossens, emerged as President with 36.2% of a three-way vote.²¹ O’Shaughnessy portrays Allende as a champion of a

21. Results of 1970 Chilean presidential election:

<i>Candidate</i>	<i>Party</i>	<i>Percent</i>
Salvadore Allende Gossens	Popular Unity (coalition of Communists, Socialists, Radicals, etc.)	36.2%
Jorge Alessandri	National Party (fusion of Conservative Party and, no less conservative, Liberal Party)	34.9%
Radomro Tomic	Christian Democratic (incumbent)	27.8%

HUGH O’SHAUGHNESSY, *PINOCHET: THE POLITICS OF TORTURE* 31, 34 (2000); HENRY KISSINGER, *YEARS OF UPHEAVAL* 374 (1982).

Western European-style left-wing social democracy. O'Shaughnessy contends "[t]here was no aspiration to a Stalinist or Marxist communist dictatorship."²² To Kissinger, however, "Allende was not a reformist democrat; he was an avowed enemy of democracy as we know it"²³ Once in office, his proclaimed intention was to revise the Chilean Constitution, to neutralize and suppress all opposition parties and media, and thereby make his own rule—or at least that of his party—irreversible.

Irrespective of its agenda, the Allende government was in crisis by the fall of 1973. Strikes and violence paralyzed the country. O'Shaughnessy attributes the crisis primarily to a plan of "economic sabotage" begun in 1972 by Allende's opponents on the right with United States cooperation and maintains that Allende's popularity increased throughout his tenure in office.²⁴ To Kissinger, Chilean government stability and social cohesion eroded because of the "massive inefficiency of [Allende's] administration and the galloping inflation promoted by his policies,"²⁵ especially his expropriation of private enterprise.²⁶

The end for the Allende government came on September 11, 1973, when the military moved against the Presidential Palace. Allende was found dead, an apparent suicide although allegations have been made to the contrary.²⁷ Pinochet, appointed commander-in-chief of the army by Allende three weeks earlier, was prominent among the officers who led the coup. O'Shaughnessy describes their actions as "treason" and "treachery";²⁸ Kissinger as an extremely reluctant response to "incipient chaos and the pleas of the democratic parties."²⁹

Pinochet emerged as the leader of the junta, which moved quickly to consolidate control over the country. Even Kissinger acknowledged that many of the junta's actions were "unnecessary, ill-advised, and brutal." But in his view, the world's "fashionabl[e] condemn[ation of] the junta" failed to account for the fact that the junta had to deal with "the thousands of revolutionaries imported and armed by Allende and his associates."³⁰

Kissinger believes that the Pinochet regime has been unfairly "judged with exceptional severity."³¹ O'Shaughnessy's book, *Pinochet: The Politics of Torture*, presents the view of those who feel that judgment justified. He places responsibility on Pinochet and his secret police, the DINA, for the following:

22. O'SHAUGHNESSY, *supra* note 21, at 38.

23. KISSINGER, *supra* note 21, at 375.

24. O'SHAUGHNESSY, *supra* note 21, at 43-44.

25. KISSINGER, *supra* note 21, at 391.

26. *See id.* at 404-05.

27. *See* O'SHAUGHNESSY, *supra* note 21, at 58-59.

28. *Id.* at 51, 62.

29. KISSINGER, *supra* note 21, at 405-06.

30. *Id.* at 413.

31. *Id.* at 412-13.

Immediately following the coup, setting up National Stadium in Santiago as a temporary prison holding, according to the Red Cross, some 7,000 prisoners.³²

Also immediately following the coup, establishing concentration camps at Pisagua, Chacabuco, and Dawson Island in the Straits of Magellan.³³

Killing General Carlos Brats, Pinochet's predecessor as commander-in-chief of the army, by a car bomb in Buenos Aires in September 1974.³⁴

Shooting leading Christian Democrat Bernardo Leighton and his wife in Rome in October 1975, resulting in serious injury to both.³⁵

Killing Spanish economist Carmelo Soria, on the staff of the United Nations and the holder of a U.N. diplomatic passport, in Santiago on July 16, 1976.³⁶

Murdering Orlando Letelier, Allende's former ambassador to the United States, along with his American assistant, Ronni Moffitt, by car bomb in Washington, D.C., on September 21, 1976.³⁷

The "state of siege" proclaimed by the junta when it took power in 1973 remained in place until April 19, 1978. An Amnesty Law was promulgated, pardoning all individuals who committed crimes during the state of siege. In 1980, Pinochet's new constitution was approved by a plebiscite described by O'Shaughnessy as widely regarded as rigged. Under its terms, Pinochet was to serve as president for eight years, after which a "protected democracy" would be created. The constitution also authorized the position of "senator for life." This constitution was modified in 1989, paving the way for transition to a civilian government but falling short of creating a full democracy. The next year, Pinochet handed over the presidency to a civilian. At the same time, the Chilean Supreme Court upheld the 1978 Amnesty Law, thus precluding prosecutions for pre-1978 human rights violations. On March 11, 1998,

32. O'SHAUGHNESSY, *supra* note 21, at 171.

33. *Id.*

34. *Id.* at 87.

35. *Id.* at 97.

36. *Id.* at 172.

37. O'SHAUGHNESSY, *supra* note 21, at 98.

Pinochet stepped down as commander-in-chief of the Army. He was sworn in as "senator for life" the next day.³⁸

Summarizing the Pinochet legacy at the time of his arrest in London, the New York Times wrote:

Ever since he led a violent coup to overthrow Salvador Allende Gossens, the elected Socialist president in 1973, Pinochet has been a political icon throughout Latin America, representing the excesses of a long period of military rule and U.S. support for right-wing strongmen who opposed Communism.

An estimated 3,000 Chileans were shot in the streets or "disappeared" during his rule, and a senior member of his regime was imprisoned under U.S. pressure for the murder of former Foreign Minister Orlando Letelier in Washington in 1976.

Pinochet cast a long and wide shadow in economic affairs as well, launching a privatized social security system and other free market policies that set examples that are still models from Argentina to Mexico.

Under a Constitution that he guided to enactment, Pinochet was able to become a senator for life upon his retirement from the military, a position that afforded him continued political influence and immunity from prosecution.³⁹

B. Pinochet Arrested and Charged in the United Kingdom.

Pinochet's record in Chile generated considerable attention in the international human rights community. In Spain, an investigating judge⁴⁰ named Baltasar Garzon began compiling a dossier on Pinochet in 1996. When Pinochet traveled to England in the fall of 1998 for surgery, Garzon made his move. On Friday, October 16, 1998, he submitted an international arrest warrant against Pinochet to Interpol, which transmitted it to Scotland Yard. At 9 p.m. that evening, Scotland Yard presented the international warrant to Nicholas Evans, a stipendiary magistrate, with a request for a "provisional warrant of arrest."

The *provisional* nature of the warrant is significant, particularly in *Pinochet*. Under the Extradition Act, a magistrate may issue a provisional warrant in advance of the government making any determination to proceed

38. *Id.* at 172-73.

39. Clifford Krauss, *Britain Arrests Pinochet to Face Charges by Spain*, N.Y. TIMES, Oct. 18, 1998.

40. Essentially a prosecutor who, in the civil law tradition, was in the employ of the judicial branch. See *supra* Introduction.

with extradition.⁴¹ Indeed, it appears that the magistrate issued the provisional warrant before the U.K. government even knew of Garzon's action.⁴² The Extradition Act only requires that the magistrate be supplied with certain information or evidence required by the statute and that it appears to the magistrate that the conduct alleged would constitute a crime under the Extradition Act, also referred to as an "extradition crime." Evans issued the requested provisional warrant. The Extradition Act requires that upon the issuance of a provisional warrant, the magistrate must immediately notify the Home Secretary who has the discretion to cancel immediately the warrant and discharge the accused or to do so later if the government decides not to proceed with extradition.⁴³

The provisional warrant issued by Magistrate Evans, indicated that Pinochet was accused of the following:

Between 11 September 1973 and 31 December 1983, within the jurisdiction of the Fifth Central Magistrates' Court of the National Court of Madrid, did murder Spanish citizens in Chile within the jurisdiction of the Government of Spain.⁴⁴

The Evans warrant recited that it appeared to the magistrate that the conduct alleged would constitute an extradition crime.⁴⁵

English police arrested Pinochet later that night.⁴⁶ The arrest was hailed in the international human rights community⁴⁷ even as the Chilean government demanded his release.⁴⁸

On Thursday, October 22, 1998, a different stipendiary magistrate, Ronald Bartle, issued a second provisional warrant in response to a second Spanish international warrant of arrest. The Bartle warrant contained allegations that Pinochet, being a public official and in the performance or purported performance of his official duties, committed the following:

1. Intentional infliction of severe pain or suffering on another between January 1, 1988, and December, 1992.
2. Conspiracy to intentionally inflict severe pain or suffering on another between January 1, 1988, and December, 1992.

41. Extradition Act § 8(1)(b).

42. *See Pinochet Arrest Ruled Unlawful*, BBC, Oct. 18, 1998.

43. Extradition Act § 8(4). *See also* Krauss, *supra* note 39.

44. Divisional Court Judgment, *supra* note 1, at 77 (Lord Bingham).

45. Divisional Court Judgment, *supra* note 1, at 76 (Lord Bingham).

46. *Id.*

47. Press Release, Human Rights Watch, HRW Hails Pinochet Detention as "Victory for the Rule of Law" (Oct. 19, 1998), available at <http://www.hrw.org/press98/oct/chile1019.htm> (last visited Feb. 14, 2004).

48. Krauss, *supra* note 39.

3. Detained hostages in order to compel them to do or abstain from doing any act in pursuance of which he threatened to kill, injure, or continue to detain the hostages between January 1, 1982, and January 31, 1992.

4. Conspiracy to detain hostages in order to compel them to do or abstain from doing any act between January 1, 1982, and January 31, 1992.

5. Conspiracy with persons unknown to commit murder in a country subject to the European Convention on Extradition between January, 1976, and December, 1992.⁴⁹

The Bartle warrant also recited that it appeared to the magistrate that the conduct alleged would constitute an extradition crime.⁵⁰

Under normal circumstances, the terms of the Extradition Act would have controlled the matter from that point forward. The statutory extradition process is complex but can, for our purposes here, be described as having four stages after a provisional warrant is issued:⁵¹

1. *Authority to Proceed.* The preliminary determination of the Secretary of State for the Home Department (Home Secretary) that extradition proceedings should commence.⁵² The Home Secretary is a cabinet member and high

49. Divisional Court Judgment, *supra* note 1, at 77.

50. Divisional Court Judgment, *supra* note 1, at 76-77. In addition to his principal arguments challenging the legality of the warrants to be discussed *infra* Part I.C.1, Pinochet also raised two additional arguments challenging the legality of the second warrant. *Id.* The court would quickly dismiss these claims. *Id.*

First, Pinochet contended that the court had no power to issue a second provisional warrant in response to a single request. The court held that where two provisional warrants are issued in response to separate international arrest warrants and the provisional warrants which were issued charge different offenses, neither the Extradition Act nor the European Convention on Extradition 1990 prevents two provisional warrants from being in force at the same time. *Id.* at 78.

Second, Pinochet contended that the court should not have issued the second provisional warrant without hearing. The court found no abuse of the magistrate's discretion in deciding the question without a hearing. *Id.*

51. As noted at the outset of this Part I-B, the Extradition Act authorizes a "provisional warrant" to be issued in advance of any determination by the government to proceed with extradition. Extradition Act § 8(1)(b).

52. Extradition Act § 7(4). See *In re an Application for Judicial Review re: Augusto Pinochet Ugarte*, E.W.J. No. 3123 CO/1786/99 (Q.B. Divl. Ct. May 27, 1999) ("The [section] 7 procedure is no more than a very coarse-meshed net (my words), whereby the Secretary of State is called upon to decide whether to issue his authority to proceed on limited material, namely the request and the supporting particulars.").

Where (as in *Pinochet*) a provisional warrant has been issued, the Home Secretary "may in any case, and shall if he decides not to issue an authority to proceed . . . , by order cancel the warrant and . . . discharge [the accused] from custody." Extradition Act § 8(4).

ranking member of the government. At all times relevant to the *Pinochet* litigation, the Home Secretary was Jack Straw.⁵³

2. *Committal.* A magistrate court's determination that the evidence would be sufficient to warrant . . . trial if the extradition crime had taken place within the jurisdiction of the court.⁵⁴ If a committal order is made, the person subject to the order has a right to apply for habeas corpus.⁵⁵

3. *Order for Return.* The Home Secretary's determination that the alleged offender should be extradited.⁵⁶

4. *Judicial Review.* A court's determination of an appeal from an order of return.⁵⁷

C. Pinochet Seeks Habeas Corpus Contending That He Is Entitled to Sovereign Immunity As a Former Head Of State.

1. Divisional Court Judgment: Pinochet Enjoys Sovereign Immunity.

Introduction.

The statutory course of extradition is described in the preceding section. The Home Secretary did not immediately exercise his discretion to cancel the provisional warrants,⁵⁸ and so instead of waiting for extradition to take its course, Pinochet immediately sought a writ of habeas corpus. The appeal from the two magistrates' decisions to issue the provisional warrants was heard by a three-judge panel in the Queen's Bench Division of the High Court consisting of the Lord Chief Justice (Lord Bingham), Justice Collins, and Justice Richards. Pinochet challenged the legality of each warrant on two principal grounds: (1) that the crimes charged did not constitute offenses for which he could be extradited under U.K. law; and (2) that U.K. courts had no jurisdiction to exercise authority over him as a former foreign sovereign.⁵⁹ The court's treatment of these two claims provides a useful introduction to my argument; therefore, it is reviewed below in some detail.

53. As will be discussed in Part I.C.3 and Part I.D, the Home Secretary issued an authority to proceed against Pinochet on December 9, 1998, following the *First Law Lords' Judgment*, and again on April 14, 1999, following the *Final Law Lords' Judgment*.

54. Extradition Act § 9.

55. Extradition Act § 11. Pinochet was ordered committed by Magistrate Bartle on October 8, 1999. See *infra* Part I.D. The Pinochet proceedings were at this point when they were terminated by Straw's decision to allow Pinochet to return to Chile. See *infra* Part I.E.

56. Extradition Act § 12(1).

57. Extradition Act § 13(6).

58. See *Divisional Court Judgment*, *supra* note 1, at 78.

59. *Divisional Court Judgment*, *supra* note 1, at 77-79. See also *id.* at 76, for discussion of two subsidiary claims raised by Pinochet.

Extradition Crime Analysis.

The Extradition Act governs extradition in the United Kingdom, and the relevant international agreement is embodied in the European Convention on Extradition (European Extradition Convention) to which both Spain and the United Kingdom are parties.⁶⁰ The Extradition Act provides that a person in the United Kingdom who is accused in a foreign state of an "extradition crime" may be arrested and returned to that state in accordance with the procedures of the Extradition Act.⁶¹ The definition of an "extradition crime" has multiple provisions depending upon the nationality of the alleged offender and the place where the alleged offense occurred.⁶² Because the warrants alleged that Pinochet's crimes were committed in Chile, not Spain (and, as such, constituted "*extra-territorial* offenses"), and because Pinochet was not a Spanish citizen, the alleged conduct would meet the definition of an "extradition crime" under the Extradition Act only if: (1) it would constitute an extra-territorial offense against the law of Spain which is punishable under Spanish law with a prison term of twelve months or more, and (2) in corresponding circumstances, equivalent conduct would constitute an extra-territorial offense against law of the United Kingdom, which would be punishable with a prison term of twelve months or more.⁶³ These twin mandates are referred to as the "double criminality requirement," i.e., the conduct must constitute an extra-territorial offense in *both* the United Kingdom and the country seeking extradition.

As to the charge in the first (Evans) warrant, Pinochet argued that the double criminality requirement was not satisfied because the murder of a

60. European Convention on Extradition, Dec. 13, 1957, 359 U.N.T.S. 273 (1960), available at <http://conventions.coe.int/treaty/en/Treaties/Html/024.htm> (last visited Feb. 24, 2004).

61. Extradition Act § 1.

62. Extradition Act § 2. The Extradition Act defines an "extradition crime" as (1) "conduct in a . . . foreign state . . . which, if it occurred in the United Kingdom," would be punishable with a prison term of twelve months or more in both the United Kingdom and that state; or (2) "as an extra-territorial offense against the law of a foreign state . . . which is punishable under that [state's] law" with a prison term of twelve months or more and which satisfies one of two alternate sets of conditions. *Id.*

The first alternative condition is that in corresponding circumstances equivalent conduct would constitute an extra-territorial offense against the law of the United Kingdom, which would be punishable with a prison term of twelve months or more. *Id.*

The second alternative condition is that a foreign state bases its jurisdiction on the nationality of the offender; that the conduct occurred outside the United Kingdom; and that, if it occurred in the United Kingdom, it would constitute an offense under the law of the United Kingdom, which would be punishable with a prison term of twelve months or more. *Id.*

As noted in the text, because the warrants alleged conduct outside of Spain ("extra-territorial offenses") and because Pinochet was not a Spanish citizen, the alleged conduct did not by definition constitute extradition crimes under either clause (1) or under the second alternative condition to clause (2). *See id.* Only the first alternative condition to clause (2) could possibly apply. *See id.*

63. Divisional Court Judgment, *supra* note 1, at 72.

British citizen by a non-British citizen outside the United Kingdom would not constitute an offense in which the United Kingdom could claim extra-territorial jurisdiction.⁶⁴ The court agreed and dismissed the first warrant.⁶⁵

Pinochet also argued that the conduct alleged in Count five of the second (Bartle) warrant did not constitute an extradition crime⁶⁶ because it was alleged to have been committed in a country party to the European Extradition Convention (a "Convention country"), and Spain was not a Convention country during part of the period covered by Count five and Chile was at no time a Convention country.⁶⁷ The court agreed with this contention but noted that it was of little assistance to Pinochet if the other four counts were valid.⁶⁸

Pinochet made another argument with respect to all five counts. He contended that the charges were not valid because some of the offenses alleged were not crimes under U.K. law during the dates identified in the charges. The Lord Chief Justice found this argument to be premature, pointing out that if Spain made an extradition request, it would have to set out a time and place of the commission of the alleged offense as accurately as possible.⁶⁹ At that point, it would become possible to see whether there was a valid objection on the basis of retrospectivity.

But the Lord Chief Justice did go on to render an advisory opinion on the retrospectivity issue. His view was that the conduct alleged in an extradition request was not required to be a criminal offense in the United Kingdom at the time the alleged crime was committed abroad.⁷⁰ As we shall see, the Law

64. *Id.*

65. *Id.* Under the Offenses Against the Person Act 1861, as amended, "the United Kingdom courts only have jurisdiction to try a defendant where he has committed a murder outside the United Kingdom if he is a British citizen, regardless of the nationality of the victim." *Id.* at 77.

66. The *Divisional Court Judgment* indicates that Pinochet acknowledged that "torture," the conduct alleged in Counts 1 and 2, was proscribed by the prohibition on torture enacted by Parliament in § 134 of the Criminal Justice Act 1988, c. 33 (Eng.), 12 Halsbury's Statutes 1014, 1079 (4th ed. 1997 Reissue), and that "hostage-taking," the conduct alleged in Counts 3 and 4, was proscribed by the Taking of Hostages Act 1982, c. 28 (Eng.), 12 Halsbury's Statutes 748 (4th ed. 1997 Reissue). *Divisional Court Judgment*, *supra* note 1, at 79.

67. *Id.* Murder in a Convention country was criminalized in the United Kingdom in the Suppression of Terrorism Act 1978, c. 26 (Eng.), 17 Halsbury's Statutes 671 (4th ed. 1999 Reissue). Pinochet also argued that conspiracy to commit murder, the conduct alleged in Count five, did not constitute an extradition offense because only murder, and not conspiracy to commit murder, was covered by section 4 of the Suppression of Terrorism Act. *Divisional Court Judgment*, *supra* note 1, at 79.

68. *Id.*

69. *Id.*

70. Reviewing section 2 of the Extradition Act, the Lord Chief Justice said:

What is necessary is that at the time of the extradition request the offense should be a criminal offense here and that it should then be punishable with twelve months' imprisonment or more. Otherwise section 2(1)(a) would have referred to conduct which would at the relevant time "have constituted" an offence, and section 2(2) would have said "would have constituted."

Id. at 79.

Lords operated on this assumption in their first decision but rejected it in their second.⁷¹ This holding in the *Final Law Lords' Judgment* had the effect of dismissing many of the charges against Pinochet.

Sovereign Immunity.

The parties appeared to agree that all of the offenses alleged were committed while Pinochet was "head of state" in Chile. Pinochet argued that under the terms of the State Immunity Act, a court could not exert criminal or civil jurisdiction over a former head of a foreign country in relation to any act done in the exercise of sovereign power. Pinochet's argument was that the State Immunity Act, when read in conjunction with the Diplomatic Privileges Act 1964 (Diplomatic Privileges Act),⁷² confers diplomatic immunity on a head of state, and when the head of state leaves office, the head of state continues to enjoy immunity "with respect to acts performed by such a person in the exercise of his functions as a head of state."⁷³ Pinochet pointed to the language of the second (Bartle) warrant, contending that it charged him not

71. See *infra* Part I.C.5.

72. Diplomatic Privileges Act 1964, c. 81 (Eng.), 10 Halsbury's Statutes 676 (4th ed. 1995 Reissue), implementing Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95 (1984).

73. First Law Lords' Judgment, *supra* note 2, at 944 (Lord Steyn). The details of the statutory construction argument were as follows:

The State Immunity Act confers on a foreign country and its sovereign or other head of state in his public capacity immunity from the jurisdiction of the courts of the United Kingdom. State Immunity Act, §§ 1, 14. The State Immunity Act also provides that the Diplomatic Privileges Act applies to a sovereign or other head of state "as it applies to the head of the diplomatic mission." *Id.* § 20(1). This provision applies to proceedings with respect to matters that occurred before the effective date of the State Immunity Act by operation of § 23(3). The Diplomatic Privileges Act, in turn, provides that diplomats are not liable to any form of arrest or detention and enjoy immunity from criminal, civil, and administrative jurisdiction. Diplomatic Privileges Act, § 2(1), 10 Halsbury's Statutes at 677, incorporating by reference Art. 29 of the Vienna Convention on Diplomatic Relations, 10 Halsbury's Statutes at 682. While that Act provides that these privileges and immunities expire when the person's official functions end, "with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist." *Id.*, incorporating by reference Art. 39(2) of the Vienna Convention on Diplomatic Relations, 10 Halsbury's Statutes at 682. Divisional Court Judgment, *supra* note 1, at 80-81.

As noted in the text, Pinochet's argument was that this last provision of the Diplomatic Privileges Act, when read in conjunction with the State Immunity Act, confers the same diplomatic immunity on a head of state. As such, when the head of state leaves office, he continues to enjoy immunity with respect to public acts performed by him as head of state, that is, in his exercise of sovereign power. *Id.*

There was little, if any, dispute over this reading of the interplay between the provisions of the State Immunity Act and the Diplomatic Privileges Act. See First Law Lords' Judgment, *supra* note 2, at 933 (Lord Lloyd) (noting that counsel for Spain, Pinochet, and the court's appointed amicus curiae all agreed with this formulation); *Id.* at 172 (Lord Nicholls). As we shall see, the key debate was over whether Pinochet's alleged crimes constituted or should be treated as "acts performed . . . in the exercise of his official functions." *Id.*

with personally torturing or murdering victims or causing their disappearance but with using the power of the state he headed to that end.

In addition to his statutory argument, Pinochet also argued that the statutory former head of state immunity provisions were a reflection of "international customary law" which clearly recognized head of state immunity. In support of this proposition, he cited several international law treatises.⁷⁴ The strongest support appeared to be in Satow's Guide to Diplomatic Practice: "A head of state who has been deposed or replaced or has abdicated or resigned . . . will be entitled to continuing immunity in regard to acts which he performed while head of state, provided that the acts were performed in his official capacity."⁷⁵

After setting forth Pinochet's argument, the Lord Chief Justice turned to the arguments of Spain⁷⁶ for the validity of the warrants. The principal argument advanced by Spain was that immunity is only available with respect to functions as head of state, and the functions of a head of state cannot include torture, hostage-taking, and murder.⁷⁷ But some crimes committed by a head of state clearly are entitled to protection, Lord Bingham said, and so "where does one draw a line?"⁷⁸ Spain responded that the line should be drawn at crimes "so deeply repugnant to any notion of morality as to constitute crimes against humanity."⁷⁹ In this category, Spain placed such crimes as genocide, torture, the taking of hostages, and other crimes of a similarly offensive character.

To support its argument, Spain pointed out that Article 4 of the Convention on the Prevention and Suppression of the Crime of Genocide mandates

74. The judgment discusses the following works: SATOW'S GUIDE TO DIPLOMATIC PRACTICE (Lord Gore-Booth ed., 5th ed. 1979); CHARLES J. LEWIS, STATE AND DIPLOMATIC IMMUNITY; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (3d ed. 1979); Divisional Court Judgment, *supra* note 1, at 82-83.

75. SATOW'S GUIDE TO DIPLOMATIC PRACTICE, *supra* note 76, at 10.

76. Under the terms of the European Convention on Extradition, the Crown Prosecution Service (CPS) represented the government of Spain. See Final Law Lords' Judgment, *supra* note 4, at 103 (Lord Browne-Wilkinson). The CPS is an agency of the U.K. government reporting to the Attorney General which is responsible for prosecuting persons charged with crimes in England. In *Pinochet*, the CPS engaged barristers Alun Jones, Q.C. and James Lewis, along with international law professor Christopher Greenwood to appear for it (and Spain) in court. *Id.*

77. The CPS also argued that immunity under the State Immunity Act only applied to a former head of state in relation to sovereign acts performed in the United Kingdom. Lord Bingham quickly rejected this notion: "No such geographical limitation is to be found in the provisions; no such geographical limitation applies to heads of mission; and it is not perhaps very probable that a foreign sovereign would exercise sovereign power in this country." Divisional Court Judgment, *supra* note 1, at 83. Lord Bingham went on to say that this argument was inconsistent with the entire rationale of sovereign immunity, which he described as "a rule of international comity restraining one sovereign state from sitting in judgment on the sovereign behavior of another." *Id.* As we shall see, Lord Phillips did construe the State Immunity Act in this way in the Final Law Lords' Judgment. See Part III.C.5.

78. Divisional Court Judgment, *supra* note 1, at 83.

79. *Id.*

punishment for persons committing genocide "whether they are constitutionally responsible rulers, public officials, or private individuals."⁸⁰ But Lord Bingham rejected this argument. He noted that while the United Kingdom adopted a portion of the Genocide Convention as the Genocide Act 1969,⁸¹ Article 4 was not incorporated into the statute. And he pointed out that neither the Criminal Justice Act 1988 (Criminal Justice Act) nor the Taking of Hostages Act 1982 (Hostage Act) (the two statutes which provided the basis for Counts 1 through 4 being extradition crimes)⁸² contained any provision in any way analogous to Article 4 of the Genocide Convention.⁸³

The Lord Chief Justice recognized that it was "a matter for acute public concern that those who abuse sovereign power to commit crimes against humanity should not escape trial and appropriate punishment."⁸⁴ In this regard, he reviewed the charters that established the Nuremberg Tribunal in 1945,⁸⁵ the International Tribunal for the Former Yugoslavia in 1993,⁸⁶ and the International Tribunal for Rwanda in 1994.⁸⁷ He pointed out that each of these charters provided that the official position of a head of state did not relieve an individual of criminal responsibility. But for two reasons, he found that the language of these instruments supported Pinochet's argument rather than that of Spain. First, in contrast to U.K. courts, these were international tribunals and so "did not violate the principle that one sovereign state will not implead another in relation to its sovereign acts."⁸⁸ Second, the signatories to the

80. GENOCIDE CONVENTION, *supra* note 6.

81. Genocide Act, 1969, c. 12 (Eng.), 12 Halsbury's Statutes 530 (4th ed. 1997 Reissue).

82. *See* Divisional Court Judgment, *supra* note 1, at 79.

83. Divisional Court Judgment, *supra* note 1, at 84. Article IV of the Genocide Convention provides: "Persons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals." Genocide Convention, *supra* note 6. As noted in the text, neither the U.K.'s Criminal Justice Act nor Hostage Act contains an analogous provision.

84. Divisional Court Judgment, *supra* note 1, at 84.

85. The International Military Tribunal at Nuremberg was established in 1945 by the London Agreement, resulting from conferences held among the United States, Britain, France, and the Soviet Union to determine what policies the victorious allies should pursue against the defeated Germans, Italians, and their surrogates. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Tribunal].

86. In 1993, the U.N. Security Council established on an ad hoc basis the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991. *See* S.C. Res. 808, U.N. S.C.O.R., 48th Sess., 3175th mtg., U.N. Doc. S/Res/808 (1993) [hereinafter Former Yugoslavia Tribunal].

87. In 1994, the U.N. Security Council established the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Such Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwanda Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between January 1, 1994 and December 31, 1994. *See* Report of the Secretary-General Pursuant to Paragraph 5 of the Security Council Resolution 955 (1994), U.N. S.C.O.R., 50th Sess., U.N. Doc. S/1995/134 (1995) [hereinafter Rwanda Tribunal].

88. Divisional Court Judgment, *supra* note 1, at 84.

charters apparently thought it necessary to provide explicitly that the tribunal would exercise jurisdiction over foreign sovereigns; neither the Criminal Justice Act nor the Hostage Act did so.⁸⁹

Lastly, the Lord Chief Justice turned his attention to several United States' decisions cited by Spain in support of its argument that Pinochet was not entitled to immunity.⁹⁰ Although each of these cases allowed the plaintiff's claim to proceed, only one involved a defendant former head of state in the exercise of public or sovereign authority. That case, *Hilao v. Marcos*, turned on the construction of the United States Foreign Sovereign Immunities Act,⁹¹ which Lord Bingham deemed to have terms very different from counterpart U.K. legislation. Instead, Lord Bingham looked to *Al-Adsani v. Government of Kuwait*.⁹² There the court found the Kuwaiti Government protected by the State Immunity Act with respect to a claim that the plaintiff suffered torture in Kuwait at the hands of the Government. In the Lord Chief Justice's view, "if the Government there could claim sovereign immunity in relation to alleged acts of torture, it would not seem surprising if the same immunity could be claimed by a defendant who had at the relevant time been the ruler of that country."⁹³

Conclusion.

The Lord Chief Justice held that Pinochet was entitled to immunity as a former sovereign from the criminal and civil process of the English courts. Mr. Justice Collins and Mr. Justice Richards concurred. However, the court did not grant Pinochet habeas corpus. It ordered both warrants quashed, but stayed the order pending appeal.⁹⁴

I will soon return to the Extradition Act and State Immunity Act statutes. As we shall see, the *Divisional Court Judgment* would prove to have settled one issue with respect to each of these statutes; however, with each, a very important issue would remain as well.

As to the Extradition Act, there would be no questioning in the House of Lords of the Divisional Court's determination that in Pinochet's case, an extradition crime required the alleged conduct to be an extra-territorial offense in both the United Kingdom and Spain. Re-visited was the question of retrospectivity—whether the conduct had to have been an extra-territorial offense

89. Divisional Court Judgment, *supra* note 1, at 84.

90. These cases were *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962); *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992); *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990); *Hilao v. Marcos*, 25 F.3d 1467 (9th Cir. 1994); and *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). I will discuss *Filartiga* in some detail later in Part III.D—Customary International Law in the United States.

91. 28 U.S.C. §§ 1330, 1602-11.

92. 107 I.L.R. 536 (Eng. C.A. 1996).

93. Divisional Court Judgment, *supra* note 1, at 85.

94. *Id.*

in both countries at the time of commission or only at the time of the extradition request. As we have seen, it was the Lord Chief Justice's view that the requirement was retrospective. That would also be the view of the *First Law Lords' Judgment* (to the extent they considered the issue).⁹⁵ But, the *Final Law Lords' Judgment* held that the requirement was not retrospective.⁹⁶

As to the State Immunity Act, there would be almost no questioning in the House of Lords of the Divisional Court's determination that the State Immunity Act provides a former head of state immunity from the criminal jurisdiction of the United Kingdom with respect to acts performed by him, whether in his own country or elsewhere, in the exercise of his functions as a head of state.⁹⁷ The principal debate in the House of Lords would be over whether Pinochet's alleged crimes constituted or should be treated as "acts performed . . . in the exercise of his official functions."⁹⁸

2. *First Law Lords' Judgment: Pinochet Not Immune.*

There were reports that left wing Labor MPs strongly objected to the Divisional Court's ruling in Pinochet's favor. One prominent Member of the House of Commons, Ken Livingstone, even called for Chief Justice Bingham's resignation for "protecting someone who tortured and murdered not just Spanish citizens but British citizens as well."⁹⁹ The Chilean government expressed support for the decision, its deputy Foreign Minister Mariano Fernandez saying that we are "happy and satisfied that the British High Court has recognised Senator Pinochet's immunity."¹⁰⁰ The U.K. government did its best to downplay its involvement. The Prime Minister, Tony Blair, dismissed opposition party criticism by saying that his government was not involved in the arrest.¹⁰¹ "The judicial process has not involved the government issuing warrants for arrest. That [was] done by the Spanish authorities through Interpol to the British magistrates, who then [took] it from there."¹⁰²

95. See David Robertson, *The House of Lords as a Political and Constitutional Court: Lessons from the Pinochet Case*, in *THE PINOCHET CASE: A LEGAL AND CONSTITUTIONAL ANALYSIS* 21 (Diana Woodhouse ed., 2000) [hereinafter Woodhouse].

96. *Final Law Lords' Judgment*, *supra* note 4, at 107 (Lord Browne-Wilkinson with Lords Hope, Hutton, Saville, and Phillips agreeing). See Robertson in Woodhouse, *supra* note 95, at 21.

97. See, e.g., *First Law Lords' Judgment*, *supra* note 2, at 166 (Lord Berwick), 171 (Lord Nicholls), 177 (Lord Steyn); *Final Law Lords' Judgment*, *supra* note 4, at 255 (Lord Hutton). The only exception was Lord Phillips who in the *Final Law Lords' Judgment* took the view that the State Immunity Act did not have "any application to conduct of a head of state outside the United Kingdom." *Final Law Lords' Judgment*, *supra* note 4, at 290-91 (Lord Phillips).

98. *Final Law Lords' Judgment*, *supra* note 4, at 290-91 (Lord Phillips).

99. *House of Lords Next Stop for Pinochet*, LONDON NET (Oct. 29, 1998), available at http://www.londonnet.co.uk/In/talk/news/pinochet_archive.html (last visited Feb. 11, 2004).

100. *Pinochet Arrest Ruled Unlawful*, BBC, Oct. 28, 1998.

101. *Id.*

102. *Id.*

Spain's appeal moved quickly. At its request, the Divisional Court certified this question to the House of Lords:

[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 United Kingdom in respect of acts committed while he was head of state.¹⁰³

During the following week, there was action on all of the British, Chilean, and Spanish stages. In the United Kingdom, the House of Lords accepted jurisdiction over the case and allowed an international human rights group, Amnesty International, to intervene in the case.¹⁰⁴ In Chile, the Senate adopted a protest against Spain, charging it with violating Chile's sovereignty by asserting extra-territorial jurisdiction and a protest as well against the United Kingdom for disregarding Pinochet's immunity from prosecution as a former head of state.¹⁰⁵ In Spain, a formal request for extradition was issued by Judge Garzon, alleging Pinochet had violated Spanish genocide, torture, and terrorism law by causing a large number of murders, disappearances, and cases of torture.¹⁰⁶ At the same time, a plenary session of Spain's National Court (Criminal Division) held that "by virtue of the principle of universal prosecution for certain crimes . . . established by our internal legislation," Spanish courts had jurisdiction over crimes of terrorism and genocide committed abroad even if the victims were not Spanish citizens.¹⁰⁷

On November 25, 1998, the House of Lords ruled.¹⁰⁸ Five Law Lords,

103. Divisional Court Judgment, *supra* note 1, at 86-87. The Lord Chief Justice did note that he was certifying the question because of "the obvious public importance and international interest in the issue" and not because of any "doubt[] as to the outcome." *Id.* at 89.

104. First Law Lords' Judgment, *supra* note 2, at 902 (Lord Slynn).

105. *Id.* at 920 (Lord Lloyd).

106. *Id.* at 903 (Lord Slynn).

107. First Law Lords' Judgment, *supra* note 2, at 903 (Lord Slynn).

108. See House of Lords, *The Judicial Work of the House of Lords* (1999-2000), available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldinfo/ld08judg/ld08judg.htm> (last visited Feb. 6, 2004). Under U.K. appellate procedures applicable in most cases (including *Pinochet*), the House of Lords nominally serves as the nation's court of last resort. *Id.* In actual fact, judges appointed to the House, referred to as Lords of Appeal in Ordinary, comprise the House's Appellate Committee and hear appeals—normally in panels of five. *Id.* Oral argument of an appeal in the House of Lords is conducted in a manner which strikes American visitors as rather like a legislative hearing—which, of course, it is: the judges (the Law Lords) sit in business suits on one side of a horseshoe-shaped dais listening to the advocates. *Id.* The judgment of the Law Lords is delivered as the report of the members of the Appellate Committee, much like legislative committee members reporting on a piece of legislation, to the full House of Lords for its approval. *Id.* Not surprisingly, the opinions are often referred to as speeches. It was once the practice for each Law Lord to read his entire speech giving his opinion, but this took such a long time that the practice was abandoned in 1962. *Id.* Today the printed speeches are distributed just before the House meets, and each Law Lord merely states that, for the reasons he has given in a speech which he has prepared and which is available in print, he

Lords Slynn, Lloyd, Nicholls, Steyn, and Hoffmann, had heard the case. Each of their speeches will be analyzed in some depth later in this article; only their conclusions and the dramatic way in which they were delivered will be described here. Lord Slynn spoke first¹⁰⁹ and then Lord Lloyd.¹¹⁰ They both indicated that they agreed with the decision of the Divisional Court—that Pinochet was entitled to immunity from prosecution. But then Lord Nicholls¹¹¹ and Steyn spoke.¹¹² They were of the opposite view—that Pinochet did not enjoy sovereign immunity and could be extradited. Lord Hoffmann spoke last: “I have had the advantage of reading in draft the speech of my noble and learned friends, Lord Nicholls of Birkenhead and Lord Steyn, and for the reasons they give I, too, would” find against Pinochet.¹¹³ By a vote of three to two, the *Divisional Court Judgment* had been reversed; Pinochet did not enjoy former head of state immunity, and the decision whether Pinochet would be extradited was now in the hands of the Home Secretary pursuant to the terms of the Extradition Act.

3. *Extradition Proceedings Commence.*

As outlined above in the discussion of the Extradition Act's terms, the Home Secretary's “authority to proceed” was required for Pinochet to be extradited to Spain. On December 9, 1998, Straw announced that he had signed an authority to proceed.¹¹⁴ “The Spanish request for [Pinochet's] extradition will now be considered by the courts,” he said.¹¹⁵ As we have seen, by the time Straw made this statement that the case was ripe for consideration by the courts, both a Divisional Court and the House of Lords had already considered the matter. Because my argument will be that those courts should have let Straw make this authority to proceed—and probably an “order to return” decision as well—before ruling on Pinochet's sovereign immunity claim, I will examine Straw's reasoning for going forward.

would allow or dismiss the appeal, that is, reverse or affirm the court below. *Id.* The House then delivers judgment by agreeing to the report from the Appellate Committee. *Id.*

For a critique of the House of Lords as national court of last resort in the context of *Pinochet*, see Robertson in Woodhouse, *supra* note 95, at 17. *Id.* Robertson is particularly critical of the Law Lords deciding cases in panels of five judges. *Id.* “The strangest thing about the *Pinochet* case is that it was originally thought acceptable to decide it by a panel of five law lords. No other supreme court in the common law world would have done so.” *Id.* at 36.

109. First Law Lords' Judgment, *supra* note 2, at 900 (Lord Slynn).

110. *Id.* at 919 (Lord Lloyd).

111. *Id.* at 935 (Lord Nicholls).

112. *Id.* at 941 (Lord Steyn).

113. First Law Lords' Judgment, *supra* note 2, at 947 (Lord Hoffmann).

114. 322 PARL. DEB., H.C. (5th ser.) (Dec. 9, 1998) 213, available at http://www.publications.parliament.uk/pa/cm199899/cmhansrd/vo981209/text/81209w08.htm#81209w08.html_sbhd2 (last visited Feb. 14, 2004).

115. *Id.* Straw said that both the Swiss and the French had also filed extradition requests but that he had given precedence to the Spanish request and notified Switzerland and France accordingly. *Id.* at 214.

Straw indicated that he evaluated the extradition request according to the following standard:

[I]f it . . . appear[ed] to him that no order for the return of Senator Pinochet to Spain could lawfully be made, or would in fact be made, then he should not issue an authority to proceed. If those conditions do not exist he has a discretion whether or not to issue an authority to proceed.¹¹⁶

Thus, there was a mandatory aspect to his review of the extradition request and a discretionary aspect. Straw also was mindful of the U.K.'s obligations under the European Extradition Convention, referring to it as a "consideration" which he gave "particular weight."¹¹⁷

As to the mandatory aspect of his analysis, Straw found that the alleged offenses of "attempted murder, conspiracy to murder, torture, conspiracy to torture, hostage taking and conspiracy to take hostages" all met the double criminality requirement of the Extradition Act and so constituted extradition crimes.¹¹⁸ Relying on the Law Lords' opinion, he also found that Pinochet was not entitled to sovereign immunity.¹¹⁹

As to the discretionary aspect, Straw said that he had considered Pinochet's claims that Pinochet's age and health would make extradition unjust or oppressive but had concluded that Pinochet was fit to stand trial.¹²⁰ Straw left open the possibility that he would reconsider this position when it came time "to exercise his final discretion at the end of the extradition process[.]"¹²¹ As to Chile's claim that Pinochet should be returned to stand trial there, Straw said:

[T]here is no extradition request from the Chilean Government Moreover, there is no provision of international law which excludes Spain's jurisdiction in this matter. . . . [T]he possibility of a trial in Chile [is not] a factor which outweighs the UK's obligations under the [European Extradition Convention] to extradite Senator Pinochet to Spain.¹²²

116. *Id.* at 215.

117. *Id.*

118. *Id.*

119. 322 PARL. DEB., H.C. (5th ser.) (Dec. 9, 1998) 213, available at http://www.publications.parliament.uk/pa/cm199899/cmhansrd/vo981209/text/81209w08.htm#81209w08.html_sbhd2 (last visited Feb. 14, 2004). Straw found inapplicable statutory restrictions that prohibit extradition for (1) political offenses, (2) punishment for political opinions, (3) offenses with respect to which the relevant statute of limitations has expired, (4) offenses with respect to which the passage of time would make extradition unjust or oppressive, and (5) extradition requests not made in good faith. *Id.* at 215-16.

120. *Id.* at 216.

121. *Id.*

122. *Id.*

Lastly, Straw said he considered:

- “(i) the possible effect of extradition proceedings on the stability of Chile, and its future democracy.
- (ii) the possible effect of extradition proceedings on the UK national interest.”¹²³

He concluded that none of these facts constituted sufficient grounds not to issue the authority to proceed.¹²⁴

On November 11, 1998, Pinochet himself appeared at a bail hearing before Graham Parkinson, the Chief Metropolitan Stipendiary Magistrate.¹²⁵ “In legal terms today’s session was a simple bail hearing, but it was also a day of high drama[,]” wrote Warren Hoge of the *New York Times*.¹²⁶ Pinochet told Parkinson “that he did not acknowledge the right of any court outside his own country to consider charges against him.”¹²⁷

4. *House of Lords Vacates Its First Decision Because of Lord Hoffmann’s Improper Participation.*

As formal extradition proceedings were getting underway, a most extraordinary thing happened. Following the November 25 House of Lords’ decision, Pinochet’s lawyers had challenged the participation of Lord Hoffmann on grounds of having an impermissible conflict of interest. The allegation was that both Lord Hoffman and his wife had close connections with Amnesty International, which, as noted above, had been permitted to intervene in the case when it reached the House of Lords. Although Straw had rejected Pinochet’s claim in this regard in issuing his authority to proceed, the Law Lords took the claim of bias more seriously.¹²⁸

123. *Id.*

124. *Id.* at 217.

125. Warren Hoge, *Only Chile Can Judge Me, Pinochet Tells British Court*, *N.Y. TIMES*, Dec. 12, 1998, at A3.

126. *Id.*

127. *Id.*

128. One of the reasons that the claim of bias may have been taken so seriously was that Pinochet threatened to take his claim of judicial bias to the European Court of Human Rights. Law Lords’ Hoffmann Judgment, *supra* note 3, at 581 (Lord Browne-Wilkinson). See Paul Catley & Lisa Claydon, *Pinochet, Bias and the European Convention on Human Rights*, in Woodhouse, *supra* note 95, at 25-31, for a discussion of this irony.

The matter was also of concern to the Lord Chancellor. On December 17, 1998, the Lord Chancellor’s Department issued the following extraordinary “Press Notice:”

LORD CHANCELLOR’S LETTER TO SENIOR LAW LORD

The Lord Chancellor, Lord Irvine, in his capacity as Head of the Judiciary, yesterday wrote to the senior Lord of Appeal in Ordinary, Lord Browne-Wilkinson. The text of his letter is as follows:

“I write, prior to the determination of the Pinochet petition now being heard by the House [of Lords] in its judicial capacity, against the possibility that the [Appellate] Committee may rule that the substantive appeal has to be heard again.

A new panel of Law Lords was convened to hear Pinochet's protest. While it is beyond the scope of this article to give the bias issue extensive treatment, the action of the House of Lords is summarized below. Hoffmann's principal connection with Amnesty International was that he served as the chairman and one of two directors of a sister entity, Amnesty International Charity Limited (AICL), established "to carry out such of the purposes of [Amnesty International] as were charitable."¹²⁹ Among the charitable activities of AICL was the underwriting of a 1993 Amnesty International research report on Chile.¹³⁰ The report "cover[ed] not only the occurrence and nature of breaches of human rights within Chile, but also the progress of cases being brought against those alleged to have infringed human rights by torture and otherwise in the courts of Chile."¹³¹

Lord Browne-Wilkinson, the senior Law Lord, delivered the lead speech for the court.¹³² He pointed out that, "[b]y seeking to intervene in this appeal and being allowed to intervene, in practice [Amnesty International] became a party to the appeal."¹³³ And he identified the ethical canon that "a man may not be a judge in his own cause."¹³⁴ This ethical principle usually only applies when a judge has a pecuniary interest in the case because of the judge's relationship to a party, Lord Browne-Wilkinson said.¹³⁵

But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties.¹³⁶

"We must make every effort to ensure that such a state of affairs could not occur again. My request to you, therefore, as the senior Law Lord, is that you, or the Law Lord in the chair, ensure, at the time when any Committee is being composed to hear an appeal, that its proposed members consider together whether any of their number might appear to be subject to a conflict of interest; and in order to ensure the impartiality, and the appearance of impartiality, of the Committee, require any Law Lord to disclose any such circumstances to the parties, and not sit if any party objects and the Committee so determines."

Press Notice, *supra* note 16. I am grateful to Sir Christopher Staughton for bringing this document to my attention.

129. Law Lords' Hoffmann Judgment, *supra* note 3, at 583 (Lord Browne-Wilkinson). Lady Hoffmann's connection with Amnesty International was not substantial and was not addressed in the Law Lords' decision. *See id.*

130. *Id.*

131. *Id.* at 584 (Lord Browne-Wilkinson).

132. On December 17, 1998, the Law Lords vacated the *First Law Lords' Judgment* of November 25. Law Lords' Hoffmann Judgment, *supra* note 3. The reasoning was announced in the *Law Lords' Hoffmann Judgment* on January 15, 1999. *Id.*

133. *Id.* at 587 (Lord Browne-Wilkinson).

134. *Id.* at 588 (Lord Browne-Wilkinson).

135. *Id.*

136. *Id.*

The speeches of the other four Law Lords—Lords Goff, Nolan, Hope, and Hutton—reached the same result.¹³⁷ They held that Lord Hoffman was subject to automatic disqualification from participating in the case and, as such, the November 25 judgment against Pinochet had to be vacated.¹³⁸ The case was set for rehearing on the merits.¹³⁹

5. *Final Law Lords' Judgment: Pinochet Immune On Some but Not All Charges.*

A panel of seven Law Lords (none of whom had participated in the *First Law Lords' Judgment*) again heard Spain's appeal.¹⁴⁰ By this time, thirty-one charges had been proposed against Pinochet, but the charges could continue to be categorized as charges of hostage taking, torture, murder, and conspiracy to commit each of those crimes—although each in different places and on different dates.¹⁴¹ On March 24, 1999, the *Final Law Lords' Judgment* held that much of the conduct with which Pinochet was charged did not constitute "extradition crimes" under the Extradition Act.¹⁴² However, the Law Lords also held that Pinochet did not enjoy immunity with respect to the small number of charges that remained.¹⁴³ Because the analysis of the immunity issue in each of the seven speeches will be discussed in some detail in Part III, I will only discuss the "extradition crimes" analysis in the *Final Law Lords' Judgment* to any extent here.

As discussed above, the *Divisional Court Judgment* included an advisory opinion that the "double criminality" requirement of the Extradition Act was retrospective, i.e., that the conduct alleged in the extradition request need only have been an extra-territorial offense in both nations at the time of the extradition request, not necessarily at the time the conduct occurred.¹⁴⁴ This conclusion was barely mentioned in the *First Law Lords' Judgment*, where it was not questioned.¹⁴⁵ But in the *Final Law Lords' Judgment*, the matter received considerable attention.¹⁴⁶ Lord Browne-Wilkinson devoted a large part of his speech to the subject and concluded that the double criminality

137. Law Lords' Hoffmann Judgment, *supra* note 3, at 592 (Lord Goff), 592 (Lord Nolan), 596 (Lord Hope), 599 (Lord Hutton).

138. *Id.*

139. *Id.*

140. See *Final Law Lords' Judgment*, *supra* note 4.

141. *Id.* at 134-35 (Lord Hope).

142. *Id.*

143. *Id.*

144. *Divisional Court Judgment*, *supra* note 1, at 79. See *supra* Part I.C.1. See also discussion at *supra* note 59.

145. *First Law Lords' Judgment*, *supra* note 2, at 921 (Lord Lloyd).

146. See *Final Law Lords' Judgment*, *supra* note 4.

requirement was not retrospective.¹⁴⁷ This was significant because the prohibition against extra-territorial torture in the Criminal Justice Act was adopted by Parliament in 1988,¹⁴⁸ most of Pinochet's alleged crimes were committed in the 1970s.¹⁴⁹ As part of their preliminary analysis, the Law Lords also dismissed the counts alleging hostage taking for technical statutory construction reasons.¹⁵⁰

It was only after this analysis that the court reached the question of sovereign immunity. Again, the speeches on this point will be examined in Part III. It suffices here to say that one of the Law Lords—Lord Millett—was of the view that Pinochet was entitled to no immunity.¹⁵¹ Another of the Law Lords—Lord Goff—was of the view that he was entitled to immunity for all the alleged offenses.¹⁵² The remaining five took the position that former head of state immunity did not cover acts of torture and conspiracy to commit torture committed after Parliament criminalized extra-territorial torture in 1988.¹⁵³ While the Law Lords dismissed all of the counts alleging torture committed before 1988,¹⁵⁴ three of the thirty-one original charges remained.¹⁵⁵ Because of the substantial reduction in the number of charges, most of the Law Lords suggested that the Home Secretary reconsider his December 9 authorization to proceed with extradition.¹⁵⁶

147. *Id.* While acknowledging that the language of the Extradition Act was ambiguous as to whether an "extradition crime" was required to be criminal under U.K. law at the date of commission or only at the date of extradition, Lord Browne-Wilkinson found that under the Extradition Act 1870, it was clear that the double criminality rule required the conduct to be criminal under English law at the conduct date, not the request date. *Id.* After consideration of the legislative history, he found no evidence of Parliament's intent to change the date. *Id.* "It seems to me impossible that the Legislature can have intended to change that date from the one which applied for over a hundred years under the Act of 1870 (i.e., the conduct date) by a side wind and without investigation." Final Law Lords' Judgment, *supra* note 4, at 107 (Lord Browne-Wilkinson). All of the other six members of the panel appear to have agreed with this analysis. See Final Law Lords' Judgment, *supra* note 4.

148. *Id.* at 111 (Lord Browne-Wilkinson).

149. *See id.*

150. *Id.* at 137-38 (Lord Hope).

151. *Id.* at 180 (Lord Millett).

152. *Id.* at 131-32 (Lord Goff).

153. *Id.* See discussions of this point in Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 21, 29 (1999) and Robertson in Woodhouse, *supra* note 95.

154. Six of the Law Lords were of this opinion. Lord Millett disagreed, being of the view that because it was a crime under international law in the 1970s, the torture alleged was an offense in the United Kingdom when committed and so satisfied the double criminality requirement. Final Law Lords' Judgment, *supra* note 4, at 178 (Lord Millett).

155. Final Law Lords' Judgment, *supra* note 4; Frances Gibb, *Thatcher Furious at "Vindictive" Pinochet Decision*, THE TIMES, Apr. 16, 1999.

156. *Id.* at 115 (Lord Browne-Wilkinson), 153 (Lord Hope), 167 (Lord Hutton), 170 (Lord Saville), 180 (Lord Millett), 192 (Lord Phillips).

D. Extradition Proceedings Re-Commenced.

On April 14, 1999, the Home Secretary issued a new "authority to proceed" after rescinding the one issued December 9.¹⁵⁷ While acknowledging that many of the speeches in the *Final Law Lords' Judgment* had asked him to reconsider his December authorization in light of their dismissal of almost all the charges,¹⁵⁸ Straw's reasoning was almost identical to that employed in his earlier authorization.¹⁵⁹ Again he indicated that he gave "particular weight" to the United Kingdom's obligations under the European Extradition Convention,¹⁶⁰ that it did not appear that Pinochet was unfit to stand trial,¹⁶¹ that the question of Pinochet's age and health could be reconsidered at a later point in the proceedings,¹⁶² and that the Home Secretary had considered "the possible effect of extradition proceedings on the stability of Chile, and its future democracy" and "on the United Kingdom national interest."¹⁶³

On October 8, 1999, the deputy chief magistrate of the Bow Street Magistrates Court, Ronald Bartle, ruled that Pinochet could be extradited to Spain to stand trial on torture and conspiracy charges.¹⁶⁴ Of the decision, Warren Hoge of the *New York Times* wrote, "While there have been a number of dramatic court decisions since General Pinochet's arrest a year ago, today's was the first to focus more on the crimes he is accused of than simply on the legality of his arrest."¹⁶⁵

Magistrate Bartle did stress that his ruling was "focused not on guilt or innocence but on whether the extradition papers were in order and the charges were for offenses extraditable under British law."¹⁶⁶ Magistrate Bartle stated,

157. 329 PARL. DEB., H.C. (5th ser.) (Apr. 15, 1999) 311, available at http://www.publications.parliament.uk/pa/cm199899/cmhansrd/vo990415/text/90415w04.htm#90415w04.htm_sbhd2 (last visited Feb. 14, 2004). This is the "Authority to Proceed" stage in the four-step extradition process summarized *supra* in Part I.B.

158. *Id.* at 312.

159. Compare 322 PARL. DEB., H.C. (5th ser.) (Dec. 9, 1998) 213-17, available at http://www.publications.parliament.uk/pa/cm199899/cmhansrd/vo981209/text/81209w08.htm#81209w08.html_sbhd2 (last visited Feb. 14, 2004), with 329 PARL. DEB., H.C. (5th ser.) (Apr. 15, 1999) 312-16, available at http://www.publications.parliament.uk/pa/cm199899/cmhansrd/vo990415/text/90415w04.htm#90415w04.htm_sbhd2 (last visited Feb. 14, 2004).

160. 329 PARL. DEB., H.C. (5th ser.) (Apr. 15, 1999) 313, available at http://www.publications.parliament.uk/pa/cm199899/cmhansrd/vo990415/text/90415w04.htm#90415w04.htm_sbhd2 (last visited Feb. 14, 2004).

161. *Id.* at 315.

162. *Id.* at 316.

163. *Id.*

164. *Kingdom of Spain v. Augusto Pinochet Ugarte*, 39 I.L.M. 135, 140 (Bow St. Mag. Ct. 2000).

165. Warren Hoge, *British Court Rules Pinochet Extraditable for Trial in Spain*, N.Y. TIMES, Oct. 9, 1999, at A4.

166. This is the "Committal" stage in the four-step extradition process summarized *supra* in Part I.B.

It cannot be too strongly emphasised that these proceedings are not conducted for the purpose of deciding the guilt or innocence of Senator Pinochet in respect of the allegations made against him, nor would a finding on my part that the request of Spain should be complied with be any indication whatever that I have formed a view as to his guilt or innocence.¹⁶⁷

Nevertheless, given that only three of thirty-one charges survived in the *Final Law Lords' Judgment*, the decision was significant for the prosecution in several respects.¹⁶⁸ In his decision, Judge Bartle approved the inclusion of thirty-three new charges, which had been filed by Spain after the *Final Law Lords' Judgment*.¹⁶⁹ As such, the decision appeared to allow prosecutors to pursue disappearances in the 1970s on the basis that they constituted "mental torture" on relatives and survivors that continued beyond 1988.¹⁷⁰ "The prosecutors also gained the right to introduce evidence of events before the crucial date as part of their effort to prove that General Pinochet was guilty of a long-running conspiracy to torture."¹⁷¹

E. Extradition Proceedings Interrupted; Pinochet Allowed to Return to Chile For Health Reasons.

On October 14, 1999, the Chilean Embassy submitted evidence to the Home Secretary that Pinochet's health had declined markedly¹⁷² after he was said to have suffered a series of small strokes in September.¹⁷³ The Home Secretary selected four doctors, specialists respectively in gerontology, geriatric medicine, neurology, and neuropsychology, to conduct an independent examination.¹⁷⁴

Based on the results of the examination, the Home Secretary declared on January 11, 2000, that Pinochet was medically unfit to stand trial in Spain and that Straw was now "inclined" to abandon the extradition case against him.¹⁷⁵ He said that it was the "unequivocal and unanimous conclusion . . . that,

167. *Augusto Pinochet Ugarte*, 39 I.L.M. at 136.

168. See *Final Law Lords' Judgment*, *supra* note 4.

169. Hoge, *supra* note 164.

170. See *Augusto Pinochet Ugarte*, 39 I.L.M. at 140; Hoge, *supra* note 165.

171. Hoge, *supra* note 165. See *Augusto Pinochet Ugarte*, 39 I.L.M. at 137-38.

172. 342 PARL. DEB., H.C. (5th ser.) (Jan. 12, 2000) 277, available at http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000112/debtext/00112-04.htm#00112-04_head0 (last visited Feb. 14, 2004).

173. Hoge, *supra* note 165.

174. 342 PARL. DEB., H.C. (5th ser.) (Jan. 12, 2000) 277, available at http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000112/debtext/00112-04.htm#00112-04_head0 (last visited Feb. 14, 2004).

175. *Id.* at 278.

following a recent deterioration in the state of Senator Pinochet's health, which seems to have occurred principally during September and October 1999, he is at present unfit to stand trial, and that no change to that position can be expected."¹⁷⁶

While the Home Secretary had authority to terminate the extradition proceedings on compassionate grounds of age and health, Straw stopped short of announcing that he would do so.¹⁷⁷ Instead, he sought the views of various international human rights groups involved in the case, of Spain and Chile, and of France, Belgium, and Switzerland, which had made extradition requests of their own.¹⁷⁸

The human rights groups and Belgium promptly protested in the High Court Straw's refusal to make public the details of the medical examination.¹⁷⁹ On January 31, 2000, High Court Judge Maurice Kay turned down the appeal.¹⁸⁰ Judge Kay found that the Home Secretary acted "lawfully, fairly and rationally" in not disclosing the medical documents.¹⁸¹ The Home Secretary "argued that to do so would violate a pledge of doctor-patient confidentiality made to [Pinochet] before the January 5 examination."¹⁸²

Belgium appealed Judge Kay's judgment.¹⁸³ A three-judge High Court panel heard Pinochet argue that his right to confidentiality outweighed public interest.¹⁸⁴ Belgium said it was entitled to see the findings because it requested his extradition on behalf of citizens who say their relatives were jailed or killed in Chile.¹⁸⁵

On February 15, a unanimous panel of the High Court ruled in favor of disclosure of the report.¹⁸⁶ In the High Court's judgment, Lord Justice Simon Brown held that the public interest "outweighs any contrary private interest."¹⁸⁷ Justice John Dyson agreed.¹⁸⁸ The judgment ordered the United Kingdom to disclose the doctors' report to Belgium, Spain, Switzerland, and France "under conditions of strict confidentiality" and report their impressions

176. *Id.*

177. *See id.*

178. *Id.*

179. Amnesty Int'l v. Sec'y of State for the Home Dept. re Pinochet Ugarte, E.W.J. No. 467 CO/236/2000, CO/238/2000 (Q.B. Jan. 31, 2000) [hereinafter Amnesty Int'l, Judge Kay's Opinion].

180. *Id.*

181. *Id.*; Warren Hoge, *Britain's High Court Supports Move to Release Pinochet*, N.Y. TIMES, Feb. 1, 2000, at A8.

182. Hoge, *supra* note 181. *See* Amnesty Int'l, Judge Kay's Opinion, *supra* note 179.

183. Hoge, *supra* note 181.

184. Amnesty Int'l Ltd. v. Sec'y of State for the Home Dept. re Pinochet Ugarte, E.W.J. No. 554 CO/236/2000, CO/238/2000 (Q.B. Feb. 15, 2000) [hereinafter Amnesty Int'l, Three Judge Panel].

185. *See id.*

186. *Id.*; Warren Hoge, *British Court Orders Disclosure of Pinochet's Medical Records*, N.Y. TIMES, Feb. 16, 2000, at A12.

187. Amnesty Int'l, Three Judge Panel, *supra* note 184; Hoge, *supra* note 186.

188. Amnesty Int'l, Three Judge Panel, *supra* note 184; Hoge, *supra* note 186.

to the Home Secretary.¹⁸⁹ The human rights groups involved in the appeal were not granted access to the report.¹⁹⁰

The four countries submitted their comments on the report to the Home Secretary on February 22, freeing Straw to issue his decision on whether Pinochet should be extradited. He ruled on March 2, 2000, that Pinochet would not be extradited to Spain. Pinochet left Britain for Chile later that day.¹⁹¹

Straw's ruling came in the form of a lengthy letter to the Spanish government¹⁹² and shorter letters to Belgium,¹⁹³ Switzerland,¹⁹⁴ and France.¹⁹⁵ Straw's reasoning began with the medical examination, which concluded that Pinochet would not be "mentally capable of meaningful participation in a trial."¹⁹⁶ He declared himself satisfied that this conclusion was correct after considering and dismissing the possibility that Pinochet "was trying to fake disability" and the criticism of the medical examination by medical examiners engaged by Spanish, Belgian, and French prosecutors.¹⁹⁷ As to the legal consequences of Pinochet's condition, Straw said:

The conclusions to which the Secretary of State has come mean that in a criminal trial in England, Senator Pinochet would be found unfit to stand trial, and there would not therefore be any trial of the charges against him on their merits. If this were a peculiarity of English criminal law, the Secretary of State would not attach as much weight to it as he does. However, in the view of the Secretary of State, the principle that an accused person should be mentally capable of following the proceedings, instructing his lawyers and giving coherent evidence is fundamental to the idea of a fair trial. He is advised that the attempted trial of an accused in the condition diagnosed in Senator Pinochet, on the charges which have been made against him in this case, could not be a fair trial in any country, and would violate Article 6 of the

189. Amnesty Int'l, Three Judge Panel, *supra* note 184; Hoge, *supra* note 186.

190. Amnesty Int'l, Three Judge Panel, *supra* note 184; Hoge, *supra* note 186.

191. *Pinochet Flies Out of Britain*, BBC, Mar. 2, 2000, available at <http://news.bbc.co.uk/1/hi/uk/663886.stm> (last visited Feb. 14, 2004); Warren Hoge, *After 16 Months of House Arrest, Pinochet Quits England*, N.Y. TIMES, Mar. 3, 2000, at A6.

192. 345 PARL. DEB., H.C. (5th ser.) (Mar. 2, 2000) 357W, available at http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000302/text/00302w09.htm#00302w09.html_sbhd2 (last visited Feb. 14, 2004).

193. *Id.* at 367W.

194. *Id.* at 369W.

195. *Id.* at 370W.

196. *Id.* at 360W.

197. 345 PARL. DEB., H.C. (5th ser.) (Mar. 2, 2000) 362W, available at http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000302/text/00302w09.htm#00302w09.html_sbhd2 (last visited Feb. 14, 2004).

European Convention on Human Rights in those countries which are party to it.¹⁹⁸

Straw also addressed arguments that the question of Pinochet's fitness for trial should be determined by U.K. courts or in accordance with Spanish judicial proceedings and that, given the seriousness of the charges of human rights abuses, the extradition proceedings themselves should be allowed to take their course.¹⁹⁹ But to each of these contentions, Straw said that he had concluded that under U.K. law he had an obligation to make such a determination; he was required to address the subject "as part of the general discretion of the [Home Secretary] under section 12(1) [of the Extradition Act]."²⁰⁰ Finally, Straw said that while in some circumstances it might be appropriate for the Home Secretary to take into account the "political, economic or diplomatic interests of the United Kingdom in exercising his discretions under the Extradition Act[.]" he did not do so in this case.²⁰¹

198. *Id.* at 363W.

199. *Id.* at 363-67W.

200. *Id.* (citing Extradition Act, 1989, § 12(1), 17 Halsbury's Statutes at 705).

201. *Id.* at 366W. After Straw had completed his official action in the case, he spoke more personally about the case in the House of Commons. The following excerpt, though not directly relevant to my arguments, gives some additional texture to the case:

Of the 70,000 letters and e-mails from the public which I have received from all over the world, and many letters from Members of Parliament and organisations, almost all have urged me to allow the extradition proceedings to take their course, so that the allegations made against Senator Pinochet could be tried. I attach great importance to the principle that universal jurisdiction against persons charged with international crimes should be effective.

I am all too well aware that the practical consequence of refusing to extradite Senator Pinochet to Spain is that he will probably not be tried anywhere. I am very conscious of the sense of injury that is bound to be felt by those who suffered from breaches of human rights in Chile in the past, as well as their relatives.

All of these are matters of great concern, and I had them very much in mind when considering the evidence about Senator Pinochet's state of health. They have been among the reasons why I required the evidence of Senator Pinochet's medical condition to satisfy a high standard of expertise, thoroughness, objectivity and cogency before I was prepared to act on it. Ultimately, however, I was driven to the conclusion that a trial of the charges against Senator Pinochet, however desirable, was simply no longer possible.

The case has taken 17 months, much of that in court proceedings. While the House of Lords hearings on state immunity were indeed an exceptional feature, that period is not an unusual one in a complex, contested extradition matter. The Extradition Act 1989 is now more than a decade old and I believe that the time has come to review it. Work on that was in fact already under way before the Pinochet case began, and I intend to publish a consultation paper in due course on the options for streamlining our extradition procedures.

As I have already made clear, this case is unprecedented. Throughout the process, I have sought to exercise my responsibilities in a fair and rational way in accordance with the law. The case has understandably aroused great debate and feeling. Its impact has been felt worldwide. It has established, beyond

F. Chilean Epilogue.

Pinochet returned to Chile to find a much-changed legal landscape. The New York Times reported:

Until General Pinochet was arrested . . . in London on a Spanish warrant, it would have been unthinkable that he might be stripped of his senatorial immunity and face prosecution.

. . . But his arrest abroad opened the way for many prosecutions of retired military officers as the courts here strained to show that they did not need foreigners to do justice for Chileans.²⁰²

This development may have been the inevitable result of Chile's argument to the U.K. government that the latter should allow Pinochet to return home because he could be put on trial in Santiago so that there was no need to extradite him to Madrid.²⁰³

Key to the ferment in Chile was the August 8, 2000 ruling of the Supreme Court that allowed investigating Judge Juan Guzmán to avoid the amnesty protections that Pinochet had erected as the price for surrendering power.²⁰⁴ The amnesty applied to human rights abuses committed prior to 1978.²⁰⁵ The court held that those who disappeared and had not been found were kidnap victims.²⁰⁶ Because the kidnapping was to be considered still in progress, it could not be covered by the amnesty.²⁰⁷

question, the principle that those who commit human rights abuses in one country cannot assume that they are safe elsewhere. That will be the lasting legacy of this case.

345 PARL. DEB., H.C. (5th ser.) (Mar. 2, 2000) 574-75, available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmhansrd/vo000302/debtext/00302-10.htm> (last visited Feb. 14, 2004).

202. Clifford Krauss, *The Chileans V. Pinochet*, N.Y. TIMES Dec. 13, 2000, at A17. An article in *The Nation* made the point this way:

Indeed, if Pinochet's London arrest was the best thing that ever happened to Chile's human rights movement, then his getting dumped back into Chile 503 days later for reason of health (in early 2000) was the second best. The British had held Pinochet just long enough to break his political hold on Chile, and they returned him home just in time to lance the boil that had festered untreated.

Marc Cooper, *Chile and the End of Pinochet*, THE NATION, Feb. 26, 2001, available at <http://www.thenation.com/doc.mhtml?i=20010226&c=1&s=cooper> (last visited Feb. 14, 2004).

203. See Anthony Faiola, *Pressures Mount to Avoid Pinochet Trial*, WASH. POST, Jan. 10, 2001.

204. See Clifford Krauss, *Pinochet Ruled No Longer Immune From Prosecution*, N.Y. TIMES, Aug. 9, 2000, at A3.

205. Cooper, *supra* note 202. See Krauss, *supra* note 204.

206. Krauss, *supra* note 204.

207. *Id.*; Cooper, *supra* note 202.

On December 1, 2000, Judge Guzmán ordered Pinochet held under house arrest so that he could be brought to trial on charges of kidnapping and murder of seventy-four individuals.²⁰⁸ While the Supreme Court dismissed the indictment on grounds that Pinochet had been denied due process because he had not been interviewed, "the court also ordered that he be deposed within 20 days—after which he could be indicted again on the same charges."²⁰⁹

January 2001, saw Pinochet submit first to medical examination and then to interrogation by Judge Guzmán.²¹⁰ On January 29, six days after questioning was completed, Judge Guzmán decided that there was no medical reason not to proceed.²¹¹ He again indicted Pinochet for the kidnapping and murder of seventy-five victims.²¹² During the ensuing months, Pinochet's lawyers successfully employed procedural delays and focused their defense on claims that he was not mentally fit to stand trial.²¹³ On July 9, 2001, an appeals court held that Pinochet's mental condition made him unfit to stand trial.²¹⁴ The New York Times described the decision and its likely impact:

The court decided that General Pinochet's health problems had contributed to a dementia so severe that he could not defend himself in court.

The ruling confirmed a growing sense among legal scholars that the prosecution of the former dictator had been losing momentum, owing to appeals and quiet political pressures from civilian and military officials in the last several months. And they predict that, if the ruling stands, General Pinochet will almost certainly be spared trial on other suspected human rights violations.

Nevertheless, the general's legal problems over more than two years have had a great impact on Chilean society — opening the way for a public discussion of the dictator's

208. Anthony Faiola, *High Court Gives Pinochet a Reprieve*, WASH. POST, Dec. 21, 2000, at A41.

209. *Id.*

210. Press Release, Amnesty International, Chile: The Long Quest for Justice Reaches a Crucial Stage AMR 22/004/2001 (Jan. 30, 2001), available at <http://web.amnesty.org/library/index/engamr220042001?open&of=eng-385> (last visited Feb. 24, 2004); *Democracy's Test*, ECONOMIST, Feb. 3, 2001.

211. *Democracy's Test*, *supra* note 210; Cooper, *supra* note 202; Press Release, Amnesty International, *supra* note 210.

212. Cooper, *supra* note 202; *Democracy's Test*, *supra* note 210; Press Release, Amnesty International, *supra* note 210; Press Release, Human Rights Watch, Re-instatement of Pinochet Charges Hailed (Jan. 29, 2001), available at <http://www.hrw.org/press/2001/01/pinochetarrest.htm> (last visited Feb. 24, 2004).

213. Clifford Krauss, *Chile's Effort to Try Pinochet Is Running Out of Steam*, N.Y. TIMES, June 25, 2001, at A3.

214. Clifford Krauss, *Chile Court Bars Trial of Pinochet*, N.Y. TIMES, July 10, 2001, at A1; Helen Hughes & Kevin G. Hall, *Appeals Court Rules Out Trial for Pinochet*, MIAMI HERALD, July 10, 2001.

legacy, weakening the power of the military over the civilian government and helping thousands of torture victims discuss and finally come to terms with their anguish.

....

Technically, the ruling yesterday is nothing more than a suspension of the charges and may be reversed if General Pinochet's health improves. But the former dictator, who wears a pacemaker, has diabetes and had several minor strokes in recent years. A week ago, he was admitted to a military hospital for treatment of diabetes, hypertension and circulatory problems.

The appeals court agreed with the defense argument that his strokes and heart problems had caused mild dementia, a condition that Chilean law says impedes a defendant from adequately defending himself.²¹⁵

This prediction proved to be correct. The following year, the Supreme Court of Chile affirmed the appellate court decision.²¹⁶ At this writing, it appears that Pinochet has avoided both extradition and prosecution not on grounds of immunity but of incompetence.

PART II: DECIDING CASES WITH FOREIGN RELATIONS IMPLICATIONS

A. *The Abstention Argument.*

Pinochet's request that he be granted habeas corpus on sovereign immunity grounds raised serious questions impinging upon U.K. foreign relations. First, the United Kingdom enjoyed cordial relations with the Pinochet regime. It recognized the junta as Chile's government only eleven

215. Krauss, *supra* note 214.

216. *Pinochet Court Battle Ends*, N.Y. TIMES, July 2, 2002, at A11; *Pinochet Deemed Unfit for Trial; Ruling Viewed as End of Legal Battle*, MIAMI HERALD, July 2, 2002. Subsequent proceedings have ended in the same way. See Larry Rohter, *Court Preserves Pinochet's Immunity*, N.Y. TIMES, Nov. 9, 2002, at A6 (Supreme Court rejects an Argentine judge's request that Pinochet be questioned); Krauss, *supra* note 214 (Appeals Court rejects request to permit Pinochet to stand trial for alleged human rights abuses). However, prosecutions of other Pinochet-era officials have proceeded. See Larry Rohter, *Chile's Leader Presses Rights Issues Softly but Successfully*, N.Y. TIMES, Sept. 7, 2003, at 3 (Chilean judges have proceedings opened on twenty-two generals "accused of abuses during the Pinochet years"); *Former Chief of Secret Police Is Indicted by Judge in Chile*, N.Y. TIMES, May 16, 2003, at A10 (leader of Pinochet's secret police was indicted "in the 1974 kidnapping of a Spanish priest who was tortured and then disappeared"). Furthermore, as recently as December 2003, efforts to resume Pinochet's prosecution have been discussed. *Interview Revives Efforts to Try Pinochet in Chile*, WASH. POST, Dec. 4, 2003, at A30 ("Chilean lawyers said [] that they would resume efforts to try former dictator Augusto Pinochet for human rights crimes, asserting that a recent television interview showed he was neither senile nor forgetful.").