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**Special Edition: A Tribute to Justice Frank Sullivan, Jr.
A Separation of Powers Perspective on *Pinochet***

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A SEPARATION OF POWERS PERSPECTIVE ON *PINOCHET*

Frank Sullivan, Jr.* **

INTRODUCTION

On October 16, 1998, the former Chilean dictator, Augusto Pinochet Ugarte, was in London undergoing medical treatment. He was arrested at the request of Spanish authorities who sought his extradition to Spain for trial on charges of human rights abuses (torture, murder, and hostage-taking) allegedly committed while he ruled Chile.

Prior to any decision having been made by the U.K. government as to extradition, Pinochet himself sought a writ of habeas corpus from the U.K. courts. Pinochet, supported by Chile, argued in part that he was entitled to immunity as a former head of state under U.K. statutory law. Spain responded in part that under principles of international law, Pinochet was not entitled to the statutory immunity he claimed.

On October 28, 1998, a three-judge divisional court held that he enjoyed immunity but refused to allow him to return to Chile pending appeal.¹ On November 25, 1998, the country's court of last resort, the Appellate Committee of the House of Lords, reversed the divisional court and held that Pinochet was not immune.² On December 17, 1998, however, the House of Lords reversed itself and vacated its first decision on grounds that one of the judges (Lord Hoffmann) who had participated in it had an impermissible conflict of

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** This article is based on a thesis submitted to fulfill a portion of the requirements of the University of Virginia Law School's LL.M. program. I want to express my appreciation to my thesis adviser, Prof. David Martin, and another UVA law professor, Prof. Paul Stephan, whose class, *International Law in the American Courts*, was of enormous help in developing the final part of my argument. I also thank the many individuals in the United Kingdom and the United States who assisted and encouraged me in this project, especially Sir Christopher Staughton and Lord Windlesham. I offer particular thanks to Robert Stevens and John Brademas for some specific encouragement. Two works, *THE PINOCHET CASE: A LEGAL AND CONSTITUTIONAL ANALYSIS* (Diana Woodhouse, ed., 2000), and Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 Mich. L. Rev. 301, 310 (1999), were particularly helpful as references. And I am deeply grateful for the comments and suggestions of the participants in a faculty colloquium at the Valparaiso University School of Law, Valparaiso, Indiana, organized by Dean Jay Conison.

1. In re an Application for a Writ of Habeas Corpus ad Subjiciendum re: Augusto Pinochet Ugarte, 38 I.L.M. 68 (Q.B. Div'l Ct. 1998) [hereinafter Divisional Court Judgment].

2. *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 4 All E.R. 897 (H.L. 1998), available at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino01.htm> (last visited Mar. 2, 2004) [hereinafter First Law Lords' Judgment] (parallel citation is [2000] 1 A.C. 61).

interest.³ Then, in a decision rendered on March 24, 1999, the House of Lords again held Pinochet not immune although on completely different, and somewhat narrower, grounds than its first decision.⁴

The effect of the holding that Pinochet was not immune was that the matter was returned to the government for a decision as to extradition. On March 2, 2000, the U.K. government announced that it had concluded that Pinochet was too ill to stand trial and would be allowed to return to Chile, rather than be extradited. Pinochet returned to Chile the same day.

The extraordinary events and issues raised during the sixteen and one-half months between Pinochet's arrest in London and his departure from the United Kingdom make the *Pinochet* case an extremely interesting and important one:

(1) As mentioned briefly above, the U.K.'s court of last resort vacated its first decision in *Pinochet* when it found that one of the judges who participated in it had an impermissible conflict of interest, making *Pinochet* an important case on judicial bias and disqualification.

(2) As mentioned briefly above, the House of Lords' third decision found that Pinochet was not entitled to immunity for very different (and much narrower) reasons than the first, making *Pinochet* an important case regarding appellate procedure.

(3) As will be discussed in detail below, *Pinochet* required judicial construction of a "double criminality" requirement of the Extradition Act,⁵ which required the government to make important determinations under §§ 7 and 12 of the Extradition Act and required a magistrate's court to make an important determination under § 9 of the Act. These facts make *Pinochet* an important case on extradition law.

(4) As will be discussed in detail below, *Pinochet* implicated important foreign relations considerations, including prior acquiescence by the U.K. government to Chilean government behavior under *Pinochet*, opposing positions taken by two allies of the United Kingdom (Chile and Spain), and extraterritorial recognition of domestic reconciliation amnesties. These facts make *Pinochet* an important case on foreign and diplomatic relations.

(5) As will be discussed in detail below, the *Pinochet* litigation featured a Spanish prosecutor pursuing in the United Kingdom a former head of state for human rights abuses alleged to have been committed in Chile.

3. Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, 1 All E.R. 577 (H.L. 1999), available at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm> (last visited Mar. 2, 2004) [hereinafter Law Lords' Hoffmann Judgment].

4. Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, 2 All E.R. 97 (H.L. 1999), available at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm> (last visited Mar. 2, 2004) [hereinafter Final Law Lords' Judgment] (parallel citation is [2000] 1 A.C. 147).

5. Extradition Act 1989, c. 33 (Eng.), 17 Halsbury's Statutes 682 (4th ed. 1999 Reissue).

These facts make *Pinochet* an important case on extraterritorial enforcement of human rights law.

(6) As will be discussed in detail below, *Pinochet* implicated important international human rights considerations: proper interpretation of the Genocide Convention,⁶ the Hostage Convention,⁷ and the Torture Convention;⁸ the extent of universal jurisdiction over international human rights abuses; and the extent to which a former head of state is entitled to sovereign immunity. These facts make *Pinochet* an important case on substantive human rights law.

This article will discuss these topics but in the context of a uniquely American inquiry: the separation of powers implications of the U.K. courts assuming jurisdiction of *Pinochet*'s case rather than allowing extradition proceedings to take their course.

While the principle of separation of powers is one of the bulwarks of the American constitutional pantheon,⁹ the role of separation of powers in the United Kingdom at the time of *Pinochet* appeared at first glance to be completely different. The head of the executive branch and all of his or her cabinet were also members of the legislature. The head of the judiciary and members of the nation's final court of appeal were also legislators.¹⁰ The head of the judiciary was also a cabinet member and head of a significant executive department—and often an active politician.¹¹ While the government advanced proposals during 2003 to modify several of these relationships in significant ways,¹² the bedrock tenet of Parliamentary supremacy would appear to prevent

6. Convention on the Prevention and Suppression of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951), available at http://www.unhcr.ch/html/menu3/b/p_genoci.htm (last visited Mar. 3, 2004) [hereinafter Genocide Convention].

7. International Convention against the Taking of Hostages of 1979, Dec. 17, 1979, 1316 U.N.T.S. 205 (1983), available at <http://www.cns.miis.edu/pubs/inven/pdfs/hostage.pdf> (last visited Mar. 3, 2004) [hereinafter Hostage Convention].

8. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (1987), available at http://www.unhcr.ch/html/menu3/b/h_cat39.htm (last visited Mar. 3, 2004) [hereinafter Torture Convention].

9. See THE FEDERALIST NOS. 47, 48 (James Madison); THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

10. Robert Stevens, *The Independence of the Judiciary: The Case of England*, 72 S. CAL. L. REV. 597, 611 (1999) [hereinafter *Case of England*]; Robert Stevens, *A Loss of Innocence?: Judicial Independence and the Separation of Powers*, 19 OXFORD J. OF LEGAL STUD. 366, 387 (1999) (an adaptation of *Case of England* giving particular attention to the impact of *Pinochet* on judicial independence) [hereinafter *Innocence*].

11. *Case of England*, *supra* note 10, at 609; *Innocence*, *supra* note 10, at 385; Lord Steyn, *The Weakest and Least Dangerous Department of Government*, Public Law 85, 89 (1997).

12. On June 6, 2003, the U.K. government announced a "package" of constitutional reforms "[a]s part of the continuing drive to modernize the constitution and public services." Press Release, Prime Minister's Office, Modernizing Government - Lord Falconer Appointed Secretary of State for Constitutional Affairs (June 12, 2003), available at <http://www.number-10.gov.uk/output/Page3892.asp> (last visited Mar. 2, 2004). Effective immediately, the Lord Chancellor's Department was abolished and replaced by a new Department of Constitutional

the emergence of the judiciary as a co-equal branch of government. This structure has led many authorities to argue that separation of powers has no place at all in the U.K. Constitution.¹³

But even though the principle of separation of powers is not and may never be constitutionally mandated in the United Kingdom, its courts have regularly invoked the principle to justify decisions.¹⁴ Indeed, there is authority for the proposition that separation of powers is an important feature of the unwritten U.K. Constitution.¹⁵ Adherence to the principle of separation of powers in U.K. courts seems to be more stringent than the actual structure the U.K. government requires.

If U.K. courts adhere to the principle of separation of powers without it being a constitutional mandate, it must be because the courts have found guidance in the values that animate the principle. My argument is not so much concerned with the extent to which the principle of separation of powers is or is not honored in the United Kingdom. My argument is certainly not that the United Kingdom should incorporate the U.S. principle of separation of powers as some type of mandatory constitutional norm. Rather, my argument is that

Affairs. *Id.* The government also announced that further reforms would be forthcoming, including an end to the previous role of the Lord Chancellor as a judge and Speaker of the House of Lords and creation of a new Supreme Court to replace the existing system of Law Lords operating as a committee of the House of Lords. *Id.* Since making the initial announcement of proposed reforms, the Department of Constitutional Affairs has published "consultation papers" on reforming the office of the Lord Chancellor (Sept. 18, 2003), available at <http://www.dca.gov.uk/consult/lcoffice/index.htm> (last visited Mar. 2, 2004), appointing judges, (July 14, 2003), available at <http://www.dca.gov.uk/consult/jacommission/judges.pdf> (last visited Mar. 2, 2004), a Supreme Court for the United Kingdom (July 14, 2003), available at <http://www.dca.gov.uk/consult/supremecourt/supreme.pdf> (last visited Mar. 2, 2004), and the future of Queens Counsel (July 14, 2003), available at <http://www.dca.gov.uk/consult/qcfuture/qc.pdf> (last visited Mar. 2, 2004). The Constitutional Affairs Committee of the House of Commons held hearings in late 2003 and early 2004 on the proposals. See Constitutional Affairs Committee: Reports and Publications, available at http://www.parliament.uk/parliamentary_committees/conaffcom/conaffcom_reports_and_publications.cfm (last visited Mar. 2, 2004).

13. O. Hood Phillips, *A Constitutional Myth: Separation of Powers*, 93 LAW Q. REV. 11 (1977).

14. See *Regina v. Sec'y of State for the Home Dep't, ex parte Fire Brigades Union*, [1995] 2 A.C. 513, 567 (Lord Mustill), stating:

It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each of their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.

Id. See also *Nottinghamshire County v. Sec'y of State for Env't*, A.C. 240, 250 (1986) (Lord Scarman) (declining judicial review of a decision of the Environment Secretary on separation of powers grounds).

15. See, e.g., *Duport Steels Ltd. v. Sirs*, 1 W.L.R. 142, 157 (H.L. 1980) (Lord Diplock) "[I]t cannot be too strongly emphasized that the British Constitution, though largely unwritten, is firmly based on the separation of powers." *Id.*

the values of institutional competence and democracy¹⁶ that animate the principle of separation of powers would have been useful to judges in the United Kingdom in the particular context of the *Pinochet* sovereign immunity claim.¹⁷

I will argue that *Pinochet* presented the U.K. courts with two discrete questions that we in the United States would consider to be separation of powers issues:

(1) Would the court impinge upon the prerogatives of the executive if it decided a case with such significant foreign relations implications without statutory authority? *Pinochet* carried with it a number of significant implications for U.K. foreign relations, the most obvious of which was choosing between the interests of mutual U.K. allies. In both the United Kingdom and the United States, courts have, at times, invoked the “political question” and “act of state” doctrines to justify abstaining from deciding questions with significant foreign relations implications. This article will review the application of the political question and act of state doctrines in cases with foreign relations implications in both countries (the appellate decisions in each country makes liberal use of the precedents of the other). And while conventional formulations of neither doctrine were precisely applicable in *Pinochet*, both suggest a separation of powers rationale for the U.K. courts to have abstained from deciding the sovereign immunity claim. I will conclude that this rationale dictated that *Pinochet*’s sovereign immunity claim was not justiciable, or at least not ripe, when presented. I will refer to this as my “abstention argument.”

My abstention argument, however, is limited in the following respect. As just noted, *Pinochet* did not wait for the U.K. government to make a decision on extradition; he immediately took his claim for discharge to the courts. Under the Extradition Act 1989,¹⁸ once the government has decided to proceed with extradition, the accused has several opportunities explicitly provided by statute for judicial review of the government’s decision. My abstention argument is that the courts should have abstained from making any decision in *Pinochet* that was not before them pursuant to explicit statutory

16. The value of judicial independence also animates the principle of separation of powers. See THE FEDERALIST NO. 78, at 230 (Alexander Hamilton) (Robert Maynard Hutchins ed., 1952) (“The complete independence of the courts of justice is peculiarly essential in a limited Constitution.”). Master Stevens has ably examined the relationship of separation of powers and judicial independence in the context of *Pinochet* and I give it little additional attention here. See *Innocence*, *supra* note 10. For a particularly vivid example of *Pinochet*’s impact on judicial independence, see Letter from Lord Irvine, Head of the Judiciary, to Lord Browne-Wilkinson, Lord of Appeal in Ordinary (Dec. 16, 1998), available at <http://www.newsrelease-archive.net/coi/depts/GLC/coi9442e.ok> (last visited Feb. 14, 2004) [hereinafter Press Notice]. The letter is fully set out *infra* note 128.

17. The argument is similar to that made by the Government in the litigation currently before the United States Supreme Court concerning whether U.S. courts lack jurisdiction to consider challenges to the detention of foreign nationals at the Guantanamo Bay Naval Base. See Brief of Petitioner at *41, *Rasul v. Bush*, 124 S. Ct. 534 (2003).

18. Extradition Act 1989.

authorized procedure. But had the court been called upon to decide Pinochet's sovereign immunity claim pursuant to the judicial review procedures of the Extradition Act, the separation of powers objections to deciding the claim would largely be eliminated. First, the executive would have had an opportunity to resolve to its satisfaction the foreign relations implications of the extradition request. Second, because the habeas and judicial review procedures are explicitly established by statute, the political legitimacy of the court to rule in this regard is unambiguous. I will attempt to justify why I find abstention appropriate with respect to Pinochet's claim but unnecessary, if not inappropriate, had the same claim been brought under the judicial review procedures of the Extradition Act.

It is to the standards for deciding Pinochet's sovereign immunity claim in that context that I now turn.

(2) Would the court impinge upon the law-making prerogatives of the legislature if it held that principles of international law take precedence over a statutory grant of immunity? In fact, the U.K. courts, to the extent they considered the question at all, found no justiciability barrier to addressing the sovereign immunity claim. And, as just noted, even if the sovereign immunity claim when first presented by Pinochet had been found to be nonjusticiable, it is possible that the courts would have been subsequently forced to deal with it in the context of judicial review of an extradition decision. As indicated in the preceding paragraph, I believe the court should address the merits of the claim when the claim is before it in such a context.

The State Immunity Act 1978¹⁹ extended immunity from prosecution to former heads of state in a way that appeared to include Pinochet's situation. The principal argument advanced by Spain was that, under prevailing international law norms, a former head of state was not entitled to immunity from prosecution for the international crimes of torture, hostage-taking, or murder. One rationale for such an argument could be that international law norms circumscribe the immunity provided by the State Immunity Act. But such a rationale would be in tension with the separation of powers notion of legislative supremacy in law-making.

I will review U.K. and U.S. authority on the relationship of international law principles to statutory enactments, each of which indicates that international law norms have been adopted by the courts of both countries as part of their respective common law. I will also refer to the work of Professors Bradley and Goldsmith and their argument that such incorporation in the United States constitutes an unconstitutional violation of separation of powers.²⁰ I will then argue that separation of powers considerations counsel against the approach of those Law Lords who analyzed Pinochet's immunity

19. State Immunity Act 1978, c. 33 (Eng.); 10 Halsbury's Statutes 757 (4th ed. 1999 Reissue).

20. Curtis Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816 (1997).

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).

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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.

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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.").

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days after it came to power in 1973.²¹⁷ There were widespread reports after Pinochet's arrest that he had been helpful to the United Kingdom in its war against Argentina over the Falkland Islands.²¹⁸ Pinochet was in the United Kingdom with the apparent express consent of the foreign ministry²¹⁹ and enjoyed vocal support from former Prime Minister Margaret Thatcher and other members of the opposition.²²⁰ The Government itself expressed no view on Pinochet's sovereign immunity claim.²²¹

Second, the claim involved a dispute between two U.K. allies. Spain requested Pinochet's extradition under the European Extradition Convention²²² and its supreme court held that Spanish courts had jurisdiction over crimes of terrorism and genocide committed abroad even if the victims were not Spanish citizens.²²³ For its part, Chile formally intervened in the House of Lords proceedings.²²⁴ Chile's Senate adopted a formal protest against Spain, charging Spain 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.²²⁵

Third, the claim involved a highly sensitive matter of Chilean domestic politics with serious international relations implications. Chile had returned to democracy through a political compromise that included amnesty for Pinochet.²²⁶ Similar amnesties were utilized at Zimbabwe's independence in 1980, by South Africa's Truth and Reconciliation Commission, and in El Salvador, Guatemala, and Argentina.²²⁷ Answering the question of whether such domestic amnesties granted as part of a legitimate national reconciliation effort should be given extra-territorial respect had implications for any nation in transition from a regime arguably guilty of human rights violations.

217. First Law Lords' Judgment, *supra* note 2, at 919 (Lord Lloyd).

218. *See, e.g., Pinochet Faces Extradition Battle*, BBC, Nov. 25, 1998, available at <http://news.bbc.co.uk/1/hi/uk/221718.stm> (last visited Feb. 24, 2004).

219. First Law Lords' Judgment, *supra* note 2, at 918 (Lord Slynn), 920 (Lord Lloyd).

220. *See, e.g., Gibb, supra* note 154.

221. *Pinochet Arrest Ruled Unlawful*, BBC, Oct. 18, 1998, available at <http://news.bbc.co.uk/1/hi/uk/203239.stm> (last visited Feb. 24, 2004).

222. European Convention on Extradition, *supra* note 61.

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

224. Final Law Lords' Judgment, *supra* note 4, at 103 (Lord Browne-Wilkinson).

225. First Law Lords' Judgment, *supra* note 2, at 922 (Lord Lloyd).

226. *Id.*

227. Ben Chigara, *Pinochet and the Administration of International Criminal Justice*, in Woodhouse, *supra* note 95, at 123-25. *See also* First Law Lords' Judgment, *supra* note 2, at 929 (Lord Lloyd) ("It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators."). There is debate over whether national reconciliation amnesties are breaches of international criminal law. *See Chigara, supra*. *See also* First Law Lords' Judgment, *supra* note 2, at 929. *Compare* Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L REV. 1, 3 (1998) (arguing that amnesties will be acceptable under international law in some situations and contradict it in others), *with* Diana F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (arguing that amnesties are contrary to international law).

Resolution of Pinochet's request that he be granted habeas corpus on sovereign immunity grounds meant the court had to answer questions such as: Should the United Kingdom deny sovereign immunity to a former head of state with whom the nation had close relations? Should the United Kingdom side with ally Spain or ally Chile? Should the United Kingdom deny extra-territorial effect to Chile's domestic amnesty program?

The values of institutional competence, executive expertise in foreign affairs, democracy, and political branch responsibility for foreign affairs decisions animate the principle of separation of powers in this arena. Because the principle of separation of powers embodies these values, I believe that the U.K. courts should not have decided Pinochet's sovereign immunity claim when presented. The courts should have abstained, dismissing the claim as non-justiciable or, perhaps, not ripe for adjudication. This would have relegated Pinochet to his rights under the Extradition Act, a procedure allowing the executive branch to make the initial determination on such matters as prior acquiescence, the competing claims of Chilean and Spanish allies, and the impact on national reconciliation efforts generally.

As mentioned in the Introduction, my abstention argument is limited. As we have seen, a "provisional warrant" process in which the U.K. government was not involved triggered Pinochet's arrest. Pinochet did not wait for the U.K. government to make a decision on extradition; he immediately took his claim for discharge to the courts. My abstention argument is that the courts should have abstained from making any decision regarding Pinochet that was not before them pursuant to explicit statutorily authorized procedure. Had the court been called upon to decide Pinochet's sovereign immunity claim in a request for habeas corpus following an order of committal or in a request for judicial review following an order of return under the Extradition Act, the separation of powers objections to deciding the claim would largely be eliminated. First, the executive would have had an opportunity to resolve to its satisfaction the foreign relations implications of the extradition request. Second, because the habeas and judicial review procedures are explicitly established by statute, the political legitimacy of the court to rule in this regard is unambiguous.

In the United Kingdom extradition context, Parliament has explicitly provided for judicial review of executive "authority to proceed" and "order for return" decisions. Explicitly conferred with such authority to make a decision with foreign relations implications, I believe the court need not, and perhaps should not, abstain from adjudicating the claim.²²⁸

228. There are obvious limits to this concept, questions so uniquely political in character (war-making power being a prime example) that courts should not decide them even upon explicit authorization of the political branches. If pressed, I might argue for abstention in a request for habeas corpus following an order of committal, deferring a decision on the merits of the sovereign immunity claim until a request for judicial review following an order of return. This is because the only review made by the executive prior to an order of committal is the authority to proceed, a cursory inquiry. See *supra* note 53.

In many respects, my abstention argument grows from the great constitutional debate over justiciability of the late 1950s and early 1960s that took place in the United States.²²⁹ The crux of the debate was over whether the court itself could employ certain "passive virtues" to decline jurisdiction in certain circumstances²³⁰ when "jurisdiction under our system is rooted in Article III and congressional enactments."²³¹ I argue for abstention from deciding Pinochet's freestanding habeas corpus claim where I believe (in accordance with the "passive virtues" school) the conflict with the foreign relations powers of the executive branch outweighs any duty to decide the case. But where the legislature has expressly provided for such a claim to be decided in the courts, as Parliament has done in the Extradition Act, I believe the case may and perhaps (in accordance with the "neutral principles" school) must be decided.

In making this argument, I follow six steps. First, I examine the speeches in the Law Lords' *Pinochet* decisions to see how they handled the foreign relations issues the case raised. Second, I examine the "political question" doctrine for its applicability here. Third, I examine the somewhat different "act of state" doctrine to the same end. Fourth, I review recent developments in the use of both the political question and act of state doctrines that appear to cut against my abstention argument. Fifth, I deal with possible criticisms of my position that the court should nevertheless proceed to adjudicate the claims such as Pinochet's when presented under the explicit procedures of the Extradition Act. I conclude by contending that the abstention argument was viable for the Pinochet situation.

B. Discussing Foreign Relations Issues in Pinochet.

None of the parties in *Pinochet* argued that the court should dismiss the case on the basis I propose. Indeed, the judges hearing the habeas claim expressed little reluctance to tackling it. The Lord Chief Justice indicated at one point that for the Home Secretary, rather than the court, to decide Pinochet's claims "could well lead to an unfortunate blurring of functions."²³²

229. See generally Gerald Gunther, *The Subtle Vices of the "Passive Virtues"*—A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1 (1964); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); Alexander M. Bickel, *The Supreme Court 1960 Term Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW (1961); LEARNED HAND, *THE BILL OF RIGHTS* (1958). I remain grateful to my law school professor, Stanley C. Finkle, for acquainting me with these materials twenty years ago. That they retain viability, see *Bush v. Gore*, 121 S.Ct. 525, 558 (2000) (Breyer, J., dissenting) (quoting *THE LEAST DANGEROUS BRANCH* 71).

230. This was the view of HAND and BICKEL, *supra* note 229.

231. Gunther, *supra* note 229, at 16. This was also the view of Wechsler, *supra* note 228.

232. Divisional Court Judgment, *supra* note 1, at 77-78. The context of the Lord Chief Justice's statement was the following: Under the Extradition Act, a magistrate must notify the Home Secretary upon issuing a provisional warrant. *Id.* at 74. The Act provides that if the

The subject of the foreign relations implications of the case was, however, a matter of debate in the speeches in a different way. Pinochet argued that, because of the United Kingdom's record of acquiescence toward Pinochet and because of the domestic political implications in Chile, Pinochet should be granted immunity and allowed to return to Chile. Pinochet also advanced the "act of state" doctrine to the same end. As I shall discuss in greater detail, the act of state doctrine holds that the courts of one sovereign country will not judge the legality of the acts of another country performed within the latter country. Pinochet contended that the act of state doctrine supported his claim to immunity because neither the validity of the warrant nor the propriety of the extradition proceedings could be determined without an investigation by the court of governmental or official acts which largely took place in Chile.

Likely because the Divisional Court recognized Pinochet's statutory claim to sovereign immunity, it did not comment on either of these arguments. The arguments were, however, discussed by the Law Lords in the *First Law Lords' Judgment* at some length and in the *Final Law Lords' Judgment* in several places.

In the *First Law Lords' Judgment*, Lord Slynn found that both the former head of state immunity provision of the State Immunity Act and customary international law supported Pinochet's immunity claim.²³³ Having reached that conclusion, he addressed the foreign relations arguments: "Factors" like the U.K.'s acquiescence to Pinochet's presence, the U.K.'s relations with Chile, and the impact of the decision on domestic politics in Chile "may be relevant on the question whether he should be extradited, but it seems to me that they are for the Secretary of State (the executive branch) and not for your Lordships on this occasion."²³⁴

This point is, of course, entirely consistent with the principle of separation of powers—that these foreign relations considerations are matters for the executive branch, not the courts. The problem with Lord Slynn's

Home Secretary "decides not to issue an authority to proceed in respect of the person to whom the warrant relates," the Home Secretary must cancel the warrant and discharge the person from custody. *Id.* at 74-75. Pinochet argued that the Home Secretary should have canceled the warrants on both of the grounds alleged, that is, sovereign immunity and the failure to allege an extradition crime. *Id.* at 76. In Pinochet's view, it should have been "obvious" to the Home Secretary that there was no extradition crime and that he was entitled to immunity as a former sovereign. *Id.*

The Lord Chief Justice firmly rejected this argument. "It is not the duty of the Home Secretary," he wrote,

to review the legal validity of a provisional warrant. If legal objections to the validity of such a warrant are raised, the Home Secretary is perfectly entitled to take the view that it is for the court and not for him to resolve what may be vexed questions of law. Any other approach could well lead to an unfortunate blurring of functions.

Id. at 77-78.

233. *First Law Lords' Judgment*, *supra* note 2, at 918 (Lord Slynn).

234. *Id.*

observation, however, is that by voting to grant Pinochet's immunity as he did, he did not leave these foreign relations issues to the executive but effectively decided them himself.

As to Pinochet's act of state argument, Lord Slynn said:

[I]n my opinion once it is established that the former head of state is entitled to immunity from arrest and extradition on the lines I have indicated, United Kingdom courts will not adjudicate on the facts relied on to ground the arrest, but in Lord Wilberforce's words, they will exercise "judicial restraint or abstention."²³⁵

Lord Slynn's reference is to Lord Wilberforce's opinion in *Buttes Gas & Oil Co. v. Hammer*,²³⁶ a case I discuss at length below involving two oil companies' dispute over drilling rights in the Persian Gulf.²³⁷ Suffice it to say here that in *Buttes Gas*, the court did abstain, dismissing the complaint and counterclaim of both companies as non-justiciable, leaving them to resolve their claims through negotiations.²³⁸ But Lord Slynn's vote was not to abstain; he voted to decide Pinochet's case on the merits.²³⁹

Lord Lloyd was also of the view that the statutory former head of state immunity provision of the State Immunity Act and common law both provided Pinochet with the immunity he sought.²⁴⁰ After discussing the statutory and common law arguments, Lord Lloyd turned to the issue of "non-justiciability," a question he termed one of "overriding importance."²⁴¹ Lord Lloyd reviewed Lord Wilberforce's analysis in *Buttes Gas*, and his conclusion was that the case raised issues "upon which [the] court could not pass."²⁴² Lord Lloyd then applied Lord Wilberforce's principle of non-justiciability to the Pinochet claim.²⁴³ He identified the claims of Spain and other states of the right to try Pinochet; Chile's demand for his return; Chile's general amnesty and the work of its Commission of Truth and Reconciliation; its supreme court's ruling that the amnesty did not apply to some of Pinochet's crimes; and he determined that issues of great sensitivity have arisen between Spain and Chile with the United Kingdom caught in the "cross fire"—if the warrant is quashed, Spain will complain; if not, Chile will complain.²⁴⁴ He concluded:

235. *Id.* at 919 (quoting *Buttes Gas & Oil Co. v. Hammer*, [1982] A.C. 888, 931).

236. *Buttes Gas & Oil Co. v. Hammer*, [1982] A.C. 888.

237. *See infra* Part II.C.

238. *Buttes Gas & Oil Co.*, [1982] A.C. at 938.

239. First Law Lords' Judgment, *supra* note 2, at 917 (Lord Slynn).

240. First Law Lords' Judgment, *supra* note 2 (Lord Lloyd).

241. *Id.*

242. *Id.* at 933-35 (Lord Lloyd).

243. *See* First Law Lords' Judgment, *supra* note 2 (Lord Lloyd).

244. *Id.*

In these circumstances, . . . by assuming jurisdiction, we would only serve to “imperil the amicable relations between governments and vex the peace of nations[.]” [W]e would be entering a field in which we are simply not competent to adjudicate. We apply customary international law as part of the common law, and we give effect to our international obligations so far as they are incorporated in our statute law; but we are not an international court. For an English court to investigate and pronounce on the validity of the amnesty in Chile would be to assert jurisdiction over the internal affairs of that state at the very time when the Supreme Court in Chile is itself performing the same task. In my view this is a case in which, even if there were no valid claim to sovereign immunity, as I think there is, we should exercise judicial restraint by declining jurisdiction.²⁴⁵

To me, Lord Lloyd’s analysis seems right on target, but his result seems unprincipled and result-driven. Instead of ordering the case dismissed, he concludes, “[i]f I had not been of the view that Senator Pinochet is entitled to immunity as a former head of state, I should have held that the principle of non-justiciability applies.”²⁴⁶ His justification for this startlingly proposition was that the “whole thrust of Lord Wilberforce’s speech was that non-justiciability is a flexible principle, depending on the circumstances of the particular case.”²⁴⁷

Lord Nicholls delivered the third speech in the *First Law Lords’ Judgment* and, as mentioned above, voted to deny Pinochet immunity.²⁴⁸ He addressed the act of state argument early in his speech.²⁴⁹ Describing it as a “common law principle of uncertain application,” he found it unnecessary to give the issue extended treatment because “there can be no doubt that it yields to a contrary intention shown by Parliament. Where Parliament has shown that a particular issue is to be justiciable in the English courts, there can be no place for the courts to apply this self-denying principle.”²⁵⁰

Lord Nicholls said that because Parliament had adopted the International Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which, by its terms, criminalizes extra-territorial torture committed by officials acting in an official capacity,²⁵¹ Parliament could not have intended for the act of state doctrine to apply in such cases.²⁵²

245. *First Law Lords’ Judgment*, *supra* note 2, at 934-35 (Lord Lloyd) (citation omitted).

246. *Id.* at 935 (Lord Lloyd).

247. *Id.*

248. *See First Law Lords’ Judgment*, *supra* note 2 (Lord Nicholls).

249. *See id.*

250. *Id.* at 938 (Lord Nicholls).

251. Torture Convention, *supra* note 8.

252. *First Law Lords’ Judgment*, *supra* note 2, at 938 (Lord Nicholls).

Invoking a statute in this way seems to me to be highly justified. While I argue that the court should have abstained and allowed the extradition proceedings to go forward, as a matter of separation of powers, the deference to the legislature Lord Nicholls shows here is entirely defensible.²⁵³

The last speech in the *First Law Lords' Judgment* came from Lord Steyn.²⁵⁴ He was also of the view that the acts Pinochet was accused of committing were not the acts of state protected by the former head of state immunity provision of the State Immunity Act; therefore, Pinochet was not entitled to statutory immunity.²⁵⁵ He, too, summarily rejected any claim of immunity as a matter of customary international law.²⁵⁶

Lord Steyn then turned to the foreign relations arguments.²⁵⁷ In language very much like Lord Slynn's, he said that "plainly" it was inappropriate for the court "to take into account such political considerations" as the U.K.'s acquiescence to Pinochet's presence, the U.K.'s relations with Chile, and the impact of the decision on domestic politics in Chile.²⁵⁸

Furthermore, he rejected Pinochet's act of state doctrine argument for three reasons.²⁵⁹ First, in his view, the court was not being asked to investigate or pass judgment on the facts alleged in the warrant or request for extradition but only to consider and decide the legal issues of immunity and act of state.²⁶⁰ Second, to employ the act of state doctrine in the way advanced by Pinochet would override what Lord Steyn characterized as "the intent of Parliament" that statutory immunity not extend to a "former head of state in respect of the systematic torture and killing of his fellow citizens."²⁶¹ This, Lord Steyn said, would stretch the act of state doctrine "far beyond anything said in the *Buttes Gas* case . . ."²⁶² Third, he viewed the act of state doctrine as having been "displaced" by Parliament's enactment of the torture prohibitions of the Criminal Justice Act and the provisions of the Hostage Act.²⁶³

In the *Final Law Lords' Judgment*, three of the Law Lords referred to the act of state doctrine in their speeches. But each treated it simply as an adjunct of the sovereign immunity doctrine itself. Because each found that sovereign immunity was not available to Pinochet, each found by necessary implication that the act of state doctrine did not apply either.²⁶⁴

253. See generally *infra* Part III.

254. *First Law Lords' Judgment*, *supra* note 2 (Lord Steyn).

255. *Id.*

256. *Id.* at 946 (Lord Steyn).

257. See *id.*

258. *Id.* at 946 (Lord Steyn).

259. *First Law Lords' Judgment*, *supra* note 2 (Lord Steyn).

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 946-47 (Lord Steyn).

264. *Final Law Lords' Judgment*, *supra* note 4, at 170 (Lord Saville), 171-72 (Lord Millett), 186 (Lord Phillips).

C. Authority Supporting the Abstention Argument.

I believe that cases decided in both the United Kingdom and the United States under the “political question” and “act of state” doctrines provide a jurisprudential basis for my claim that the U.K. courts should have dismissed Pinochet’s habeas claim in deference to the separation of powers value of institutional competence.

Political Question Cases with Foreign Relations Implications.

In *United States v. Curtiss-Wright Export Corp.*,²⁶⁵ the U.S. Supreme Court recognized “very delicate, plenary and exclusive power” on the part of the President “as the sole organ of the nation in its external relations, and its sole representative with foreign nations.”²⁶⁶ Because of the allocation of foreign relations authority to the executive, the court has found issues, such as the following, as outside the purview of judicial review:²⁶⁷ whether the credentials of foreign diplomat were valid;²⁶⁸ whether one ratifying a treaty on behalf of a foreign nation had the power to do so;²⁶⁹ whether a new nation should be recognized;²⁷⁰ whether a state of war existed;²⁷¹ whether a treaty had been broken;²⁷² and whether the President properly refused to grant a foreign air flight license.²⁷³

These cases each stand for the proposition that the “political question” doctrine precludes judicial scrutiny of controversies involving Presidential and Congressional handling of a foreign affairs matter. On this, one political scientist has written:

Separation of powers mostly limits the Court itself. Broadly speaking, most foreign policy decisions are beyond judicial review. The prime rationale is the fuzzy political question doctrine: that courts cannot consider subjects belonging by law, function, or prudence to political branches. Territorial boundaries, recognition of governments, termination of hostilities, abrogation of treaties, the legality of the Vietnam War, are all controversial instances of this judicial self-

265. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

266. *Curtiss-Wright Export Corp.*, 299 U.S. at 319 (quoting Justice Marshall).

267. The citations to the following cases were collected in *United States v. Martinez*, 904 F.2d 601 (11th Cir. 1990).

268. *In re Baiz*, 135 U.S. 403 (1890).

269. *Doe v. Braden*, 57 U.S. 635 (1854).

270. *United States v. Palmer*, 16 U.S. 610 (1818).

271. *The Divina Pastora*, 17 U.S. 52 (1819).

272. *Ware v. Hylton*, 3 U.S. 199 (1796).

273. *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

abrogation. Barriers against excessive delegation of powers by the legislative branch also are minimal.²⁷⁴

"Act of State" Doctrine.

A second doctrine, the "act of state" doctrine, also has been invoked as a restraint on judicial scrutiny in foreign relations cases where the legality of action by a foreign country within its own borders is in question. The earliest case invoking this principle that I have found is the 17th century English case, *Blad v. Banfield*.²⁷⁵ There, a Danish citizen, who had been granted exclusive trading rights in the Danish colony of Iceland by the King of Denmark, seized the property of several Englishmen trading there. Finding this to be "a case of state," the English chancery court refused to question the legality of the exclusive trading rights granted by the King of Denmark over Danish territory.

Often cited is the 1844 House of Lords case, *Duke of Brunswick v. King of Hanover*.²⁷⁶ The case involved an instrument issued pursuant to a decree of the German Diet that deprived the plaintiff of control over the Duchy of Brunswick and appointed his brother in his place.²⁷⁷ The plaintiff sought to have the instrument declared invalid in the English courts.²⁷⁸ Because the instrument had been issued by, and thus was an act of, a sovereign, the Lord Chancellor, joined by all of the other members of the court, held that the House of Lords could not "inquire into it."²⁷⁹ Although acknowledging that there were certain unique aspects of *Duke of Brunswick*, Lord Wilberforce would argue in 1982 that "the case [was] nevertheless support . . . [for] a principle of non-justiciability by the English courts of a certain class of sovereign acts."²⁸⁰

The leading early U.S. act of state case is the 1897 Supreme Court decision *Underhill v. Hernandez*.²⁸¹ In that case, an American businessman working in Venezuela sought compensation in U.S. courts for damages he and his business suffered when he became embroiled in a revolution there.²⁸² Chief Justice Fuller rejected the claim with a formulation of the act of state doctrine used in almost every such case:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one

274. J. Woodford Howard, Jr., *Foreign Affairs and Foreign Policy*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 307 (Kermit L. Hall ed., 1992).

275. *Blad v. Banfield*, 3 Swan. 604 (Ch. 1674), 36 Eng. Rep. 992 (1904).

276. *Duke of Brunswick v. King of Hanover*, 9 Eng. Rep. 993 (1848).

277. *Id.*

278. *Id.*

279. *Id.* at 1000 (Lord Chancellor Cottenham).

280. *Buttes Gas & Oil Co.*, [1982] A.C. at 932-33 (Lord Wilberforce).

281. *Underhill v. Hernandez*, 168 U.S. 250 (1897).

282. *Id.* at 253-54.

country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.²⁸³

A series of cases with similar facts in both the United States and the United Kingdom have used similar act of state doctrine language to decline to examine the legality of acts of foreign states. For example, in *American Banana Co. v. United Fruit Co.*,²⁸⁴ where Costa Rican soldiers seized an American banana plantation business in Panama in the aftermath of Panama's war of independence from Columbia, the Supreme Court refused to hold the Costa Rican action illegal. In *Luther v. James Sager & Co.*,²⁸⁵ involving competing claims to a quantity of plywood that the defendants had purchased from a Russian factory after it had been nationalized by the Soviet government, the U.K. Court of Appeal refused to find the Soviet action illegal. Two other Russian Revolution cases, *Princess Paley Olga v. Wiesz*²⁸⁶ in the United Kingdom and *United States v. Belmont*²⁸⁷ in the United States also upheld nationalization action in the Soviet Union.

"Act of State" as a Separation of Powers Doctrine.

Here I need to make an important point. It is clear that the political question doctrine is a doctrine of justiciability. A court will not adjudicate such questions because to do so would impinge upon the constitutional prerogatives of the political branches of government. But is the act of state doctrine a doctrine of justiciability as well? Consider this language from the *Duke of Brunswick* case: the claim is that "the instrument was contrary to the laws of Hanover and Brunswick, but, notwithstanding that it is so stated, still if it is a sovereign act, then, whether it be according to law or not according to law, we cannot inquire into it."²⁸⁸ To the same effect is this language from the *American Banana* case: To apply the law of the forum jurisdiction rather than that of the place where the acts occurred "not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."²⁸⁹

283. *Id.* at 252.

284. *See* *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 327 (1909).

285. *See* *Luther v. James Sager & Co.*, 3 K.B. 532 (C.A. 1921).

286. *Princess Paley Olga v. Wiesz*, 1 K.B. 718 (C.A. 1929).

287. *United States v. Belmont*, 301 U.S. 324 (1937).

288. *Duke of Brunswick v. King of Hanover*, 9 Eng. Rep. 993, 1000 (1848) (Lord Chancellor Cottenham).

289. *American Banana*, 213 U.S. at 356.

The implications of these two quotations—and there are many cases that use similar language—is that the act of state doctrine is simply a formulation of the doctrine of sovereign immunity applicable where the acts of a sovereign performed in that sovereign's country are called into question in another jurisdiction. As we have seen, Pinochet attempted to invoke the act of state doctrine in precisely this way in making his sovereign immunity claim:²⁹⁰ the State Immunity Act provides former heads of state immunity with respect to “acts performed . . . in the exercise of the functions of a head of state”;²⁹¹ under the act of state doctrine, the U.K. courts were required to assume the legality of his actions in Chile; as such, he was entitled to the immunity conferred by the statute.

But the act of state doctrine has a separation of powers pedigree as well. Starting at least with the case of *Oetjen v. Central Leather Co.*,²⁹² a 1918 U.S. Supreme Court case, the court used separation of powers rationale, as well as sovereign immunity considerations, in refusing to question the legality of property confiscated by ultimately successful Mexican revolutionaries. *Oetjen* is one of the most frequently cited act of state cases both in the United States and in the United Kingdom.

Additional support for the act of state doctrine as a separation of powers principle comes from the post-World War II era *Bernstein* litigation.²⁹³

290. First Law Lords' Judgment, *supra* note 2 (Lord Steyn).

291. *Id.* at 946 (Lord Steyn).

292. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918).

293. See *Bernstein v. N. V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

The *Bernstein* litigation involved two cases. In the first, *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947), Judge Learned Hand held the court strictly limited by the act of state doctrine to recognizing the validity of the Nazi actions alleged. Hand acknowledged that the court would not adhere to the act of state doctrine if “the foreign rights and liabilities [are] abhorrent to the moral notions of its own state.” *Id.* at 249. But it was up to the government, not the court, to determine whether the Nazi behavior at issue was abhorrent to American moral notions. *Id.* Judge Hand then examined American regulations for occupied post-war Germany and found no provision for settling claims like Bernstein's. *Id.* Nor did he find any American executive branch assent to hearing claims like Bernstein's in America's prosecution of Nazi war crimes at Nuremberg. *Id.* Unable to find that the executive branch waived application of the act of state doctrine in this case, Judge Hand ordered Bernstein's claim dismissed. *Id.*

Soon thereafter, Bernstein's claim with respect to his other steamship line also reached the Second Circuit. Following *Van Heyghen*, the district court's dismissal was affirmed. *Bernstein v. N. V. Nederlandsche-Amerikaansche*, 173 F.2d 71 (2d Cir. 1949). It was following that decision that the State Department issued a press release announcing that it was the administration's policy,

with respect to claims asserted in the United States for restitution of property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials involved in Nazi forced transfers, to free American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Bernstein v. N. V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954). In the face of this pronouncement, the court amended its mandate to remove any restrictions imposed by the act of state doctrine. *Id.*

Bernstein attempted to recover in a U.S. court two steamship companies, which he contended Nazi authorities pressured him to sign over to others with threats of indefinite imprisonment, torture, and death. Under the act of state doctrine, the court would have recognized the validity of the Nazi actions alleged. But the State Department announced that it was the administration's policy that American courts were free from any restraint to pass upon the validity of the acts of Nazi officials. On this basis, the litigation proceeded.

If the act of state doctrine is simply a species of broader sovereign immunity principles, the U.S. State Department could not waive it; after all, it is a foreign state's immunity that is at stake. But if the act of state doctrine is a matter of separation of powers—that courts will not intrude upon the prerogatives of the executive—then in logic there is no reason why the executive should not be free to disclaim any impingement on its prerogatives.²⁹⁴ Thus *Bernstein* appears to establish that the act of state doctrine is grounded in separation of powers, not sovereign immunity considerations.

I think all of this was made clear in an important U.S. Supreme Court case, *Banco Nacional de Cuba v. Sabbatino*.²⁹⁵ *Sabbatino* was a Cold War case reminiscent of the Latin American and Russian Revolution confiscation cases. At issue were the proceeds of sugar that had been sold after the Castro regime's nationalization of Cuba's sugar industry. There is a great deal in *Sabbatino* relevant to our discussion and I will return to it in Part III of this article. The present discussion focuses on its analysis of the act of state doctrine.

Justice Harlan rejected broad claims that international law or American constitutional law compels the act of state doctrine. At the same time, he concluded that the rule is binding on federal and state courts. In the end, the act of state doctrine “depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.”²⁹⁶ This will in turn depend upon the extent to which the political branches have acted in a particular area of international law, the degree of political sensitivity involved, and whether the government which perpetrated the challenged act of state is no longer in existence (to wit, *Bernstein*).²⁹⁷

But although Justice Harlan's formulation was flexible, he applied it very narrowly.

[R]ather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of

294. I say there is no such impingement as a matter of logic. There could nevertheless be constitutional limitations on such waivers.

295. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

296. *Id.* at 427-28.

297. *Id.* at 428.

property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.²⁹⁸

Buttes Gas & Oil Co. v. Hammer.

This brings me to *Buttes Gas & Oil Co. v. Hammer*, the 1982 decision of the House of Lords mentioned in several of the *Pinochet* speeches.²⁹⁹ The *Buttes Gas* litigation grew out of a dispute between two American oil exploration companies over drilling rights to an area of the Persian Gulf. One claimed its rights by grant from one of the Arab Emirates; the other by grant from a different Emirate. Crucial to the claim of *Buttes Gas* was a decree of sovereignty over the disputed area of the Gulf that Occidental claimed had been unlawfully and fraudulently backdated. There were also claims by Iran and the United Kingdom that further complicated the litigation.

Buttes Gas argued that the act of state doctrine dictated that the court not examine the legitimacy of the allegedly backdated decree. Occidental responded that exceptions to the act of state doctrine for principles of international law and extraterritoriality applied here and so the court was permitted to examine the legitimacy of the decree.

Lord Wilberforce delivered the court's judgment. He rejected Occidental's arguments on these two points; however, making a point central to my argument, he said that the act of state doctrine alone was not enough to justify deciding this issue in *Buttes Gas*'s favor: "I do not regard the case against justiciability of the instant disputes as validated by the rule itself. If it is to be made good it must be upon some wider principle."³⁰⁰ And that wider "principle, if existing," Lord Wilberforce continued, would not be a variation of the act of state doctrine but a principle of "judicial restraint or abstention."³⁰¹

The question he addresses is this: When a court is faced with disputes involving actions of foreign governments, should it apply the act of state doctrine as a rule of decision so that, once applied, the outcome is dictated? Or is the act of state doctrine really a species of the broader doctrine that courts should not attempt to decide some questions. Lord Wilberforce believes the latter is the case:

298. *Id.*

299. First Law Lords' Judgment, *supra* note 2, at 919 (Lord Slynn), 933-34 (Lord Lloyd), 937 (Lord Nicholls), at 946-47 (Lord Steyn).

300. *Id.* at 931

301. *Buttes Gas & Oil Co.*, [1982] A.C. at 931.

In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalized in the law of the United States of America which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process.³⁰²

He reaches this conclusion by a survey of many of the English and American cases discussed above, including *Underhill* and *Oetgen*. He concludes his historical review with the following characterization of *Sabbatino*:

[I]nternational law does not require application of the doctrine of "act of state." Granted this, and granted also, as the respondents argue, that United States' courts have moved towards a "flexible" use of the doctrine on a case to case basis, there is room for a principle, in suitable cases, of judicial restraint or abstention.³⁰³

He then turned to a discussion of cases in U.S. courts in which *Occidental* and *Buttes Gas* had also litigated the exploration question. Two federal district courts had dismissed the case; both were affirmed on appeal.³⁰⁴ While the case was pending in the district court, Lord Wilberforce noted, the U.S. State Department submitted a letter to the court which said in part:

We believe that the political sensitivity of territorial issues, the need for unquestionable U.S. neutrality and the harm to our foreign relations which may otherwise ensue, as well as the evidentiary and jurisprudential difficulties for a U.S. court to determine such issues, are compelling grounds for judicial abstention.

We do not believe that this judicial self-restraint should turn on such analytical questions as whether the so-called Act of State doctrine which is traditionally limited to governmental actions within the territory of the respective state can apply to an exercise of disputed territorial jurisdiction. It rather follows from the general notion that national courts should not assume the function of arbiters of territorial conflicts

302. *Id.* at 932.

303. *Id.* at 934.

304. *See Occidental of Umm Al Qaywayn, Inc. v. Cities Serv. Oil Co.*, 396 F. Supp. 461 (W.D. La. 1975), *aff'd sub nom. Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless Colocotronis*, 577 F.2d 1196 (5th Cir. 1978); *Occidental Petroleum Corp. v. Buttes Gas and Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950.

between third powers even in the context of a dispute between private parties.³⁰⁵

Lord Wilberforce acknowledged that constitutional notions of separation of powers differentiate the United States and United Kingdom and also that the U.K. government (unlike the U.S. government) had made no request for judicial abstention in the Occidental-Buttes Gas dispute.³⁰⁶ "But," he said, "the ultimate question [of] what issues are capable, and what are incapable, of judicial determination must be answered in closely similar terms in whatever country they arise, depending, as they must, upon an appreciation of the nature and limits of the judicial function."³⁰⁷ Deciding the Occidental-Buttes Gas litigation, Lord Wilberforce found, would require the court to determine "inter-state issues" and "issues of international law" beyond the limits of the judicial function.³⁰⁸ "Leaving aside all possibility of embarrassment in our foreign relations," he said, "there are . . . no judicial or manageable standards by which to judge these issues . . ." ³⁰⁹ Because both Buttes Gas's claim and Occidental's counterclaim could not "succeed without bringing to trial non-justiciable issues[,]" the court held that they could not "be entertained."³¹⁰

Summary.

In summary, the political question doctrine has long stood for the proposition that courts will not adjudicate foreign relations questions within the prerogative of the political branches. And while the act of state doctrine has been employed to decide a species of sovereign immunity claims, there is strong authority from both U.S. and U.K. courts, that it, like the political question doctrine, is also a doctrine of justiciability grounded in the institutional competence value that animates the separation of powers principle.

D. Authority Raising Questions About the Abstention Argument.

The authority discussed in the preceding section supports the abstention argument, i.e., that the U.K. courts should have abstained on separation of powers grounds from deciding Pinochet's habeas claim. They identify the institutional competence, if not constitutional preeminence, of the executive in foreign relations matters in holding that the issues presented are not

305. *Buttes Gas & Oil Co.*, [1982] A.C. at 936 (quoting *Occidental of Umm al Qaywayn*, 577 F.2d at 1204 n.13).

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at 938.

appropriate for judicial review. But at least since *Baker v. Carr*,³¹¹ there is authority that the judiciary can play a role in at least some cases with foreign relations implications.

Baker v. Carr.

Baker v. Carr, of course, was the famous case that opened the door for the Supreme Court's equally famous "one person-one-vote" decision in *Reynolds v. Sims*.³¹² At issue in *Baker v. Carr* was whether, under the political question doctrine, the court had the power to review state legislative apportionment schemes. In the course of concluding that some political questions were justiciable, Justice Brennan analyzed the limits of court authority in "representative" political question cases.³¹³ Among the cases he reviewed were those with foreign relations implications. Citing *Oetjen*, he began by saying that "[t]here are sweeping statements to the effect that all questions touching foreign relations are political questions."³¹⁴ He acknowledged that "resolution of such issues frequently turn on standards that defy judicial application, or involved the exercise of a discretion demonstrably committed to the executive or legislature."³¹⁵ Further, "many such questions uniquely demand single-voiced statement of the Government's views." But it would be a mistake, Justice Brennan argued, "to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."³¹⁶

A court might well take on a foreign relations question depending upon "the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action,"³¹⁷ Justice Brennan wrote. He presented several examples he felt supported this proposition.³¹⁸ In any

311. *Baker v. Carr*, 369 U.S. 186 (1962).

312. *Reynolds v. Sims*, 377 U.S. 533 (1964).

313. *Baker*, 369 U.S. at 211.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 211-12.

318. Here is Justice Brennan's analysis:

For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question "governmental action . . . must be regarded as of controlling importance," if there has been no conclusive "governmental action" then a court can construe a treaty and may find it provides the answer. Compare *Terlinden v. Ames*, 184 U.S. 270, 285, with *Society for the Propagation of the Gospel in Foreign Parts v. New Haven*, 8 Wheat. 464, 492-495. Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law. Compare *Whitney v. Robertson*, 124 U.S. 190, with *Kolovrat v. Oregon*, 366 U.S. 187.

While recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called "a

event, he uses the examples of court decision-making in the foreign relations area, together with examples drawn from other political question cases, to pronounce the now-familiar test for justiciability of political questions:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.³¹⁹

After *Baker v. Carr*, courts in the United States had a much wider array of tools with which to address cases implicating foreign relations. While the political question doctrine still recognized the allocation of foreign relations responsibilities to the executive and legislative branches, it was now formulated in a way that allowed courts to decide political questions. Finding a political question touching on foreign relations non-justiciable had become a much more complicated exercise.

republic of whose existence we know nothing," and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area. Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them seeking, for example, to determine whether the situation is such that statutes designed to assure American neutrality have become operative. *The Three Friends*, 166 U.S. 1, 63, 66. Still again, though it is the executive that determines a person's status as representative of a foreign government, *Ex parte Hitz*, 111 U.S. 766, the executive's statements will be construed where necessary to determine the court's jurisdiction, *In re Baiz*, 135 U.S. 403. Similar judicial action in the absence of a recognizably authoritative executive declaration occurs in cases involving the immunity from seizure of vessels owned by friendly foreign governments. Compare *Ex parte Peru*, 318 U.S. 578, with *Mexico v. Hoffman*, 324 U.S. 30, 34-35.

Baker, 369 U.S. at 212-13 (footnotes omitted).

319. *Id.*

Goldwater v. Carter.

The difficulty created by *Baker v. Carr* of deciding which foreign relations cases are justiciable and which are not was well illustrated by *Goldwater v. Carter*.³²⁰ As part of the President's decision to recognize the Chinese government in Beijing, the President terminated the U.S. treaty with the government of Taiwan. Senator Goldwater and certain other members of Congress claimed that the President's action in terminating the treaty with Taiwan deprived them of their constitutional role with respect to treaties. Six members of the court voted to dismiss Senator Goldwater's complaint, but there was no definitive answer to whether the case presented a non-justiciable political question.³²¹ Although that was the position taken in an opinion written by Justice Rehnquist, his viewpoint mustered only four votes.³²²

Justice Rehnquist contended that the case presented a non-justiciable political question for two reasons. First, the case involved "the extent to which the Senate or the Congress is authorized to negate the action of the President."³²³ He argued that because there was no "constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties,"³²⁴ the case "must surely be controlled by political standards"³²⁵ rather than court judgment.³²⁶ Second, the foreign relations aspects of the case made the reason for holding it a non-

320. See *Goldwater v. Carter*, 444 U.S. 996 (1979).

321. *Goldwater*, 444 U.S. at 996. These six justices voted to grant certiorari, vacate the judgment of the Court of Appeals, and remand the case to the district court with instructions to dismiss the complaint. A discussion of their reasoning follows in the text. In addition, Justices White and Blackmun joined the grant of certiorari but would have set the case for argument and given it plenary consideration. Justice Brennan also joined the grant of certiorari but would have affirmed the judgment of the Court of Appeals. A discussion of his reasoning follows in the text.

322. *Id.* Justice Powell voted to dismiss on grounds that the complaint was not ripe for judicial review. *Id.* Justice Powell's argument was that

a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.

Id. at 997 (Powell, J. concurring). Justice Marshall voted to concur in the result without further explanation. *Id.* at 996.

323. *Goldwater*, 444 U.S. at 1002.

324. *Id.* at 1003.

325. *Id.*

326. *Id.* (quoting *Dyer v. Blair*, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975)).

justiciable political question "even more compelling."³²⁷ Because the Taiwan treaty included a commitment to use military force in the defense of a foreign government if attacked, Justice Rehnquist maintained, its termination affected "a situation entirely external to the United States, and falling within the category of foreign affairs."³²⁸

To Justice Brennan, Justice Rehnquist's analysis "profoundly misapprehend[ed] the political-question principle as it applies to matters of foreign relations."³²⁹ To Justice Brennan, *Baker v. Carr* held that "the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been 'constitutional[ly] commit[ted].'"³³⁰ The court was not being asked to review a foreign policy judgment here, he said, but rather an "antecedent question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power. The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts."³³¹

Tel-Oren v. Libyan Arab Republic.

The malleability of the political question doctrine was particularly well illustrated³³² by the 1984 case of *Tel-Oren v. Libyan Arab Republic*.³³³ A group of survivors and representatives of persons murdered in an armed attack in 1978 on a civilian bus in Israel sued Libya, the PLO, the Palestine

327. *Goldwater*, 444 U.S. at 1003.

328. *Id.* at 1003-04 (quoting *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936)).

329. *Id.* at 1006.

330. *Id.* (quoting *Baker*, 369 U.S. at 211-213, 217).

331. *Id.* at 1007 (citation omitted).

332. To the same effect, compare *United States v. Martinez*, 904 F.2d 601, 602 (11th Cir. 1990) (where a criminal defendant sought a determination that an electronic device which he had been convicted of exporting was not a "defense article" under the Arms Export Control Act, held the request involved "Presidential and Congressional handling of foreign affairs matter" such that the political question doctrine precluded judicial review), and *Aktepe v. United States*, 105 F.3d 1400 (11th Cir. 1997) (where Turkish Navy sailors sought damages for personal injury and death when two missiles fired from a U.S. Navy aircraft carrier accidentally struck their vessel during NATO training exercises, dismissed the claims as presenting a non-justiciable political question), with *Lamont v. Woods*, 948 F.2d 825, 832 (2d Cir. 1991) (where plaintiffs contended that grants under a U.S. foreign aid program that were used to support Israeli schools and schools affiliated with Roman Catholic religious orders violated the Establishment Clause, held that that adjudication of the plaintiffs' claim did not amount to "judicial usurpation of the political branches' constitutional powers to formulate foreign policy"), and *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc) (where a U.S. citizen sought damages suffered from U.S. military operation of a large military training facility for Salvadoran soldiers on his private ranch in Honduras without his permission or any lawful authority, held, over the dissents of Judges Bork, Scalia, and Starr, that the political question doctrine was not implicated).

333. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (per curiam).

Information Office, the National Association of Arab Americans, and the Palestine Congress of North America. Their complaint, alleging multiple torts in violation of international law, U.S. treaties, U.S. criminal law, and common law had been dismissed by the District Court for lack of subject matter jurisdiction and as barred by the applicable statute of limitations. Each of the three judges on the panel also voted to dismiss³³⁴ but for very different reasons. Two of the judges—Judge Harry Edwards and Judge Robert Bork—engaged in a lengthy debate over whether the Alien Tort Statute,³³⁵ provided a cause of action for the plaintiffs or was merely jurisdictional.³³⁶ All three of the judges also examined the underlying justiciability of the claim as a matter of separation of powers in general and political question doctrine in particular. For purposes of our discussion here, the views of the judges on justiciability are relevant; however, I will return later to the Alien Tort Statute debate at several points.

Judge Edwards, following the view of Justice Brennan in *Goldwater v. Carter*, found no political question impediment to addressing the merits of the claim.³³⁷ As noted above, Justice Brennan described the political question doctrine in the foreign relations context as “restrain[ing] courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been constitutional[ly] commit[ted].”³³⁸ Finding no “exercise of foreign policy judgment” by the executive branch subject to review in this case, Judge Edwards found no justiciability bar to review.³³⁹

To Judge Bork, this litigation was resolvable on the statutory issue alluded to above. But, he said, “if it were necessary,” he “might well hold that the political question doctrine bars this lawsuit, since it is arguable . . . that this case fits several of the categories listed in *Baker v. Carr*.”³⁴⁰ To that end, he argued that the political question doctrine and the act of state doctrine are the principal doctrinal limitations on judicial power in the international law area required by the separation of powers principle that the conduct of foreign relations is committed to the political branches. Judge Bork worked through

334. *Id.* at 775.

335. 28 U.S.C. § 1350.

336. At issue was the proper interpretation of the Alien Tort Statute. Judge Edwards argued for following *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), discussed *infra* Part III.D-Customary International Law in the United States; Judge Bork argued to the contrary.

A highly visible attempt to invoke the Alien Tort Statute is provided by *Al Odah v. United States*, 321 F.3d 1134, 1144 (D.C. Cir. 2003), *cert. granted*, 124 S.Ct. 534. In addition to seeking relief explicitly in the nature of a habeas corpus, detainees held by the U.S. government at Guantanamo Bay have sought injunctions and declaratory judgments under the statute, alleging that the United States is confining them in violation of treaties and international law. See note 17 *supra*.

337. *Tel-Oren*, 726 F.2d at 776.

338. *Goldwater v. Carter*, 444 U.S. 996, 1006 (1979).

339. *Tel-Oren*, 726 F.2d at 798.

340. *Id.* at 803.

the act of state cases, highlighting the growing emphasis on separation of powers considerations. Quoting *Sabbatino*, he said that "[t]he Court emphasized the separation of powers basis for the doctrine when it observed that the doctrine's 'continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.'"³⁴¹ He also pointed out that the "courts of appeals have likewise emphasized the decisive role played, in applying the doctrine, by the two relevant aspects of separation of powers: the potential for interference with the political branches' functions and the fitness of an issue for judicial resolution."³⁴²

Judge Bork then argued that the "same separation of powers principles are reflected in the political question doctrine."³⁴³ Giving a quite different read to *Baker v. Carr* than Judge Edwards, Judge Bork cited it for the proposition that "[q]uestions touching on the foreign relations of the United States make up what is likely the largest class of questions to which the political question doctrine has been applied."³⁴⁴

To Judge Robb, the case clearly presented a non-justiciable political question, he found an "inherent inability of federal courts to deal with cases such as this one."³⁴⁵ His analysis rested on five principal points. First, he argued that federal courts are not in a position to determine the international status of terrorist acts, given that there are frequently diplomatic efforts "to dignify the violence of terrorist atrocities . . ." ³⁴⁶ And given the complex "web" of international terrorism, it would be even more problematic for a court to assess "individual responsibility for any given terrorist outrage."³⁴⁷

Second, Judge Robb argued that this case involved "questions that touch on sensitive matters of diplomacy that uniquely demand a singlevoiced statement of policy by the Government."³⁴⁸ Of particular concern to Judge Robb was the necessity, if this case were found to be justiciable, of taking a position on the international status of the PLO, which had not at the time of this case been recognized by the U.S. government. "The courts must be careful to preserve [the President's] flexibility"³⁴⁹ to deal or not deal with terrorists. On the other hand, taking on such cases might well publicize and even "legitimize

341. *Id.* at 802 (per Bork, J.) (quoting *Sabbatino*, 376 U.S. at 427-28.)

342. *Tel-Oren*, 726 F.2d at 802-03 (per Bork, J.) (citing *Int'l Assoc. of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358-61 (9th Cir. 1981), *cert. denied* 451 U.S. 1163 (1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292-93 (3d Cir. 1979); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77-79 (2d Cir.), *cert. denied* 434 U.S. 984 (1977); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 605-08 (9th Cir. 1976)).

343. *Tel-Oren*, 726 F.2d at 803.

344. *Id.*

345. *Id.* at 823.

346. *Id.*

347. *Id.*

348. *Id.* at 824.

349. *Id.* at 825.

that which ought to remain hidden and those who deserve the brand of absolute illegitimacy."³⁵⁰

Judge Robb also argued that questions connected to the activities of terrorists have historically been within the exclusive domain of the executive and legislative branches and that the pragmatic problems associated with proceedings designed to bring terrorists to the bar are numerous and intractable. Finally, he argued that the possible consequences of judicial action in this area were injurious to the national interest. Although this particular case was easy in its contrast between good and evil, "not all cases of this type will be so easy Each supposed scenario carries with it an incredibly complex calculus of actors, circumstances, and geopolitical considerations. The courts must steer resolutely away from involvement in this manner of case."³⁵¹

Act of State Cases.

The political question cases just discussed illustrate that, at least since *Baker v. Carr*, judges and courts have been able to advance arguments to reach the merits of claims with foreign relations implications. This has also been the case with act of state doctrine cases. To illustrate, I have selected a U.K. tax case, *Oppenheimer v. Cattermole*³⁵² and a U.S. case, *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*³⁵³

Oppenheimer, a Jewish refugee from Nazi Germany, was naturalized a British citizen in 1948. After the war, he began to receive a German pension. If—but only if—he was a dual national, continuing to hold German as well as British citizenship, he would be able to take advantage of agreements between Britain and Germany limiting double taxation.

At the outset of the litigation, it appeared that the answer would turn on whether Britain recognized the validity of a 1941 Nazi statute revoking the citizenship of any Jew who fled Germany. The act of state doctrine appeared to require that the courts recognize the validity of the statute but, in addition to the moral consequences of such a conclusion, it would deprive Oppenheimer of the benefit of the agreements against double taxation. However, as the litigation progressed, the parties realized that the German Constitutional Court in 1968 had declared the 1941 Nazi statute to be void *ab initio*³⁵⁴ and so as a matter of German law, Oppenheimer's tax status did not turn on the validity of the 1941 enactment.

The House of Lords decided *Oppenheimer*; each of the five judges delivered speeches and each agreed that Oppenheimer's tax status did not turn on the validity of the 1941 enactment. But perhaps because the opinions in the

350. *Id.*

351. *Id.* at 825-27.

352. See *Oppenheimer v. Cattermole*, [1976] A.C. 249.

353. See *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp.*, 493 U.S. 400 (1990).

354. *Oppenheimer*, [1976] A.C. at 267-68 (Lord Cross).

lower courts had addressed the issue, four of the Law Lords expressed opinions on the issue. The lead speech of Lord Cross, with which Lords Hodson and Salmon agreed, held that it was "part of the public policy of this country that our court should give effect to clearly established rules of international law."³⁵⁵ Lord Cross acknowledged that it was often difficult to identify an applicable rule of international law and that in any event a judge should be reluctant not to give effect to the law of a foreign state in a matter over which it has jurisdiction.

But, what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.³⁵⁶

Lord Pearson took a point of view closer to Judge Hand's in the first *Bernstein* case.³⁵⁷ He would have recognized the validity of the 1941 act, employing the following analysis:

When a government, however wicked, has been holding and exercising full and exclusive sovereign power in a foreign country for a number of years, and has been recognised throughout by our government as the government of that country, and some legislative or executive act of that government, however unjust and discriminatory and unfair, has changed the status of an individual by depriving him of his nationality of that country, he does in my opinion effectively cease to be a national of that country and becomes a stateless person unless and until he has acquired some other nationality (as the appellant Oppenheimer did in this case). Suppose then that the wicked government is overthrown. I do not think it would be right for the courts of this country on their own initiative to disregard that person's change of status which in fact had occurred and deem that it never had occurred. A decision on that fictitious basis might be no kindness to the person concerned, who might be quite content with his new status and unwilling to have his former status artificially

355. *Oppenheimer*, [1976] A.C. at 278 (Lord Cross).

356. *Id.*

357. *See Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947), discussed *supra* note 293.

restored to him. The problem of effecting any necessary rectification of the position created by the unjust decree of the wicked government is a problem for the successor government of the foreign country, and we know that in the present case the problem was dealt with by the successor government of West Germany by its Basic Law of 1949. But if the successor government had not dealt with the problem, I do not see that the courts of this country would have had any jurisdiction to restore to the person concerned his lost nationality of the foreign country.³⁵⁸

Indeed, even Lord Cross had acknowledged certain practical problems with his approach. He noted that many persons affected by the 1941 decree would likely not have wished to remain German nationals and that other countries, despite loathing the 1941 act, had given it effect for that reason.³⁵⁹

Of course, given the fact that German law at the time the Law Lords confronted Oppenheimer's case did not require any opinion on the validity of the 1941 Nazi statute, the court need not have rendered any opinion at all. This was the view taken by the final member of the committee, Lord Hailsham. In arguing that the court should express no opinion, he cited authority to the effect that "only in a relatively small proportion of cases is the possession of dual nationality an advantage There would seem small value in adding hardship to injustice in order to emphasize the cruel nature of the injustice." And he pointed out that U.K. law might well "not give a single and unequivocal answer to the problems raised by the unjust and discriminatory legislation of a foreign country."³⁶⁰

In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, an unsuccessful bidder for a construction contract with the Nigerian government sought damages from the successful bidder under various U.S. statutes, alleging that the successful bidder had obtained the contract by bribing Nigerian officials.³⁶¹ The defendant sought dismissal of the complaint, contending that the "act of state" doctrine precluded judicial inquiry into the motivation of a sovereign act that would result in embarrassment to the sovereign, or constitute interference with the conduct of U.S. foreign policy.³⁶²

The U.S. Supreme Court rejected the argument, finding that the act of state doctrine did not apply because nothing in the complaint required a court

358. *Oppenheimer*, [1976] A.C. at 265-66 (Lord Pearson).

359. *Id.* at 278 (Lord Cross) (citing Dr. F.A. Mann, *The Present Validity of Nazi Nationality Laws*, 89 L.Q.R. 194 (1973)).

360. *Oppenheimer*, [1976] A.C. at 263 (Lord Hailsham).

361. The defendant had been found guilty under the Foreign Corrupt Practices Act of 1977, 91 Stat. 1495, as amended, 15 U.S.C. § 78dd-1.

362. *W.S. Kirkpatrick & Co. v. Entl. Tectonics Corp.*, 493 U.S. 400, 402 (1990).

to declare invalid the official act of a foreign sovereign.³⁶³ But the defendant in *Kirkpatrick* tried to invoke the "act of state" doctrine as a doctrine of abstention in much the same way as I argue for abstention in *Pinochet*. It contended that the policies underlying our act of state cases—"international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations"³⁶⁴—were implicated by the case such that the court should abstain from deciding it.

Justice Scalia, speaking for a unanimous court, resoundingly rejected this argument:

It is one thing to suggest, as we have, that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked; it is something quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine (or, as the United States puts it, unspecified "related principles of abstention") into new and uncharted fields.

The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the present case because the validity of no foreign sovereign act is at issue.³⁶⁵

Summary.

My abstention argument holds that U.K. courts should have abstained from deciding *Pinochet's* habeas claim when presented in deference to the executive's prerogative in the field of foreign relations. This argument is supported by the general principles of the political question and act of state doctrine. But the opinions of Justice Brennan in *Baker v. Carr* and *Goldwater v. Carter*, of Judge Edwards in *Tel-Oren*, and of Lord Cross in *Oppenheimer* seem to provide license to courts to reach the merits of such claims. And *Kirkpatrick* suggests that except in the narrowest of circumstances it must.

363. *Id.* at 405.

364. *Id.* at 408.

365. *Id.* at 409-10.

On the other hand, the reasoning of Justice Rehnquist in *Goldwater v. Carter*, of Judges Bork and Robb in *Tel-Oren*, and of Lord Hailsham in *Oppenheimer* suggest that the abstention argument retains viability even in the post-*Baker v. Carr* era—that the separation of powers values of institutional competence and democracy dictate that courts defer to the political branches in matters of foreign relations. And two aspects of the *Kirkpatrick* case make it less troubling to me than Justice Scalia's strong language rejecting abstention might suggest. First, although Justice Scalia said that it was not important to his analysis, the State Department had indicated to the trial court that it had no objection to the court deciding the claim. Second, the claims at issue followed a finding of guilt on the part of the defendant under the Foreign Corrupt Practices Act.³⁶⁶ As such, I infer political acquiescence to the adjudication of such claims.

E. Limitation on the Abstention Argument: The Court Need Not Abstain From Judicial Review Authorized By the Extradition Act.

As previously discussed, my abstention argument is limited. As we have seen, a "provisional warrant" process in which the U.K. government was not involved triggered Pinochet's arrest.³⁶⁷ Pinochet did not wait for the U.K. government to make a decision on extradition; he immediately took his claim for discharge to the courts. My abstention argument is that the courts should have abstained from making any decision in *Pinochet* that was not before them pursuant to explicit statutorily authorized procedure. But had the court been called upon to decide Pinochet's sovereign immunity claim in a request for habeas corpus following an order of committal or in a request for judicial review following an order of return under the Extradition Act, I believe the court could have and perhaps should have decided the claim.

This limitation is susceptible to criticism. It is certainly true that some of the authority I have discussed supports a much stronger version of abstention; a version where even a claim following authority to proceed or order to return would be dismissed as non-justiciable.³⁶⁸ It is also true that a court ruling on a claim of former head of state sovereign immunity following authority to proceed or order to return could have exactly the same foreign relations repercussions as those that could follow a claim brought in advance of action under the Extradition Act. But I think it is an important limitation for two reasons.

First, the separation of powers calculus in which we have been operating changes when the political branches acquiesce to or invite judicial participation. When facing a claim brought pursuant to the procedures of the Extradition Act, the separation of powers objections to deciding the claim

366. See *supra* note 361.

367. See *supra* Introduction & Part II.A.

368. *Buttes Gas & Oil Co.*, [1982] A.C. at 932.

would largely be eliminated. First, the executive would have had an opportunity to resolve to its satisfaction the foreign relations implications of the extradition request. Second, because the habeas and judicial review procedures are explicitly established by statute, the political legitimacy of the court to rule in this regard is unambiguous.

The *Bernstein* litigation,³⁶⁹ the *Tel-Oren* case,³⁷⁰ and even the *Kirkpatrick* case³⁷¹ discussed earlier suggest analogies to my abstention argument and the limitation I have placed on it. In the *Bernstein* litigation, the court first applied the act of state doctrine and refused to entertain Bernstein's claim challenging the validity of the Nazi actions alleged. But when the State Department announced that it was the administration's policy that American courts were free from any restraint to pass upon the validity of the acts of Nazi officials, the litigation proceeded. With the acquiescence by the executive branch in such circumstances, a court need not abstain from deciding cases with foreign relations implications.

In *Tel-Oren*, both Judge Bork and Judge Robb invoked separation of powers concerns in general and political question concerns in particular in arguing that the court should not address the merits of the plaintiffs claims for injuries suffered during a terrorist incident in Israel.³⁷² Following publication of their opinions, Congress amended the Alien Tort Statute to provide an explicit cause of action in certain circumstances.³⁷³ With authority to adjudicate such claims provided by the legislative branch in such circumstances, a court need not abstain from deciding cases with foreign relations implications.

In *Kirkpatrick*, as I have noted,³⁷⁴ the court firmly rejected abstaining on act of state grounds. But the case featured a letter from the State Department acquiescing to adjudication and the litigation itself was an offshoot of a criminal prosecution for foreign corrupt practices. With such acquiescence and legislative authority, a court need not abstain from adjudicating claims with foreign policy implications.

Second, broader principles of judicial restraint are also at stake here. I have already mentioned the echoes of the great U.S. constitutional debate over justiciability of the late 1950s and early 1960s where Learned Hand, Herbert Wechsler, Alexander Bickel, and Gerald Gunther contended over whether the

369. See *supra* Part II.C & note 293.

370. See *supra* Part II.D.

371. *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp.*, 493 U.S. 400 (1990).

372. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 (per Judge Bork), 823 (per Judge Robb) (D.C. Cir. 1984).

373. Largely as a result of Judge Bork's opinion in the *Tel-Oren* case, taking the position that the Alien Tort Statute did not provide a cause of action, the U.S. Congress in 1991 passed the Torture Victims Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992), intended to provide a cause of action where torture is alleged. Gregory H. Fox, *International Litigation In Practice: Alien Tort and Other Claims Before National Courts*, 94 AM. SOC'Y INT'L L. PROC. 149 (2000).

374. See *supra* Part I-D-Summary.

court itself could employ certain “passive virtues” to decline jurisdiction in certain circumstances³⁷⁵ when “jurisdiction under our system is rooted in Article III and congressional enactments.”³⁷⁶ Justice Brandeis’s declaration that “[t]he most important thing we do is not doing”³⁷⁷ is the foundation on which Professor Bickel’s “passive virtues” are built.³⁷⁸ But those virtues—devices for withholding the ultimate constitutional judgment of the court—do not in my view (or Bickel’s or Brandeis’s) divest the court of authority ever to act; they only make it possible for the court to postpone acting until a more propitious time. Indeed, it was the argument of Wechsler and Gunther that the Constitution and Congress sets the court’s jurisdiction, that it has no business creating jurisdiction on its own.³⁷⁹

Much more could be written on this point. I close my argument simply by observing how much better off the U.K. judiciary would have been had the Law Lords abstained. In the course of deciding Pinochet’s sovereign immunity claim, the U.K. judiciary embarrassed itself to an enormous degree by having to vacate its first decision because of the improper participation of Lord Hoffmann.³⁸⁰ Indeed, the Lord Chancellor, in his capacity as head of the judiciary, was compelled to declare, “We must make every effort to ensure that such a state of affairs could not occur again.”³⁸¹ Beyond the institutional embarrassment caused by Hoffmann was the less obvious embarrassment of the same court taking up the same issue twice and coming to two conclusions that were the same in result only,³⁸² demonstrating what one observer called the “sheer chanciness of appellate decision making . . . more brutally than in any case easily recalled this century.”³⁸³ Had the court abstained, none of this embarrassment would have resulted because Straw’s decision returning Pinochet to Chile occurred before any judicial review under the Extradition Act reached the House of Lords.

F. Conclusion.

I believe that it would have been highly consistent with the political question and act of state doctrines—and the separation of powers considerations that they embody—for the U.K. courts to dismiss Pinochet’s request for a writ of habeas corpus as non-justiciable when presented. I said

375. This was the view of Hand and Bickel, *supra* note 229.

376. Gunther, *supra* note 229, at 16. This was also the view of Wechsler, *supra* note 229.

377. BICKEL, *supra* note 229, at 112 (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)). This was the passage of *The Least Dangerous Branch* Justice Breyer referred to in *Bush v. Gore*, 121 S.Ct. at 558 (Breyer, J., dissenting). See *supra* note 229.

378. BICKEL, *supra* note 229, at 112.

379. See Gunther, *supra* note 229; Wechsler, *supra* note 228.

380. See *Innocence*, *supra* note 10; Robertson, in Woodhouse, *supra* note 95, at 25.

381. Press Notice, *supra* note 16.

382. Robertson, in Woodhouse, *supra* note 95, at 24.

383. *Id.* at 17.

at the outset that my purpose here was not to suggest that U.S. separation of powers law be adopted as U.K. law. Rather, my abstention argument is that in both countries institutional competence and democracy—values that animate the principle of separation of powers—require the executive branch to exercise the nation's foreign relations power. Not only does the executive possess the necessary expertise to do so but also, as a more theoretical matter, the courts do not enjoy the same legitimacy as do the political branches in decisions that can carry national security implications.

The cases I have mentioned highlight these considerations in litigation involving foreign relations. *Sabbatino*, for example, noted that inquiries into the validity of foreign acts of state might "seriously interfere with negotiations being carried on by the Executive Branch"³⁸⁴ and, at another point, that such inquiries "would involve the possibility of conflict with the Executive view."³⁸⁵ *Baker v. Carr*, for all the flexibility it introduced into political question analysis, acknowledged that "resolution of [foreign relations] issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature. . . ."³⁸⁶ Further, "many such questions uniquely demand single-voiced statement of the Government's views."³⁸⁷ And remember Lord Wilberforce's dismissal of both sides' claims in *Buttes Gas* with his expressed concern over impact on neutrality, embarrassment in foreign relations, and inability to ascertain judicial or manageable standards.³⁸⁸

These considerations apply with particular force in *Pinochet*. As discussed at the outset, the United Kingdom had enjoyed cordial relations with the Pinochet regime and apparently acquiesced in his trip to the United Kingdom; the claim involved a dispute between two U.K. allies; and the claim involved a highly sensitive matter of Chilean domestic politics with serious implications for amnesties in other countries.

Because as a matter of separation of powers, such matters are entrusted to the foreign relations authority of the executive, I believe that the U.K. courts should have abstained from deciding Pinochet's habeas claim when presented. The courts should have dismissed it as non-justiciable or, perhaps, not ripe for adjudication. This would have relegated Pinochet to his rights under the Extradition Act, a procedure allowing the executive branch to make the determination on such matters as prior acquiescence, the competing claims of Chilean and Spanish allies, and the impact on national reconciliation efforts generally. Then, had extradition gone forward, the court could have reviewed Pinochet's sovereign immunity claim in accordance with a procedure explicitly authorized by the legislative branch.

384. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432 (1964).

385. *Id.* at 433.

386. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

387. *Id.*

388. *See Buttes Gas & Oil Co.*, [1982] A.C. at 938.

PART III: CUSTOMARY INTERNATIONAL LAW AND STATUTES

A. *The Statutory Construction Argument.*

The U.K. courts did not abstain from deciding Pinochet's habeas claim. The Law Lords reached the merits and held that, at least with respect to charges of torture and conspiracy to commit torture committed after 1988, he was not entitled to former head of state immunity from prosecution or extradition. The terms of the Extradition Act controlled the matter from that point forward. It is worthwhile to return to the schematic of the extradition process first presented earlier in this article. There I noted that the statutory extradition process is complex but can be described as having four stages after a provisional warrant is issued:³⁸⁹

1. *Authority to Proceed.* The Home Secretary's preliminary determination that extradition proceedings should commence.³⁹⁰ (As discussed in Part I, the Home Secretary issued 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*.³⁹¹)

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."³⁹² (As discussed in Part I, Pinochet was ordered committed by Magistrate Bartle on October 8, 1999.³⁹³) If a committal order is made, the person subject to the order has a right to apply for habeas corpus.³⁹⁴ (The *Pinochet* proceedings were at this point when they were terminated by Straw's decision to allow Pinochet to return to Chile.)

3. *Order for Return.* The Home Secretary's determination that the alleged offender should be extradited.³⁹⁵

389. As noted at the outset of 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, 1989, § 8(1)(b), 17 Halsbury's Statutes at 696. See also *supra* note 44.

390. Extradition Act § 7(4), 17 Halsbury's Statutes at 694. 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, 1989, § 8(4), 17 Halsbury's Statutes at 697.

391. See Part I.C.3 and I.D.

392. Extradition Act § 9.

393. See discussion *supra* Part I.D.

394. Extradition Act § 11.

395. Extradition Act § 12.

4. *Judicial Review.* A court's determination of an appeal from an order of return.³⁹⁶

I emphasized in Part II.E that the Law Lords were never called on to review a decision at any of these stages of *Pinochet*. That is, assuming that that statutory extradition process had unfolded in the same way even had the courts abstained on Pinochet's initial sovereign immunity claim, the Law Lords would never have had to decide the question—or suffered the Hoffmann embarrassment. But had the court been called upon to decide Pinochet's sovereign immunity claim in a request for habeas corpus following an order of committal or in a request for judicial review following an order of return, how should it have gone about deciding the claim? That is the subject of this Part III.

The discussion in Part I of the *Divisional Court Judgment*³⁹⁷ and *Final Law Lords' Judgment*³⁹⁸ described the two issues that Pinochet's claim presented: (1) whether the conduct with which he was charged constituted "extradition crimes" under the Extradition Act and, if so, (2) whether he was entitled to immunity from prosecution and extradition for those charges. On the basis that at least some of the conduct charged did constitute extradition crimes, all of the Law Lords sitting in the first and in the final judgments reached the immunity issue. Pinochet argued that he was provided immunity both by statute and by customary international law. My focus will be on his statutory claim.

The meaning of the statutory immunity provision required a careful reading of interrelated sections of the State Immunity Act³⁹⁹ and Diplomatic Privileges Act.⁴⁰⁰ All but one of the eleven Law Lords believed it should be read as providing that a former head of state enjoyed "immunity from the criminal jurisdiction of the United Kingdom with respect to his official acts performed in the exercise of his functions as head of state."⁴⁰¹ The statutory interpretation question was thus reduced to whether the extradition crimes with which Pinochet was charged constituted "official acts performed in the exercise of his functions as head of state."⁴⁰²

The principal argument advanced by Spain was that, as a matter of customary international law, a former head of state was not entitled to immunity from prosecution or extradition for the international crimes of

396. Extradition Act § 13.

397. See discussion *supra* Part I.C.1.

398. See *supra* Part I.C. 5.

399. State Immunity Act, §§ 1, 14, 20(1).

400. Diplomatic Privileges Act, § 2(1), incorporating by reference arts. 29 & 39(2) of the Vienna Convention on Diplomatic Relations, 10 Halsbury's Statutes at 682 & 687. See *supra* note 73.

401. First Law Lords' Judgment, *supra* note 2, at 944 (Lord Steyn). Only Lord Phillips disagreed, believing the immunity provision only covered acts performed in the United Kingdom. Final Law Lords' Judgment, *supra* note 4, at 192 (Lord Phillips).

402. First Law Lords' Judgment, *supra* note 2, at 944 (Lord Steyn).

torture, hostage-taking, and murder. Furthermore, Spain argued, these principles of customary international law took precedence over, or at least dictated the proper interpretation of, the immunity provided by the former head of state immunity provision of the State Immunity Act.

To give these principles of customary international law precedence over, or allow them to dictate the proper interpretation of, relevant statutory provisions would be in tension with the separation of powers notion of legislative supremacy in law-making. My claim, which I refer to as my statutory construction argument, is that the separation of powers value of democracy counseled in favor of deciding Pinochet's entitlement to immunity based on the language of the relevant statutes, not customary international law. This is because customary international law does not enjoy the political legitimacy of being adopted through a democratic political processes. I also contend that the approach of those Law Lords in *Pinochet* who found Pinochet was not entitled to immunity as a matter of statutory construction (without relying on customary international law) was consistent with separation of powers values because it relied on Parliamentary enactments.

B. Customary International Law in the United Kingdom.

My claim is an extremely broad one and I acknowledge that it requires relegating customary international law to a lesser position in U.K. law than it currently occupies. As I shall discuss, customary international law is incorporated into U.K. domestic common law. Since that is so, few would argue that it ought to be available for consultation when interpreting the meaning of statutes since it can be assumed that Parliament was aware of the common law when legislating. (It is true that the U.K. courts have held that as the rules of customary international law change, U.K. law changes with them.⁴⁰³ But Parliament is presumably mindful of this principle as well.) Although my statutory construction argument is that separation of powers counsels against the use of customary international law to interpret the former head of state immunity provision of the State Immunity Act, I acknowledge that those Law Lords who employed customary international law to decide Pinochet's sovereign immunity claim did so consistent with U.K. law.

The proposition that customary international law is part of U.K. common law is acknowledged in both the speech of Lord Lloyd in favor of Pinochet's position and the speech of Lord Millett against it. Lord Lloyd said:

[T]he common-law incorporates the rules of customary international law. The matter is put thus in Oppenheim's International Law 9th edition 1992, page 57:

403. See *Trendtex Trading Co. v. Cent. Bank of Nigeria*, 1 Q.B. 529, 554 (Eng. C.A. 1977), discussed *infra* in this Part III.B.

"The application of international law as part of the law of the land means that, subject to the overriding effect of statute law, rights and duties flowing from the rules of customary international law will be recognised and given effect by English courts without the need for any specific Act adopting those rules into English law."⁴⁰⁴

Lord Millett made the same point without elaboration: "Customary international law is part of the common-law"⁴⁰⁵

The willingness of most of the Law Lords to employ customary international law in their analysis of Pinochet's sovereign immunity claim is consistent with a long tradition of U.K. courts treating customary international law as U.K. common law. In 1977, Lord Justice Denning set forth the history of this proposition in an important international commercial law (and sovereign immunity) case, *Trendtex Trading Corp.*:

The doctrine of incorporation goes back to 1737 in *Buvot v. Barbut* (1736), in which Lord Talbot L.C. (who was highly esteemed) made a declaration which was taken down by young William Murray (who was of counsel in the case) and adopted by him in 1764 when he was Lord Mansfield C. J. in *Triquet v. Beth* (1764):

"Lord Talbot declared a clear opinion – "That the law of nations in its full extent was part of the law of England, . . . that the law of nations was to be collected from the practice of different nations and the authority of writers." . . .

That doctrine was accepted, not only by Lord Mansfield himself, but also by Sir William Blackstone, and other great names, too numerous to mention. In 1853 Lord Lyndhurst in the House of Lords, with the concurrence of all his colleagues there, declared that . . . "the law of nations, according to the decisions of our greatest judges, is part of the law of England."⁴⁰⁶

Lord Alverstone's judgment in a 1905 case gives some flavor for the rationale underlying this principle:

[I]nternational law forms part of the law of England. . . .
[W]hatever has received the common consent of civilized nations must have received the assent of our country, and that

404. First Law Lords' Judgment, *supra* note 2, at 923 (Lord Lloyd).

405. Final Law Lords' Judgment, *supra* note 4, at 177 (Lord Millett).

406. *Trendtex Trading*, 1 Q.B. at 553 (citations omitted; ellipses in original) (Denning, M.R.)

to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.⁴⁰⁷

Not only does the United Kingdom recognize customary international law as part of its domestic common law but also changes in customary international law are automatically incorporated into it. This was established in *Trendtex Trading*, a case involving a claim on a letter of credit issued by the National Bank of Nigeria.⁴⁰⁸ The Bank argued that as an instrumentality of the country of Nigeria, it was entitled to sovereign immunity. Both traditional international law and (importantly for purposes of this litigation) relevant English precedent would have recognized the Bank's claim to immunity. But in the intervening years since that precedent, international law had changed to recognize that state instrumentalities engaged in commercial activities were not entitled to sovereign immunity.⁴⁰⁹

It was clear that customary international law was part of U.K. common law. But were rules of customary international law automatically incorporated into U.K. law? Or were these rules not part of U.K. law until they were adopted by judicial decision, Act of Parliament, or long-established custom? If the first, when the rules of international law changed, English law would change with them. But if the second, English law would not change; precedent would bind it.⁴¹⁰

Admitting that he had previously subscribed to the second approach,⁴¹¹ Lord Denning changed his view:

407. *West Rand Gold Mining Co. v. R.*, 2 K.B. 391, 406 (1905) (Alverstone, L.C.J.). Lord Alverstone conditioned this principle as follows:

But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations.

Id.

408. *Trendtex Trading*, 1 Q.B. at 529.

409. *Trendtex Trading*, 1 Q.B. at 555-56 (Denning, M.R.) (citing *Alfred Dunhill of London Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) ("immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions").

410. *Trendtex Trading*, 1 Q.B. at 553 (Denning, M.R.).

411. *Id.* at 554 (Denning, M.R.) (citing *R. v. Sec'y of State for the Home Dep't, Ex parte Thakrar* Q.B. 684,701 (Eng. C.A. 1974) (Denning, M.R.)).

Seeing that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law.⁴¹²

Finding that the change in customary international law had been incorporated into English common law and that the Bank had been engaged in commercial or proprietary actions in issuing the letter of credit, the court found that the Bank was not entitled to immunity.⁴¹³

C. Using Customary International Law to Decide the Availability of Former Head of State Immunity In Pinochet.

Consistent with the principle that customary international law is part of U.K. common law, eight of the eleven speeches in the two *Pinochet* judgments made extensive reference to customary international law in analyzing Pinochet's entitlement to former head of state immunity. (The remaining three Law Lords analyzed the claim more narrowly, focusing only on the relationship between the former head of state immunity provision of the State Immunity Act and the Torture Convention. Their analysis is discussed in Part III.E below.)

Five of the Law Lords started their analysis with the statutory former head of state immunity provision but used customary international law to interpret it. One Law Lord analyzed the statutory former head of state immunity provision and customary international law as parallel bodies of law, to be analyzed separately. Because he found that both had the same rationale, in the end there is little substantive difference between his approach and that of the prior five.

Two Law Lords used customary international law alone to analyze Pinochet's immunity claim, one because he believed that the statute was "subsumed" by customary international law, and the other because he believed that the statute was not relevant to the circumstances. These positions are summarized in the accompanying table and then described.

412. *Trendtex Trading*, 1 Q.B. at 554 (Denning, M.R.).

413. *Trendtex Trading*, 1 Q.B. at 561 (Denning, M.R.).

**Rough Typography of Law Lords' Use of Customary International Law in
Analyzing Pinochet's Former Head Of State Immunity Claim
(with Notation of Their Votes on the Claim)**

**I=Pinochet Immune on All Charges;
NI=Pinochet Not Immune on at Least One Charge**

	First Law Lords' Judgment	Final Law Lords' Judgment
Used customary international law to interpret statutory former head of state immunity provision	Lord Slynn—I Lord Nicholls—NI [Lord Hoffmann—NI]* Lord Steyn—NI	Lord Hope—NI Lord Hutton—NI
Treated customary international law and statutory former head of state immunity provision as parallel with separate analysis of each	Lord Lloyd—I	
Used customary international law exclusively because statutory former head of state immunity provision was "subsumed" by customary international law		Lord Millett—NI
Used customary international law exclusively because statutory former head of state immunity provision applied only to extra-territorial offenses		Lord Phillips—NI
Treated issue solely as measuring the impact of the adoption of the Torture Convention on statutory former head of state immunity		Lord Browne- Wilkinson—NI Lord Goff—I Lord Saville—NI

* Lord Hoffmann concurred in the reasoning of Lord Nicholls without further explanation.

It is perhaps testament to the indeterminacy of law that among both those Law Lords who relied on customary international law and those who relied on statutory construction to decide Pinochet's former head of state immunity claim, there were those who found in his favor and those who found against.

1. Five Law Lords Used Customary International Law to Interpret the Statutory Former Head of State Immunity Provision.

Lord Slynn.

Lord Slynn's approach to the relationship between statute and customary international law was to use the statutory former head of state immunity provision as the "starting point" for analyzing Pinochet's claim but to interpret the statute by reference to customary international law. Similarly, for Lord Slynn the question of whether the language of the extra-territorial torture provision of the Criminal Justice Act abrogated former head of state immunity could only be decided by reference to customary international law.

Lord Slynn started his analysis by discussing the interrelationship of the Diplomatic Privileges Act and State Immunity Act provisions⁴¹⁴ and identified the central question presented by the statute as whether the conduct with which Pinochet was charged constituted official acts in the exercise of a head of state's functions.⁴¹⁵ He concluded that under the language of the statute, Pinochet would be entitled to immunity.⁴¹⁶

But Lord Slynn said that it was not sufficient to answer the question based on the language of the statute alone. He felt he was required to interpret the statutory immunity provision "against the background of those principles of public international law as are generally recognized by the family of nations."⁴¹⁷ He found that at the time the statutory immunity provision was adopted, customary international law would have provided Pinochet with the immunity he sought.⁴¹⁸ And because U.K. law is bound by changes in customary international law,⁴¹⁹ he also examined subsequent developments to determine if the principle of immunity had changed. His study of various international conventions and tribunal charters⁴²⁰ indicated that, while there

414. See *supra* notes 73.

415. First Law Lords' Judgment, *supra* note 2, at 908 (Lord Slynn).

416. While acknowledging that international law does not recognize that it is one of the specific functions of a head of state to commit torture, Lord Slynn said immunity in respect of criminal acts would have little content if it did not apply where a head of state committed an illegal act. *Id.* at 908 (Lord Slynn).

417. First Law Lords' Judgment, *supra* note 2, at 908 (Lord Slynn) (quoting *Alcom Ltd. v. Republic of Columbia*, [1984] A.C. 580, 597 (1984) (Lord Diplock)).

418. First Law Lords' Judgment, *supra* note 2, at 911 (Lord Slynn). In reaching this conclusion, Lord Slynn examined the treatises and cases discussed by Lord Chief Justice Bingham in the Divisional Court Judgment to the same effect.

419. This principle, established in *Trendtex Trading*, is discussed in Part III.B.

420. First Law Lords' Judgment, *supra* note 2, at 912-13 (Lord Slynn) (discussing the Hostage Convention, *supra* note 7; the Genocide Convention of 1948, *supra* note 6; the Nuremberg Tribunal, *supra* note 85; the Former Yugoslavia Tribunal, *supra* note 86; the Rwanda Tribunal, *supra* note 87; and the Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf/183/9 (1998) [hereinafter International Criminal Court Statute]).

had been some movement towards the recognition of crimes against international law is to be seen

also in the decisions of national courts . . . [i]t does not seem to me that it has been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in national courts on the basis of the universality of jurisdiction. Nor [was] there any *jus cogens* in respect of such breaches of international law which require that a claim of sovereign immunity, itself a well-established principle of international law, should be overridden.⁴²¹

Still within the realm of U.K. domestic law's incorporation of customary international law, Lord Slynn found it necessary to examine a related problem: whether the recognition of certain acts as international crimes had any effect on the immunity provided former heads of state in both the State Immunity Act and in customary international law. While finding some authority for this proposition,⁴²² he concluded that a national judge must proceed cautiously in finding that sovereign immunity has been abrogated. "Immunity, it must be remembered, reflects the particular relationship between states by which they recognize the status and role of each others head and former head of state."⁴²³ To exercise that caution, Lord Slynn said he would require the following to be present before abrogating former head of state immunity:

1. There must be a provision in an international convention to which both the country asserting, and the country being asked to refuse, sovereign immunity are parties.
2. The convention must clearly define a crime against international law and require or empower a country to prevent or prosecute the crime (a) whether or not committed in its jurisdiction and (b) whether or not committed by one of its nationals.
3. The convention must make it clear either (a) that a national court has jurisdiction to try a crime alleged against a former head of state or (b) that having been a head of state is

421. First Law Lords' Judgment, *supra* note 2, at 913 (Lord Slynn). A "*jus cogens*" norm, referred to by Lord Slynn, is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 332, 344 (1980).

422. First Law Lords' Judgment, *supra* note 2, at 914 (Lord Slynn).

423. *Id.* at 915 (Lord Slynn).

no defense and that expressly or impliedly the immunity is not to apply so as to bar proceedings against him.⁴²⁴

Lord Slynn then applied these principles to the crimes with which Pinochet was charged, most importantly torture. The Torture Convention outlaws torture committed or authorized by a public official or person acting in an official capacity.⁴²⁵ It provides that, if the offender is not extradited, the offender must be prosecuted in the jurisdiction where found.⁴²⁶ Chile was a party to the convention and as previously discussed,⁴²⁷ the United Kingdom incorporated the convention into domestic law in 1988.⁴²⁸

Lord Slynn concluded that the reference to "a public official or person acting in that capacity" in the Torture Convention and Criminal Justice Act is not sufficient to overcome former head of state immunity. "As a matter of ordinary usage," he said, "it can obviously be argued that" it does.⁴²⁹ But again looking beyond the language of the statute to customary international law, Lord Slynn argued that the international conventions and tribunal charters of the last half-century have made "specific provisions in respect of heads of state as well as provisions covering officials. . . . [I]f States wish to exclude the long established immunity of former heads of state in respect of allegations of specific crimes, or generally, then they must do so in clear terms."⁴³⁰

To summarize, Lord Slynn's analysis of whether Pinochet was entitled to immunity started with the statutory immunity provision and found that both under its terms and interpreting it as a matter of customary international law, former head of state immunity was viable. He also recognized that the immunity would not be available in respect of certain international crimes where the conventions establishing those crimes clearly abrogate former head of state immunity. But he concluded that while the language of the Torture Convention and the Criminal Justice Act suggests that immunity is not available in respect of torture, viewed from the proper perspective of customary international law, the language was not clear enough to overcome "the long established immunity of former heads of state."⁴³¹

Lord Nicholls.

Lord Nicholls's approach to the interrelationship of statute and customary international law resembled Lord Slynn's—though he reached the

424. *Id.*

425. Torture Convention, *supra* note 8.

426. *Id.*

427. *See supra* Part I.C.5.

428. Criminal Justice Act 1988 § 134, 12 Halsbury's Statutes at 1079.

429. As we shall see, this is precisely the position taken by Lord Browne-Wilkinson and Lord Saville in the *Final Law Lords' Judgment*. *See discussion infra* Part III.E.

430. *Id.*

431. *Id.*

opposite result. He too interpreted former head of state immunity provision of the State Immunity Act using customary international law. To Lord Nicholls, the answer to the question of whether under the statute acts of hostage-taking and torture with which Pinochet was charged were done in the exercise of his functions as head of state was found in international law:

International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.⁴³²

Lord Nicholls's rationale for this proposition was essentially that the Nuremberg tribunal and several United Nations resolutions put heads of state on notice that they were subject to personal liability if they "participated in acts regarded by international law as crimes against humanity"—crimes which included hostage-taking and torture.⁴³³

Lord Steyn.

Lord Steyn also approached the interrelationship of statute and customary international law by starting with the statutory former head of state immunity provision and using customary international law to interpret.⁴³⁴ Zeroing in on the "official acts performed in the exercise of his functions as head of state" requirement of the statute, Lord Steyn takes the position that "it is not sufficient that official acts are involved; the acts must also have been performed by the defendant in the exercise of his functions as head of state."⁴³⁵ Unlike even Lord Nicholls, Lord Steyn is unwilling to accept the difficulty in drawing the line between acts to which immunity attaches and acts to which it does not. To say that such a line cannot be drawn inexorably led, in Lord Steyn's view, to the conclusion "that when Hitler ordered the 'final solution,'

432. First Law Lords' Judgment, *supra* note 2, at 939-40 (Lord Nicholls).

433. *Id.* at 940 (Lord Nicholls). Lord Nicholls made no attempt to address Pinochet's argument to the effect that the very creation of the Nuremberg and other international tribunals demonstrates that under customary international law former heads of state "cannot be tried in the ordinary courts of other states." *Id.* at 913 (Lord Slynn), 930 (Lord Lloyd).

434. *Id.* at 944 (Lord Steyn). Indeed, for him any former head of state immunity under customary international law had been overridden by the former head of state immunity provision of the State Immunity Act. *Id.* at 946.

435. *Id.*

his act must be regarded as an official act deriving from the exercise of his functions as head of state."⁴³⁶

Lord Steyn invoked customary international law to draw the line between what is and what is not an official act performed in the exercise of the functions of a head of state and concluded as follows:

[T]he development of international law since the second world war justifies the conclusion that by the time of the 1973 coup d'etat [perpetrated by Pinochet in Chile], and certainly ever since, international law condemned genocide, torture, hostage taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. . . .

. . . .

The normative principles of international law do not require that such high crimes should be classified as acts performed in the exercise of the functions of a head of state.⁴³⁷

Lord Steyn concluded "that as a matter of construction of the relevant statutory provisions the charges brought by Spain against General Pinochet are properly to be classified as conduct falling beyond the scope of his functions as head of state."⁴³⁸ But as described above, his "construction of the relevant provisions" used principles of customary international law to interpret the meaning of "acts performed in the exercise of the functions of a head of state."

Lord Hope.

Lord Hope also approached the interrelationship of statute and customary international law by starting with the statutory former head of state immunity provision and then using customary international law to interpret whether "acts of the kind alleged in this case . . . were acts done in the exercise of the state's authority."⁴³⁹ He found protected "all acts which the head of state has performed in the exercise of the functions of government."⁴⁴⁰ As to whether some such acts are outside the protection of former head of state immunity, Lord Hope associated himself with Lord Slynn's view in the *First Law Lords' Judgment*. That is, former head of state immunity continues to exist except in regard to (1) crimes in respect of which international tribunals have been convened under terms that specify that heads of state have no immunity, or (2) international crimes where the international conventions

436. *Id.*

437. *First Law Lords' Judgment*, *supra* note 2, at 945-46 (Lord Steyn).

438. *Id.* at 946 (Lord Steyn).

439. *Final Law Lords' Judgment*, *supra* note 4, at 146 (Lord Hope).

440. *Id.* at 147 (Lord Hope).

establishing those crimes contain certain provisions including clearly abrogating former head of state immunity.⁴⁴¹

As discussed above, Lord Slynn concluded that the language of the Torture Convention was not clear enough to abrogate former head of state immunity. Lord Hope revisited this issue, asking “whether the effect of the Torture Convention was to remove [former head of state immunity] by necessary implication.”⁴⁴² He first observed that the Convention only applies to torture “inflicted by or at the instigation of or with the consent or acquiescence of the public official or other person acting in an official capacity.” He thinks that it “would be a strange result” if the Convention could not be applied to “the person primarily responsible” for the torture but only their underlings.⁴⁴³ On the other hand, he found no discussion of head of state and former head of state immunity in the history of the drafting of the Convention. Therefore, he concluded that immunity was not intended to be affected by the Convention.

Before coming to this conclusion, Lord Hope’s reasoning takes a surprising turn from that of Lord Slynn’s. He looked to the fact that Chile itself was a party to the Convention and to what he finds to be widespread agreement by 1988 that “the prohibition against official torture had achieved the status of the *jus cogens* norm.”⁴⁴⁴ While he says that the Torture Convention itself did not deprive former heads of state of their immunity, he does find that “the obligations which were recognised by customary international law in the case of such serious international crimes by the date when Chile ratified the Convention [were] so strong as to override any objection by it on the ground of [former head of state] immunity . . . to the exercise of the jurisdiction” by the United Kingdom over the crimes of which Pinochet was accused.⁴⁴⁵ To Lord Hope, former head of state immunity is not available for large-scale torture—“inhuman acts of a very serious nature,” “widespread or systematic attack against any civilian population”—that is, torture “of such a kind or on such a scale as to amount to an international crime.”⁴⁴⁶

Lord Hutton.

Lord Hutton’s analysis is quite similar to Lord Steyn’s. Starting with the statutory former head of state immunity provision, he looked to principles of customary international law to determine whether the acts alleged against Pinochet were in the performance of his functions as a head of state. After

441. *Id.* at 147-48 (Lord Hope) (quoting First Law Lords’ Judgment, *supra* note 2, at 915 (Lord Slynn)).

442. *Id.* at 148 (Lord Hope).

443. *Id.* at 149 (Lord Hope).

444. Final Law Lords’ Judgment, *supra* note 4, at 149 (Lord Hope).

445. *Id.* at 152 (Lord Hope).

446. *Id.* at 151 (Lord Hope).

distinguishing a number of cases that affirmed immunity as not being on point,⁴⁴⁷ he found that a number of international studies and tribunals stood for the proposition that head of state immunity had been abrogated for certain international crimes.⁴⁴⁸ “Since the end of World War II,” Lord Hutton argued, “there has been a clear recognition by the international community that certain crimes are so grave and so inhuman that they constitute crimes against international law and that the international community is under a duty to bring justice to a person who commits such crimes.” Torture has been recognized as such a crime in the Torture Convention signed by the United Kingdom, Spain, and Chile. Because of this, Lord Hutton concludes, “acts of torture cannot be regarded as functions of a head of state under international law.”

Thus, Lord Hutton held against Pinochet because he interpreted the statutory former head of state immunity provision based on customary international law to preclude acts of torture from constituting acts in the performance of the function of a head of state.

2. Lord Lloyd Treated Customary International Law and Statutory Former Head of State Immunity Provision as Parallel with Separate Analysis of Each.

While Lord Slynn used the relevant statutes as his starting point and then interpreted them based on his understanding of customary international law, Lord Lloyd treated the relevant statutes and customary international law as parallel bodies of law, to be analyzed separately. Because he found both had similar rationale, there is little substantive difference between his approach and Lord Slynn's.

Strictly speaking, the two separate bodies of law Lord Lloyd analyzed were common law and statutory law. Starting on the foundation that U.K. common law incorporated the rules of customary international law, Lord

447. *Al-Adsani vs. Gov't of Kuwait*, 107 I.L.R. 536 (Eng. C.A. 1996) (distinguishable because the case involved civil liability); *Siderman de Blake vs. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (distinguishable because case involved civil liability); *Marcos & Marcos v. Fed. Dept. of Police*, 102 I.L.R. 198, 203-04 (Switz. Fed. Trib. 1989) (distinguishable because of express waiver by the State of the Philippines); *In re Former Syrian Ambassador to the German Democratic Republic*, 115 I.L.R. 596 (F.R.G. Const'l Ct. 1997) (former head of state immunity sought by Pinochet distinguishable from diplomatic immunity at issue in this case).

448. Lord Hutton cites the Report of the International Law Commission to the United Nations General Assembly, *reprinted in* 2 Y.B. INT'L.L. COMM'N (1950) (codifying “Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal,” U.N.G.A. Resolution 95(I) (Dec. 11, 1946)); International Law Commission, Draft Code of Offenses Against Peace and Security of Mankind, 28 July 1954, U.N. Doc. A/2673 (1954); Rwanda Tribunal, *supra* note 87; Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its Forty-eighth Session, 51st Sess., Supp. No. 10, art. 18, U.N. Doc. A/51/10 (1996); International Criminal Court Statute, *supra* note 422.

Lloyd explored whether Pinochet was entitled to immunity. To him, the writings of scholars and decided cases stood for the proposition that a country was entitled to expect that its former head of state would not be subjected to the jurisdiction of the courts of another state for certain categories of acts performed while he was head of state unless immunity is waived by the current government of the state of which he was once the head.⁴⁴⁹

In deciding whether the conduct of which Pinochet was accused fell within these "categories of acts," Lord Lloyd found it critical to determine whether Pinochet was acting in his private capacity in committing the alleged crimes or whether he was acting in a sovereign capacity as head of state. He noted that the Spanish arrest warrant alleged that Pinochet organized the commission of crimes as the head of the government and carried out those crimes through the use of the police and secret service. In Lord Lloyd's view, the inevitable conclusion was that Pinochet was acting in a sovereign capacity and not a personal or private capacity.⁴⁵⁰

Lord Lloyd turned to two arguments made by Spain. First, in response to its contention that the crimes alleged against Pinochet were so horrific that an exception needed to be made to the ordinary rule of customary international law, Lord Lloyd pointed to the difficulty in distinguishing between less serious governmental acts for which immunity would be available and more serious governmental acts for which it would not.⁴⁵¹ Second, in response to Spain's contention that there should be an exception from the general rule of immunity for the crimes of hostage-taking and torture which have been made the subject of international conventions, Lord Lloyd responded that neither convention provides that constitutionally responsible rulers are subject to punishment for these crimes.⁴⁵² The absence of such a provision was significant to him because such a provision was included in the international convention govern-

449. First Law Lords' Judgment, *supra* note 2, at 923 (Lord Lloyd). Lord Lloyd cites the following authorities: Sir Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 *Recueil des Cours* 89 (1994-III); SATOW'S GUIDE TO DIPLOMATIC PRACTICE ¶ 2.2 (Lord Gore-Booth ed., 5th ed. 1979); Oppenheim's INTERNATIONAL LAW ¶ 456 (9th ed. 1992). He also calls attention to the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 464 (1987), disagreeing with the interpretation of it given by Professor Brownlie.

Lord Lloyd cites the following cases: *Duke of Brunswick v. King of Hanover*, 6 Beav. 1 (1844), 2 H.L. Cas. 1 (1848); *Hatch v. Baez*, 7 Hun. 596 (N.Y. 1876); *Underhill v. Hernandez*, 168 U.S. 250 (1897); *contra Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962); *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990).

Of particular interest to Lord Lloyd was the U.S. case of *Hilao v. Marcos*, 25 F.3d 1467 (9th Cir. 1994), which he described as the closest case to finding official acts committed by head of state subject to suit or prosecution after he left office. Although there was no formal waiver of immunity in the case, he said the government of the Philippines made plain its view that the claim should proceed.

450. First Law Lords' Judgment, *supra* note 2, at 927 (Lord Lloyd).

451. *Id.* at 928 (Lord Lloyd). In making this point, he cited the analyses in the Divisional Court Judgment of Lord Chief Justice Bingham and Justice Collins. *Id.*

452. *Id.* at 928 (Lord Lloyd).

ing genocide⁴⁵³ and Parliament did not adopt that provision when otherwise ratifying the convention against genocide.

Lord Lloyd also examined "the widespread adoption of amnesties," finding no contention that they were contrary to international law for failure to prosecute the beneficiaries,⁴⁵⁴ and international tribunals, finding that their very existence demonstrates that former heads of state "cannot be tried in the ordinary courts of other states."⁴⁵⁵

Finding that Pinochet is entitled to immunity as former head of state in respect of crimes alleged against him based on principles of customary international law, Lord Lloyd turns to the former head of state immunity provision of the State Immunity Act. In this analysis, he concludes that the only relevant question is whether Pinochet's accused conduct constituted official acts performed in the exercise of his functions as head of state. Lord Lloyd finds that they were, for the same reasons he concluded they were as a matter of customary international law.

Lord Lloyd's approach to the interrelationship of statute and customary international law as parallel bodies of law informed by the same rationale is well illustrated by his conclusion:

So the answer is the same whether at common law or under the statute. And the rationale is the same. The former head of state enjoys continuing immunity in respect of governmental acts which he performed as head of state because in both cases the acts are attributed to the state itself.⁴⁵⁶

3. Lord Millett Used Customary International Law Exclusively Because the Statutory Former Head of State Immunity Provision Was "Subsumed" by Customary International Law.

Lord Millett looked almost exclusively to customary international law to answer the question of whether the extradition crimes with which Pinochet was charged constituted "official acts in the exercise of his functions as head of state." He did not consider it necessary to parse the former head of state immunity provision in the State Immunity Act too closely "for any narrow statutory immunity is subsumed in the wider immunity in respect of other

453. *Id.* 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.

454. First Law Lords' Judgment, *supra* note 2, at 929-30 (Lord Lloyd). See discussion *supra* Part II.A.

455. First Law Lords' Judgment, *supra* note 2, at 930 (Lord Lloyd).

456. *Id.* at 933 (Lord Lloyd).

official or governmental acts under customary international law."⁴⁵⁷ And once outside the realm of statute, Lord Millett examined whether the doctrine of state immunity protected conduct that was prohibited by international law.⁴⁵⁸

He took the position that even before the end of World War II, it was questionable "whether conduct contrary to the peremptory norms of international law attracted state immunity from the jurisdiction of national courts."⁴⁵⁹ But this was largely an academic matter in 1946, he said, "since the criminal jurisdiction of such courts was generally restricted to offenses committed within the territory of the foreign state or elsewhere by the nationals of that state."⁴⁶⁰

With such developments as the Nuremberg trials, the adoption of the Universal Declaration of Human Rights in 1948,⁴⁶¹ the Israeli Supreme Court decision authorizing the Eichmann prosecution in 1962,⁴⁶² and the adoption of the International Covenant on Civil and Political Rights of 1966,⁴⁶³ "[w]ar crimes had been replaced by crimes against humanity."⁴⁶⁴ The way in which a state treated its own citizens within its own borders had become a matter of legitimate concern to the international community.⁴⁶⁵ This history led Lord Millett to conclude that "the systematic use of torture on a large scale and as an instrument of state policy" had become a crime prohibited by international law. He said that this had occurred before 1973, though he gave no support for that date.⁴⁶⁶

In Lord Millett's view, customary international law authorizes "universal jurisdiction,"⁴⁶⁷ extra-territorial jurisdiction by any country, in respect of

457. Final Law Lords' Judgment, *supra* note 4, at 172 (Lord Millett).

458. *Id.*

459. *Id.*

460. *Id.* at 173 (Lord Millett).

461. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948).

462. Attorney-General of Israel v. Eichmann, 36 I.L.R. 5 (Jm. 1961), *aff'd*, 36 I.L.R. 277 (S. Cr. 1962) (Isr.).

463. International Covenant on Civil and Political Rights 1966, Dec. 16, 1966, 999 U.N.T.S. 171 (1976).

464. Final Law Lords' Judgment, *supra* note 4, at 177 (Lord Millett).

465. *Id.*

466. *Id.* at 178 (Lord Millett). This finding allowed Lord Millett to find the "double criminality" requirement of the Extradition Act satisfied with respect to all of the torture counts. See discussion *supra* I.C.1 and I.C.5 for a discussion of the double criminality requirement.

467. Final Law Lords' Judgment, *supra* note 4, at 177 (Lord Millett). Lord Millett defines "universal jurisdiction" as "extra-territorial jurisdiction by any country." *Id.* The RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (1987) provides further guidance on the meaning of universal jurisdiction: "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . ." A comment to this section discusses "universal jurisdiction" as follows:

[I]nternational law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim). Universal jurisdiction over the specified

international crimes that satisfy two criteria. "First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order."⁴⁶⁸ And because customary international law is part of U.K. common law, Lord Millett argued that U.K. courts "have and always have had extra-territorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law."⁴⁶⁹

Lord Millett concluded his analysis by contending that any immunity provided by statute was not relevant because it subsumed any immunity that might exist under customary international law. And he found that customary international law provided no immunity from charges of torture because that would be inconsistent with having established torture as an international crime. As such, Lord Millett would have held that customary international law provided the U.K. courts extra-territorial jurisdiction over the "systematic use of torture on a large scale and as an instrument of state policy" at any time after 1973 and that no former head of state immunity was available.⁴⁷⁰

4. Lord Phillips Used Customary International Law Exclusively Because the Statutory Former Head of State Immunity Provision Was Not Relevant to the Circumstances.

Lord Phillips acknowledged a duty to reconcile the statutory former head of state immunity provision with customary international law. But he did so in a manner unique to the Law Lords speaking in the two *Pinochet* judgments. In his view, the immunity provision applied only to acts performed in the United Kingdom, i.e., it had no extra-territorial application.⁴⁷¹

Lord Phillips's analysis of customary international law was similarly unique. He acknowledges that former head of state immunity exists for civil proceedings.⁴⁷² But he finds nothing in custom (the primary source of inter-

offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. These offenses are subject to universal jurisdiction as a matter of customary law.

Id. § 404 comment a.

468. Final Law Lords' Judgment, *supra* note 4, at 177 (Lord Millett). See also discussion *supra* note 320 of "jus cogens" norms.

469. Final Law Lords' Judgment, *supra* note 4, at 177 (Lord Millett).

470. *Id.* at 178 (Lord Millett).

471. *Id.* at 191-92 (Lord Phillips). As noted, none of the other Law Lords took this position and Lord Steyn specifically repudiated it. See First Law Lords' Judgment, *supra* note 2, at 944 (Lord Steyn). However, given that former head of state immunity predated the development of any of the concepts of extra-territorial jurisdiction, Lord Phillips's contention has some force. I am grateful to Professor Michael Straubel for this insight.

472. Final Law Lords' Judgment, *supra* note 4, at 182 (Lord Phillips) (citing *Hatch v. Baez*, 7 Hun. 596 (N.Y. 1876)).

national law), judicial decisions, or the writings of authors on international law to provide a foundation for former head of state immunity in respect of criminal proceedings.

"In the latter part of this century," Lord Phillips says, "there has been developing recognition among states that some types of criminal conduct cannot be treated as a matter for the exclusive competence of the state in which they occur." Observing that "this is an area where international law is on the move," he argues that

[t]here are some categories of crime of such gravity that they shock the consciousness of mankind and cannot be tolerated by the international community. Any individual who commits such a crime offends against international law. . . . In these circumstances it is desirable that jurisdiction should exist to prosecute individuals for such conduct outside the territory in which such conduct occurs.⁴⁷³

This analysis leads Lord Phillips to conclude that former head of state immunity is not available in respect of international crimes. More specifically, he would hold that because torture is prohibited by international law and that the prohibition of torture has the character of *jus cogens*, the Torture Convention is incompatible with the applicability of former head of state immunity.⁴⁷⁴

Lord Phillips's conclusions, then, were that the statutory former head of state immunity provision was not available to Pinochet because in Lord Phillips's view it did not extend to extra-territorial conduct, and there was no immunity provided by customary international law to former heads of state in respect of international crimes such as torture.⁴⁷⁵

5. Summary.

Consistent with the strong tradition that U.K. common law incorporates customary international law, eight of the eleven Law Lords who spoke in the two *Pinochet* judgments employed customary international law in reaching their decisions on whether or not Pinochet was entitled to former head of state immunity. Five of those Law Lords used customary international law to interpret whether the conduct with which Pinochet was charged constituted official acts in the exercise of a head of state's functions within the meaning of the statutory former head of state immunity provision of the State Immunity Act. Three of those five—Lord Nicholls, Lord Steyn, and Lord Hutton—used

473. *Id.* at 188 (Lord Phillips).

474. *Id.* at 190 (Lord Phillips).

475. *Id.* at 192 (Lord Phillips).

a relatively superficial analysis of international tribunals and other similar developments in customary international law from the end of World War II to conclude that former head of state immunity was not available in respect of charges of torture. The other two—Lord Slynn and Lord Hope— used a more sophisticated analysis of those developments, identifying the extent, if any, that each explicitly abrogated sovereign immunity. From his analysis, Lord Slynn concluded that there was nothing in customary international law that abrogated statutory former head of state immunity in respect of the crimes with which Pinochet was charged. Lord Hope, however, found that former head of state immunity did not protect torture “of such a kind or on such a scale as to amount to an international crime.”⁴⁷⁶

The other three Law Lords who looked to customary international law, for somewhat different reasons, the question was almost exclusively one of customary international law. For Lord Millett, statutory former head of state immunity was “subsumed” by customary international law. For Lord Phillips, statutory former head of state immunity was inapplicable to extra-territorial offenses. Lord Lloyd analyzed Pinochet’s claim of common law immunity first and then applied the same rationale to statutory immunity.

D. Rethinking Customary International Law as Domestic Common Law.

My statutory construction argument claims that the Law Lords should not have employed customary international law to analyze and resolve Pinochet’s statutory former head of state immunity provision claim. However, I cannot deny that the eight speeches just described were firmly grounded in the U.K. tradition of incorporating customary international law into U.K. common law, a tradition dating back to Lord Mansfield and Sir William Blackstone. To develop my argument, I need to take four more steps. First, I will examine the fact that the courts in the United States have, like their counterparts in the United Kingdom, treated customary international law as part of U.S. common law. Second, I will describe and adopt the position of two American scholars who contend that such treatment is unconstitutional as a violation of separation of powers. Third, I will unpack this separation of powers argument in an effort to show that, irrespective of the constitutional law issue involved, judges in the United Kingdom should employ the values that animate the principle of separation of powers as well. Finally, I will examine with approval, the speeches of three of the Law Lords in the *Final Law Lords’ Judgment* who used statutory construction only to decide Pinochet’s former head of state immunity claim.

476. *Id.* at 246 (Lord Phillips).

Customary International Law in the United States.

A review of several authorities suggests that customary international law holds a similar position in the United States to that in the United Kingdom, i.e., that customary international law is U.S. common law, or, more precisely, customary international law is federal common law. In fact, many of these authorities cite U.K. cases for this proposition.

A useful starting point is *Sabbatino*. As discussed in Part II,⁴⁷⁷ a claimant to sugar expropriated by Cuba sought to collect the proceeds of the sale of that sugar in New York. To employ the act of state doctrine, Justice Harlan was required to explain why customary international law and not New York law applied. Justice Harlan stated:

[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*. Soon thereafter, Prof. Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers where *Erie* extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.⁴⁷⁸

This passage seems to hold that *Erie* did not prevent federal common law from including customary international law. But is that the same as saying that customary international law is federal common law?

Perhaps the leading case is the holding in *Filartiga v. Pena-Irala*.⁴⁷⁹ The *Filartiga* plaintiffs alleged that the defendant, while a police chief in Paraguay, had tortured and killed their son and brother. The question was whether the U.S. court had jurisdiction to hear the claim. The defendant argued that even if his conduct violated international law, the claim could not be heard in federal court because it did not "arise[] under . . . the laws of the United States . . ." as required by Article III of the Constitution.⁴⁸⁰ But Judge Kaufman looked to the role of customary international law in both the United Kingdom and the United States:

477. See discussion *supra* Part II.C of "Act of State" as a Separation of Powers Doctrine.

478. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

479. *Filartiga v. Americo Norberto Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

480. U.S. CONST. art. III § 2, cl. 1.

The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution. . . .

During the eighteenth century, it was taken for granted on both sides of the Atlantic that the law of nations forms a part of the common law. 1 Blackstone, Commentaries 263-64 (1st ed. 1765-69); 4 *id.* at 67. . . .

It is an ancient and a salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case. This doctrine was originally conceived and formulated in England in response to the demands of an expanding commerce and under the influence of theories widely accepted in the late sixteenth, the seventeenth and the eighteenth centuries. It was brought to America in the colonial years as part of the legal heritage from England.⁴⁸¹

At the same time that *Filartiga* and similar cases⁴⁸² were being decided, the American Law Institute was re-writing the Restatement of the Foreign Relations Law of the United States. The First Tentative Draft appeared in 1980 and, unlike the previous version, enunciated that “[i]nternational law and international agreements of the United States are law of the United States and supreme over the law of the several States.”⁴⁸³ In the introductory note to this section, the commentators said:

International law was part of the law of England and, as such, of the American colonies. With independence, it became part of the law of each of the thirteen States. When the United States became a state it became subject to international law. From the beginning, the law of nations, later referred to as international law, was considered to be incorporated into the law of the United States without the need for any action by Congress or the President, and the courts, State and federal, have applied it and given it effect as the courts of England had done. Customary international law as developed to that time was law of the United States when it became a state.

481. *Filartiga*, 630 F.2d at 886.

482. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

483. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 (1987).

Customary law that has developed since the United States became a state is incorporated into United States law as of the time it matures into international law.⁴⁸⁴

Taking on whatever ambiguity may have attached to the discussion of *Erie* in *Sabbatino*, the commentators continued:

Erie R. R. Co. v. Tompkins held that, in suits based on diversity of citizenship jurisdiction, a federal court was bound to apply the common law as determined by the courts of the State in which the federal court sat. On that basis, some thought that the federal courts must also follow State court determinations of customary international law. However, a different view has prevailed. It is now established that customary international law in the United States is a kind of federal law, and like treaties and other international agreements, it is accorded supremacy over State law by Article VI of the Constitution. Hence, determinations of international law by the Supreme Court of the United States, like its interpretations of international agreements, are binding on the States. Also, cases "arising under" customary international law arise under "the laws" of the United States. They are within the Judicial Power of the United States (Article III, Section 2) and the jurisdiction of the federal courts (28 U.S.C. §§ 1257, 1331).⁴⁸⁵

The Bradley & Goldsmith Critique.

To the extent that the Restatement restates U.S. law, customary international law appears to be incorporated into domestic U.S. law every bit as much as in the United Kingdom. But two scholars argue that while that might be "the modern position" of scholarship and jurisprudence, customary international law should not have the status of federal common law.

Professors Curtis A. Bradley and Jack L. Goldsmith acknowledge that the concept of customary international law as federal common law—what they call the "modern position"—appears to be well entrenched in American jurisprudence. "During the last twenty years, almost every federal court that has considered the modern position has endorsed it. Indeed, several courts have

484. RESTATEMENT (THIRD) OF FOREIGN RELATIONS CHAPTER 2, introductory note (cross-reference omitted).

485. *Id.* (citations and cross references omitted).

referred to it as 'settled.' The modern position also has the overwhelming approval of the academy."⁴⁸⁶

These scholars have identified a number of serious implications of the modern position in the course of arguing that customary international law should not have the status of federal common law. They contend that, in the absence of treaty or statute, both separation of powers and *Erie*⁴⁸⁷ dictate that customary international law is at most state common law.⁴⁸⁸ This contention has provoked lively debate.⁴⁸⁹ Much of the criticism of their argument is directed at the claim that federalism under *Erie* dictates that customary international law is state law. (The sarcastic title of Professor Koh's article, *Is International Law Really State Law?*, gives a sense of the tone of the debate.) But Professor Koh also makes a strong argument against the separation of powers rationale, demonstrating that common law-making need not intrude upon executive or legislative foreign relations prerogatives.⁴⁹⁰ This criticism of the Bradley and Goldsmith project rings true to me. While Bradley and Goldsmith are right to object to "free-wheeling coordinate lawmaking power" exercised by courts,⁴⁹¹ Koh ably demonstrates that the use of customary international law by courts is not inevitably freewheeling nor lawmaking.

Yet embedded in Bradley and Goldsmith's separation of powers argument is a more modest point, a point with which I perceive little disagreement on the part of Professor Koh or the other critics. The point is that the notion of customary international law *where the political branches have acted* is an unconstitutional violation of separation of powers:

At the level of separation of powers, it is difficult to see how the federal common law of foreign relations could authorize federal courts to bind the federal political branches to judicial interpretations of [customary international law]. *Sabbatino* recognizes that courts can make law in certain contexts involving foreign affairs. But the Court in *Sabbatino* made

486. Bradley & Goldsmith, *supra* note 20, at 817.

487. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) ("There is no federal general common law.").

488. Bradley & Goldsmith, *supra* note 20, at 857.

489. See Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997). For Bradley & Goldsmith's replies to these criticisms, see generally Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 327-30 (1997).

490. Koh, *supra* note 489, at 1843-44.

491. Bradley & Goldsmith, *supra* note 20, at 816-17.

law in the face of political branch silence, and the law it made flowed from a recognition of both political branch hegemony and relative judicial incompetence in foreign affairs. *Sabbatino's* federal common law analysis was designed to shield courts from involvement in foreign affairs. It was not an endorsement of a free-wheeling coordinate lawmaking power for federal courts in the foreign affairs field.⁴⁹²

Bradley and Goldsmith's point is that the use of customary international law in the United States in the absence of political branch silence, i.e., where the political branches have acted, is unconstitutional because it violates separation of powers. As I have repeatedly emphasized, it is not my argument that U.K. law should conform to U.S. constitutional law. But if we unpack the Bradley and Goldsmith point, I think we see more than just U.S. constitutional norms at stake.

First, Bradley and Goldsmith highlight "relative judicial incompetence" in foreign affairs. This is, of course, a characteristic of the United Kingdom as well as the United States. Indeed, this was the principal theme of Lord Wilberforce's speech in *Buttes Gas*.⁴⁹³

Second, Bradley and Goldsmith point out "political branch hegemony" in foreign affairs. Again, the United Kingdom also allocates both power over foreign affairs and law-making power in a manner similar to the United States. Lord Wilberforce spoke in *Buttes Gas* of the determination of certain "inter-state issues" and "issues of international law" as beyond the limits of the judicial function.⁴⁹⁴ And several of the Law Lords in the *First Law Lords' Judgment* indicated that they thought the foreign relations issues in the case were for the executive branch to resolve.⁴⁹⁵

Key to the Bradley and Goldsmith point is their observation that "*Sabbatino* made law in the face of political branch silence."⁴⁹⁶ Again, the United Kingdom is no different from the United States in viewing common law as displaced by statutory law. Indeed, as discussed above, one of the Law

492. *Id.* at 861 (emphasis supplied).

493. See *supra* Part II.C.

494. See *supra* Part II.C.

495. Bradley & Goldsmith, *supra* note 20, at 861. *First Law Lords' Judgment*, *supra* note 2, at 918 (Lord Slynn), 934-35 (Lord Lloyd), 946 (Lord Steyn). See discussion *supra* Part II.B.

496. Their principal critics appear to acknowledge this point. See Neuman, *supra* note 491, at 376 (acknowledging that "contrary norms found in the Constitution, federal statutes or treaties, or valid presidential acts . . . supersede the applicability of . . . particular rule[s] [of customary international law]").

Indeed, Professor Koh criticizes Bradley and Goldsmith for not being true to the point they make. He says that they endorse an approach that would cause courts to construe more narrowly than Congress intended statutes enacted to incorporate into domestic U.S. law international human rights norms. See Koh, *supra* note 489, at 1845-46.

Lord's speeches explicitly recognized that any judicial use of customary international law was "subject to the overriding effect of statute law."⁴⁹⁷

My broad point is that while Bradley and Goldsmith criticize as unconstitutional U.S. courts giving customary international law precedence over statutory law, the values that animate the constitutional principle at stake, separation of powers, also inform U.K. jurisprudence. No more in the United Kingdom than in the United States are courts justified in exercising "free-wheeling coordinate lawmaking power . . . in the foreign affairs field."⁴⁹⁸ To honor these values, U.K. courts should—in a situation like this where Parliament has acted to provide statutory former head of state immunity—decide the question presented on the basis of the statute as enacted.

E. Lord Browne-Wilkinson, Lord Goff, and Lord Saville Decided the Availability of Former Head of State Immunity Solely by Measuring the Impact of Parliament's Adoption of the Torture Convention.

Three of the Law Lords in the *Final Law Lords' Judgment*—Lord Browne-Wilkinson, Lord Goff, and Lord Saville—did analyze Pinochet's former head of state immunity claim using an approach similar to that which I advocate. They each began with the statutory former head of state immunity provision, noted its force, and looked to—but only to—the Torture Convention as a possible source for abrogating the statutory provision. I say this approach is similar to the one I advocate because the Torture Convention, as a treaty ratified by the United Kingdom and its substantive criminal provision enacted into the Criminal Justice Act, is domestic U.K. law. As such, reconciling the provisions of the Torture Convention (and the torture provisions of the Criminal Justice Act) is the equivalent of statutory construction.

Lord Browne-Wilkinson.

Lord Browne-Wilkinson was of the view that the statutory former head of state immunity provision protected Pinochet in respect of "acts done by him as head of state as part of his official functions."⁴⁹⁹ And as to whether the "alleged organization of state torture (if proved) would constitute an act committed by Senator Pinochet as part of his official function as head of state,"⁵⁰⁰ Lord Browne-Wilkinson looked to the Torture Convention for an answer:

497. First Law Lords' Judgment, *supra* note 2, at 157 (Lord Lloyd) (quoting OPPENHEIM'S INTERNATIONAL LAW 57 (9th ed. 1992)). See discussion *supra* Part II.B.

498. Bradley & Goldsmith, *supra* note 20, at 861.

499. Final Law Lords' Judgment, *supra* note 4, at 113 (Lord Browne-Wilkinson).

500. *Id.* at 112.

I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as *jus cogens* was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts.⁵⁰¹

But to Lord Browne-Wilkinson, the Torture Convention provided several reasons for concluding that the implementation of torture cannot be a state function. First, he pointed out, it provided worldwide universal jurisdiction.⁵⁰² Second, it required all member states to ban and outlaw torture. Third, because an essential feature of the international crime of torture is that it must be committed “by or with the acquiescence of a public official or other person acting in an official capacity,” all defendants in torture cases will be state officials. The intent of this provision, Lord Browne-Wilkinson said, cannot be to exempt from liability the person most responsible for torture while inferiors who carried out orders are liable.⁵⁰³

Lord Browne-Wilkinson concluded that “all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.”⁵⁰⁴

Lord Goff.

Lord Goff was the only vote for Pinochet in the *Final Law Lords' Judgment*. In his view, the State Immunity Act

Provide[s] the sole source of English law on this topic. This is because the long title to the Act provides, *inter alia*, that the Act is “to make new provision with regard to the immunities and privileges of heads of state.”⁵⁰⁵

Lord Goff made the same point as Lord Slynn and Lord Hope about the various international tribunals that had been convened to address torture—that they were “all concerned with international responsibility before international tribunals, and not with the exclusion of state immunity in criminal proceedings before national courts.”⁵⁰⁶ This led him to the conclusion that, “if state

501. *Id.* at 114 (Lord Browne-Wilkinson).

502. *Id.*

503. *Id.* at 114-15 (Lord Browne-Wilkinson).

504. *Id.* at 115 (Lord Browne-Wilkinson).

505. *Id.* at 118 (Lord Goff).

506. *Id.* at 121 (Lord Goff).

immunity in respect of crimes of torture has been excluded at all in the present case, this can only have been done by the Torture Convention itself."⁵⁰⁷

Lord Goff's analysis of the Torture Convention was careful and persuasive. He first argued that a state's waiver of its immunity by treaty must be express and that there was nothing in the Torture Convention or otherwise to suggest that Chile had waived its immunity.⁵⁰⁸ But Lord Goff recognized that the Torture Convention was not being invoked to suggest waiver on Chile's part but rather for the proposition that "torture does not form part of the functions of public officials or others acting in an official capacity" He quite rightly observed that such a proposition can only be derived from the Torture Convention by implication and made several arguments why such an implication should be rejected. First, he said, nothing in the negotiating history of the Convention suggests that any waiver of state immunity was considered. Second, he continued, there were a number of reasons why parties to the Torture Convention might have been unwilling to relinquish state immunity, including allowing former heads of state to travel abroad without worry of being subjected to "unfounded allegations emanating from states of a different political persuasion."⁵⁰⁹ Lord Goff concluded that the implication that the Torture Convention abrogated former head of state immunity should "be rejected not only as contrary to principle and authority, but also as contrary to common sense."⁵¹⁰

Lord Saville.

Lord Saville employed essentially the same analysis as Lord Browne-Wilkinson with perhaps an even tighter statutory construction methodology. He took the position that because of the operation of the former head of state immunity provision of the Extradition Act, Pinochet was immune from extradition "unless there exists, by agreement or otherwise, any relevant qualification or exception to the general rule of immunity. . . ."⁵¹¹ To Lord Saville, the only possible relevant qualification or exception was to be found in the Torture Convention. He said:

It is important to bear in mind that the Convention applies (and *only* applies) to any act of torture "inflicted by or at the instigation of war with the consent or acquiescence of a public official or other person acting in an official capacity."

. . .

507. *Id.*

508. *Id.* at 123-24 (Lord Goff) (quoting *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989)).

509. *Id.* at 127-30 (Lord Goff).

510. *Id.* at 130 (Lord Goff).

511. *Id.* at 168 (Lord Saville).

To my mind it must follow in turn that a head of state, who for state purposes resorts to torture, would be a person acting in an official capacity within the meaning of this Convention. He would indeed to my mind be a prime example of an official torturer.⁵¹²

Lord Saville thought that it was impossible that immunity could exist consistently with the terms of the Torture Convention, at least for countries that had ratified the Torture Convention. Lord Saville commented that each state agreed that one can exercise jurisdiction “over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution; and thus to my mind can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture.”⁵¹³

Chile, Spain, and the United Kingdom had been parties to the Torture Convention since at least December 8, 1988, Lord Saville noted, and so those countries in his view must be considered to agree that former head of state immunity could be invoked in cases of alleged official torture.⁵¹⁴

Lord Saville appeared to be replying to Lord Goff when he concluded by saying, “I do not reach this conclusion by implying terms into the Torture Convention, but simply by applying its express terms.”⁵¹⁵

F. Conclusion.

The organization and operation of democracy in both the United Kingdom and the United States reflects certain common values. One is that the judiciary does not have the competence of the executive or the legislature in the realm of foreign affairs. A second is that the law-making function is derivative of the electorate and, although the judiciary has a law-finding function, it is subject to the law-making authority of the legislature. These values underpin the constitutional doctrine of separation of powers in the United States but should also guide, in my view, judicial decision-making in the United Kingdom.

Courts in the United Kingdom and the United States have for many years treated customary international law as a part of domestic common law. In the absence of statute, such decision-making is unremarkable. But in the face of statute, its justification vanishes under the considerations of “political branch hegemony and relative judicial incompetence in foreign affairs.”⁵¹⁶ Courts in

512. *Id.* at 169.

513. *Id.*

514. *Id.*

515. *Id.*

516. Bradley & Goldsmith, *supra* note 20, at 861.

such circumstances have no "free-wheeling coordinate lawmaking power ... in the field of foreign affairs."⁵¹⁷

In my view, the approach of eight of the Law Lords in the two Pinochet judgments came close to being exercises of "free-wheeling ... lawmaking power." They employed arguments from propositions of customary international law never before incorporated in U.K. law to support the conclusion that Pinochet was or was not entitled to former head of state immunity. In doing so, they went well outside the bounds of any legislation or treaty enacted by Parliament.

I find the approaches of Lords Browne-Wilkinson, Goff, and Saville more congenial. They struggled to make sense of the former head of state immunity provision adopted by Parliament in light of a treaty (the Torture Convention) and another statute (the torture provisions of the Criminal Justice Act) without straying far afield into customary international law. They attempted to give meaning to the enactments of the legislature, not make law themselves. It is an approach that reflects the very same values that animate the principle of separation of powers.

CONCLUSION

Beyond my broad abstention and statutory construction claims, I have tried in this article to illustrate several themes about this most extraordinary episode in world legal history, including the following:

(1) The United Kingdom's court of last resort, the Appellate Committee of the House of Lords, rendered three opinions in *Pinochet*, two on the merits of his claim to sovereign immunity as a former head of state. The House of Lords vacated its first decision when it found that one of the judges who participated in it had an impermissible conflict of interest. As such, it is an important case on judicial bias and disqualification. When the House of Lords issued its second decision on the merits, it again found that Pinochet was not entitled to former head of state immunity but for very different (and much more narrow) reasons. As such, it is an important case on appellate procedure.

(2) *Pinochet* required construction of the "double criminality" requirement of the Extradition Act, required the Home Secretary to make important determinations under §§ 7 and 12 of the Extradition Act, and required a magistrate's court to make an important determination under § 9 of the Act. As such, it is an important case on extradition law.

(3) *Pinochet* implicated important foreign relations considerations: acquiescence by the U.K. government to Chilean government behavior under Pinochet; opposing positions taken by two U.K. allies (Chile and Spain); extra-territorial recognition of domestic reconciliation amnesties. As such, it is an important case on foreign and diplomatic relations.

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(4) The *Pinochet* litigation featured a Spanish prosecutor pursuing in the United Kingdom a former head of state for human rights abuses alleged to have been committed in Chile. As such, it is an important case on extra-territorial enforcement of human rights law.

(5) *Pinochet* implicated important international human rights considerations: proper interpretation of the Genocide Convention, the Hostage Convention, and the Torture Convention; the extent of universal jurisdiction over international human rights abuses; and the extent to which a former head of state is entitled to sovereign immunity. As such, it is an important case on substantive human rights law.

As of today, the most tangible result of *Pinochet* appears to be that the willingness of Spain and the United Kingdom to examine allegations against Pinochet made it politically possible for Pinochet and his henchmen to be pursued at home in Chile. The role played by the U.K. courts undoubtedly contributed to that salutary result. But the U.K. courts paid a price in terms of prestige and institutional legitimacy; it remains to be seen whether the price was too high.

In this article, I have argued that separation of powers and its animating values of institutional competence and democracy should have dictated that U.K. courts dismiss Pinochet's application for habeas corpus on grounds of non-justiciability and that, if faced with the sovereign immunity defense during judicial review of an extradition order, resolved the question as a matter of statutory construction and not by reference to customary international law. Had the courts followed this more restrained course, I believe they would have played a more appropriate role in this most extraordinary drama.

