THE EXTRADITION PROCEEDINGS AGAINST GENERAL AUGUSTO PINOCHET: IS JUSTICE BEING MET UNDER INTERNATIONAL LAW?

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I. INTRODUCTION

In a written request to Great Britain for General Augusto Pinochet’s extradition, Spain described some of the acts alleged to have been committed under his command of Chile from 1973 to 1990.¹ Spain’s description of the torture endured in Chile revealed

The most usual method was ‘the grill’ consisting of a metal table on which the victim was laid naked and his extremities tied and electrical shocks were applied to the lips, genitals, wounds, or metal prosthesis; also two persons, relatives or friends, were placed in two metal drawers one on top of the other so that when the one above was tortured the psychological impact was felt by the other; on other occasions the victim was suspended from a bar by the wrists and/or the knees, and over a prolonged period while held in this situation electric current was applied to him, cutting wounds were inflicted or he was beaten; or the ‘dry submarine’ method was applied, i.e. placing a bag on the head until close to suffocation, also drugs were used and boiling water was thrown on various detainees to punish them as a foretaste for the death which they would later suffer.²

From October 1998 until March 2000, the British courts and government were the focal point of the highly publicized international debate on whether General Pinochet should be extradited to Spain by Great Britain for crimes against humanity committed in Chile. The case against Pinochet led the Divisional Court of Britain and the House of Lords to render several rulings dealing with the issues of immunity and extraditable offenses.

* J.D. 2001, The University of Georgia.
2 Id. at 1503.
As a result of the extradition proceedings, the House of Lords advanced international human rights laws by strengthening the "emerging obligation in international law to investigate and impart justice on those former heads of state guilty of committing . . . crimes against humanity in light of the growing acceptance of universal jurisdiction." By recognizing the importance of universal jurisdiction, the British courts helped to set the standard that there could be prosecution of "dictators and leaders of repressive regimes by courts in countries where the alleged abuses did not occur." Furthermore, the British courts set another precedent by not granting immunity for former heads of state when charged with crimes against humanity committed under their command.

The British courts, however, also demonstrated the need for further advancement in international law so that the global community can have the authority to stop crimes against humanity. Pinochet's regime tortured thousands of victims from 1973 to 1990. Yet, in March of 1999, the House of Lords ruled that Pinochet could legally be extradited to Spain solely for acts of torture or conspiracy to torture that occurred after December 1988. The Lords reasoned that Great Britain, Spain, and Chile had not all become parties to the International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act of 1984 (Convention Against Torture Act) until December 1988. The United Nations adopted the Convention Against Torture Act in 1984, as an effort to strengthen the already existing custom of international law to outlaw torture and other inhumane treatment. Customary international law stems from the "general practice of states which is accepted and observed as law, i.e. from a sense of legal obligation, and

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5 See id.
7 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, S. TREATY Doc. No. 100-20 (1988) [hereinafter Convention Against Torture].
thus, the outlawing of torture by the international community was custom by the 1970s.

This Recent Development will explore Great Britain’s treatment of international law through the use of its national legal system, analyze what went wrong with the Pinochet extradition, and suggest improvements of the process for the future.

First, Pinochet’s use of torture in Chile will be explored briefly along with Spain’s request for Pinochet’s extradition and the legal procedural history in Great Britain dealing with the torture allegations against him. Second, customary international law and the conventions and treaties recognized during Pinochet’s regime in Chile will be discussed in the context of the House of Lords’ initial decision in November 1998. Although this decision denied Pinochet immunity, it represented a narrow construction, for it looked to British national law in determining how to implement international law. Third, the House of Lords’ second decision in March 1999, granting Pinochet partial immunity for the crimes occurring before the 1988 ratification of the United Nations Convention Against Torture, reiterates this narrow construction of international law. International law was given effect only when directly enacted into British national law. Fourth, the Extradition Act of 1989 also indicates that Britain’s national law outweighs international law of universal jurisdiction especially in light of the fact that Home Secretary Jack Straw had discretion to decide whether Pinochet would be extradited to Spain. Finally, individual national legal systems do not provide the best forum in which to address international crimes against humanity such as torture. Each national legal system’s application of universal jurisdiction varies according to how each nation incorporates international customary law, treaties, and conventions. This variation in application has the potential to lead to inconsistencies in the implementation of what should be uniform international law.

II. PINOCHET’S REGIME IN CHILE AND THE LEGAL PROCEDURES AGAINST HIM IN GREAT BRITAIN

A. General Augusto Pinochet’s Regime in Chile

On September 11, 1973, General Augusto Pinochet led a military junta to overthrow Chile’s president, Salvador Allende. Within the first three months of the Pinochet regime, “13,500 people were arrested with perhaps 1,500 killed.” From studies conducted by the National Commission on Truth and

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11 Nehal Bhuta, Note, Justice Without Borders? Prosecuting General Pinochet, 23 MELB.
Reconciliation,\textsuperscript{12} "the armed forces and security forces were responsible for the deaths of 2,115 Chileans in the years following the 1973 coup as well as the systematic torture or imprisonment of thousands of other opponents."\textsuperscript{13}

The Chileans were kept in constant fear by the secret police, known as the National Intelligence Directorate (D.I.N.A.), which directly reported to Pinochet.\textsuperscript{14} Pinochet instructed the D.I.N.A., who were specially trained in torture techniques and had access to secret torture chambers, to eliminate political adversaries.\textsuperscript{15} To protect military officials and the government from involvement in the human rights abuses that occurred from 1973 until 1978, Chile enacted an amnesty act.\textsuperscript{16} In the 1980s, the National Information Center (CNI) replaced D.I.N.A. and continued to conduct crimes of torture to further oppress Pinochet's opposition.

By December of 1989, Chile made the transition back to democracy. Although no longer president, Pinochet remained the commander-in-chief of the army until March 1998, at which time he appointed himself Senator for life so that he would be given immunity from any prosecution in Chile.\textsuperscript{17}

\textbf{B. The Legal Procedures Against Pinochet in Great Britain}

In September of 1998, Pinochet traveled to Great Britain to undergo minor back surgery. During the two years prior to this trip, Judge Garzon of Spain conducted an investigation of torture crimes in Chile.\textsuperscript{18} Judge Garzon filed international warrants with Great Britain in October of 1998 for Pinochet to

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\textsuperscript{13} Id. at xxxvii.

\textsuperscript{14} See id. at 52.


\textsuperscript{16} See English & Tollefson, \textit{supra} note 12, at 292. See also Bhuta, \textit{supra} note 11, at 509 (stating that the Amnesty Law of 1978 was upheld by the Chilean Supreme Court in 1990 as being constitutional).

\textsuperscript{17} See Curtis A. Bradley & Jack L. Goldsmith, \textit{Pinochet and International Human Rights Litigation}, 97 \textit{MICH. L. REV.} 2129, 2133 (1999). On August 8, 2000, the Chilean Supreme Court held that Pinochet no longer has immunity for the seventeen years in which he committed acts of torture. This development could lead to prosecution of Pinochet in Chile. See Chile Revokes Pinochet's Immunity (visited Nov. 15, 2000) <http://www.washingtonpost.com/wp-dyn/world/americas/A56419-2000Aug8.html> (on file with author).

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stand trial in Spain for the torture and murder of Spanish and Chilean citizens in Chile.  

Great Britain determined that Pinochet had a prima facie case to answer in the extradition proceedings against him. Under Great Britain's Extradition Act of 1989, Pinochet could be extradited to Spain if the alleged offense against the requesting state (Spain) would also be an offense under British law. The warrant against Pinochet for torture crimes used to silence Chilean political opposition fell within the boundaries of the Extradition Act. Great Britain, Spain, and Chile all ratified the Convention Against Torture Act in 1988, which allowed for the enforcement of universal jurisdiction for crimes against humanity such as torture. The Convention Against Torture Act was implemented by British Parliament in Section 134(1) of the Criminal Justice Act whereby "torture by a public official or person acting in a public capacity became a criminal offense in the U.K. after September 29, 1988, no matter where it took place."  

In October of 1998, Pinochet moved for the Divisional Court to quash the warrant. He claimed immunity as Chile's head of state at the time of the alleged crimes, and the court agreed that he should be granted immunity. On appeal, the House of Lords voted to reverse the lower court decision and stripped Pinochet of immunity, since crimes against humanity do not constitute the normal acts of a head of state. This ruling was annulled in December of 1998.

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19 See Bradley & Goldsmith, supra note 17, at 2133.  
20 See Extradition Act, 1989, §12 (Eng.).  
21 See Fox, supra note 18, at 209.  
22 Criminal Justice Act, 1988, § 134(1) (Eng.).  
23 John R. Schmertz & Mike Meier, House of Lords Rules that Crimes of Torture Allegedly Committed During Pinochet Regime in Chile are Extraditable to Extent They Occurred After Ratification of Torture Convention by Chile, Spain, and United Kingdom in Late 1988; Head-of-State Immunity Held Inapplicable to Torture Charges as Jus Cogens Offenses, 5 INT’L L. UPDATE 41 (1999).  
24 See id.  
25 The House of Lords is the final court of appeal in civil and criminal matters from all courts in England, Wales and Northern Ireland and all lower court decisions are bound by its precedent. See Penny Darbyshire, Eddey on the English Legal System 160 (1992).  
26 See John R. Schmertz & Mike Meier, In 3 to 2 Vote British House of Lords Reverses Ruling that General Pinochet was Immune from Extradition to Spain, 4 INT’L L. UPDATE 129 (1998).  
27 One of the law lords who voted against Pinochet was linked to contributing to Amnesty International, a human or rights group campaigning against Pinochet’s claim of immunity. See Pinochet for Beginners (visited Sept. 18, 1999) <http://www.remember-chile.org.uk/beginners/index.htm>.
The House of Lords then reheard Pinochet's case. They voted in March of 1999, that Pinochet was not entitled to absolute immunity, and his arrest was lawful. They granted Pinochet partial immunity because they did not hold him accountable for charges of human rights abuses prior to Great Britain's ratification of the Convention Against Torture Act on September 29, 1988. The charges by Spain remaining against Pinochet were torture and conspiracy to commit torture that occurred after December 1988, when the Convention Against Torture Act had been ratified by Great Britain, Spain, and Chile.

The Home Secretary, Jack Straw, continued the extradition proceedings. He considered whether to extradite Pinochet based on the Extradition Act, which required him to balance whether the offenses were trivial or occurred a long time ago, the accusations were made in good faith, or if the extradition be inhumane or unjust. After the Deputy Chief Magistrate, Ronald Bartle, ruled that Pinochet could legally be extradited to Spain, Straw once again considered whether to extradite Pinochet. Pinochet's attorneys pleaded for Straw to allow him to return to Chile based on his ill health over the past year. Straw ordered a team of doctors to examine Pinochet. While the medical records were not made public, Straw stated that the doctors determined that Pinochet was senile and could not make coherent statements, due to brain damage from his previous strokes. Straw's final decision allowed Pinochet to go back home to Chile and to forego extradition to Spain, since he was medically unfit to stand trial.

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29 See Bradley & Goldsmith, supra note 17, at 2138.
34 See id.
III. LEGAL ANALYSIS

A. Customary International Law

To understand the House of Lords decisions, the customary international law of the 1970s and 1980s should be examined to determine if international law was violated in the earlier years of Pinochet's regime. The original and oldest source of international law is custom. International custom is evidence of a general practice accepted as law in the states because these certain actions are "obligatory or right." Custom usually takes time to develop from evolving rules of law that eventually are recognized as "obligatory or right" to be followed by all states in the international community. The standard elements of customary international law are "(1) uniformity of state practice, (2) generality of state practice, and (3) the sense that state practice is required by law," which "may thus be reduced to two primary components: the objective practice of states and the subjective belief motivating this practice." Under customary international law, a state can grant extradition for any crime that it deems appropriate. States usually will extradite for crimes that they regard as serious offenses.

Another custom that should be considered is "double criminality." This custom, followed by many states, sets forth that "extradition is only granted in respect of a deed which is a crime according to the law of the state which is asked to extradite, as well as of the state which demands extradition." The Extradition Act of 1989 implemented the custom of double criminality into Great Britain's national law. Under another custom in international law, the courts of the state requesting extradition do not have to determine whether the defendant committed the crimes. The courts merely review the evidence to determine if a prima facie case exists for which the defendant must answer at trial in the requesting state.

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37 Id. at 26-27.
38 See id. at 30.
40 See Oppenheim's International Law, supra note 36, at 957.
41 Id. at 958. This custom played an important role in the House of Lords decisions concerning what crimes allegedly committed by Pinochet are extraditable.
42 See id. at 958. Again, this custom was followed by the House of Lords as they determined whether Pinochet had a case to answer for in Spain without determining if Pinochet was actually involved in the alleged crimes.
Widely recognized in customary international law are "peremptory norms." A peremptory norm of international law "[is] accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted." A peremptory norm has more force in international law than do customary rules or treaties. A peremptory norm is not to be overruled by local custom because it is designed to produce a deterrent effect requiring that all nations stay true to its authority.

For human rights protection, "it is widely accepted that customary law contains preemptory norms that prohibit the types of acts committed in Chile—disappearances, torture, and summary executions." Chile accepts that the international law prohibiting torture is a preemptory norm. The Chilean government, therefore, violated peremptory norms when engaging in these acts and should be held liable under international law for these violations.

Customary law also traditionally recognizes a grant of immunity to heads of state or former heads of state for carrying out official acts which might otherwise violate international law. This exception, however, requires that (1) this person be a head of state, and that (2) the act be carried out in the course of duties recognized as official acts. Customary law also provides a current head of state with immunity from criminal prosecution under international law. There is not a clear customary international rule, however, on whether a crime violating international law withdraws this status of immunity from a former head of state. The lack of a definite rule creates a problem of interpretation for national courts in determining when a former head of state should be granted or denied immunity for past actions that may have violated international law.

44 White, supra note 3, at 155 (quoting Hilao v. Macos, 25 F.3d. 1467, 1471 n.6 (9th Cir. 1994)).
46 See id.
47 Quinn, supra note 43, at 921-22 n.92.
50 See id. at 1501.
51 See id. at 1473-74.
B. Conventions, Treaties, and Other Laws Recognized Before 1988

In 1948, the United Nations created the Universal Declaration of Human Rights, where the member states pledged themselves to uphold the standard "that human rights should be protected by the rule of law." As a founding member of the UN, Chile had a duty to abide by this declaration. Under Article Three, "Everyone has the right to life, liberty, and security of person," and under Article Five, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Although the Universal Declaration outlawed torture thirty years before Pinochet's regime took control, Pinochet's regime ignored it, using torture to silence its political opposition. The Amnesty Law of 1978, which was created under the military government in Chile, granted immunity to all state and military officials who participated in the disappearances and torture acts perpetrated from 1973 to 1978. Because those involved likely recognized that they were committing punishable crimes against humanity, they granted themselves amnesty. This amnesty, however, should not apply to universal jurisdiction and the violation of international law. Pinochet openly commanded a violation of international law by the use of torture to maintain control over his government. He should not be allowed to create an amnesty act that overrides international law.

The Pinochet regime also violated the 1948 Geneva Conventions and the 1978 Inter-American Convention on Human Rights. These conventions protected personal liberty and due process, rights included in Chile's constitutions, but ignored by the Pinochet regime's acts of torture and disappearances. Under the Geneva Conventions, there is no amnesty for wartime crimes.

Thus, customary international law and the conventions enacted prior to and during the Pinochet regime prohibited torture and defined it as an international crime. In fact, the British House of Lords recognized this argument in both the

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53 See id.
54 Id.
57 See Snyder, supra note 55, at 264.
November 1998 and March 1999 decisions in their consideration of the issues of immunity and extraditable crimes.58

C. The United Kingdom Becomes a Forum for International Law

From the very beginning of the United Kingdom’s analysis of the Pinochet extradition issue, the House of Lords recognized that “the capacity to prosecute Pinochet in national courts is not commonplace.”59 The House of Lords looked to English national law in deciding how to implement international law.60 In their decision, the Lords considered the issue of “how fast to push the development of the [customary] law.”61 The Lords were divided on their views of international law and universal jurisdiction for crimes against humanity. They “were merely construing a British jurisdictional statute” with “their interpretation of the statute . . . [being] informed by a reading of international law.”62 Thus, the House of Lords narrowed the application of the decision rather than grant an outright victory for human rights under international law. They used British law informed by international law rather than customary international law allowing for universal jurisdiction.

D. The House of Lords’ November 1998 Pinochet Ruling

1. The Majority’s View

After the Divisional Court upheld Pinochet’s immunity as a former head of state for the offenses alleged in Spain’s international warrants for extradition, the House of Lords reversed that decision by a three to two vote. The main issue discussed in the November 1998 decision was whether Pinochet should be granted immunity. Pinochet argued that he was entitled to immunity under customary international law and the State Immunity Act of 1978, as read with the Diplomatic Privileges Act of 1964.63

The majority held that the State Immunity Act of 1978 did not apply to criminal proceedings. Thus, since the extradition proceeding dealt with criminal charges, there was no issue upon which the State Immunity Act could

59 Id.
60 See id. at 297.
61 Id.
62 Id.
grant Pinochet immunity. The majority also held that when section twenty of the State Immunity Act was read in conjunction with schedule one of the Diplomatic Privileges Act of 1964, immunity could be granted for a head of state performing official acts. They determined, however, that "the crimes of torture . . . [fall] outside what international law would regard as functions of a head of state."45

The majority applied identical reasoning in its analysis of Pinochet's argument for immunity under customary international law. The majority focused on whether Pinochet should have immunity as a former head of state. All three Lords of the majority agreed that there was no clear authority on whether customary international law granted immunity to a former head of state.66 Further, the majority determined that to be eligible for statutory immunity, the former head of state had to be performing official acts, and the majority delineated the requisite criteria for an act to be deemed "official" in nature.67 In drawing this line, the majority examined the issue of whether the municipal law of Chile or the principles of customary international law should determine these criteria.68

The majority chose to use the rules of international law. Lord Steyn argued that "the development of international law since the second world war justifies the conclusion that by the 1973 coup d'état, and certainly ever since, international law condemned . . . torture . . . and crimes against humanity . . . as international crimes deserving of punishment."69 Therefore, the offenses alleged by Spain to have been committed under the orders of Pinochet could not be deemed to be official acts. The majority concluded that there was no immunity of any kind that could be granted to Pinochet. Thus, this majority opinion seemed to abide by the customs of international law without putting an undue emphasis on national law.

2. The Minority's View

The two minority Lords gave lengthy opinions on why the immunity should be granted to Pinochet. Lord Slynn emphasized the far-reaching implications of this decision. He stated that the Lords were not "concerned only with this applicant," but were "concerned on the arguments advanced with a principle

64 See id.
65 Id.
66 See id. at 1501, 1503.
67 See id. at 1505.
68 See id.
which will apply to all heads of state and all alleged crimes under international law."70 This perspective revealed the cautious application of international law in this opinion. The minority agreed with the majority that the State Immunity Act of 1978 did not apply to criminal proceedings or expressly deal with the position of a former head of state.71

The minority focused on rejecting the majority’s view that the functions of a head of state must be defined by international law rather than by national law. Lord Slynn claimed that international law did not list the functions considered to be official acts of head of state. He argued that the role of a head of state differs among nations.72 Lord Slynn conceded that international law does not recognize torture as an official act of a head of state. Yet, he rejected the conclusion that if a head of state commits an illegal act, then he is no longer carrying out one of his functions and thus loses immunity with respect to those criminal acts.73

The minority conceded that more states now recognize a category of crimes not covered by head of state immunity. Lord Slynn, however, concluded this movement was still in its earliest stages of development and therefore, did not represent a general consensus that “all crimes against international law should be justiciable in national courts on the basis of the universality of jurisdiction.”74 He stressed that no universal definition of crimes against humanity existed, and that states should be cautious in examining this issue. Without long established customary international law in this area, he did not want to subject a former head of state to a trial of international law crimes within another state.75 He was not in agreement with the proposition that “international crimes are outside the protection of the immunity respect of former heads of state.”76 Further, he disagreed with the concept of universal jurisdiction and stressed that national judges should proceed carefully in their debate of this concept.77

Even the language of the Convention Against Torture Act did not convince the minority that Pinochet should be denied immunity for acts of torture. While recognizing that the Convention Against Torture Act involved public officials, allowed extradition, and constituted national law in Chile, Spain, and

70 Id. at 1460.
71 See id. at 1465.
72 See id. at 1468.
73 See id.
74 Id. at 1473.
76 Id. at 1474.
77 See id.
the United Kingdom, the minority viewed it as unclear. The minority claimed that it did not explicitly determine whether immunity should be taken away. Moreover, it felt that a national court should not interpret whether the Convention Against Torture Act meant for immunity to be taken away from a head of state, particularly because the term “public official” was too vague to determine whether it included a head of state.78

Lord Berwick’s minority opinion also attacked the Convention Against Torture, contrasting it with the Genocide Convention. He stated that the Genocide Convention was clear in expressing no immunity for a head of state.79 When it was adopted at British law, however, the British law left that portion out so that immunity for heads of state was upheld. Thus, he concluded that if the Convention Against Torture Act had clearly contained a prohibition on head of state immunity, then Parliament would most likely have incorporated immunity into the statute as it did with the Genocide Convention.80

The minority hesitated in directly applying international law because it did not view the British court system as an international court. Lord Berwick explained, “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.”81 The minority wanted to narrowly apply international law. They argued that this type of case did not belong in a national court system but would be better suited for an international court system.

The Convention Against Torture Act was adopted into the British legal system through section 134(1) of the Criminal Justice Act of 1988. This act defines “torture” as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” by “the instigation of or with the consent or acquiescence of a public official.”82 In Article Four of the Convention Against Torture Act, each state party agrees to make torture and conspiracy to commit torture criminal offenses that must be punished.83 The minority did not construe this language as universal jurisdiction. Yet, it used this language to deny Pinochet immunity because torture cannot be considered an official act of a head of state under customary international law or the Convention Against Torture Act. This Act also gives the state parties an explicit duty to initiate criminal proceedings against persons guilty of torture.

78 See id. at 1476-78.
79 See id. at 1488.
80 See id.
82 Convention Against Torture, art. 1, para. 1.
83 See id.
Thus, the state parties do not have the right to pass amnesty laws that protect torturers from prosecution.\footnote{See Schabacker, supra note 39, at 27.}

Overall, the decision by the House of Lords set an important precedent in international law, even though narrowly applied under their national law. The House of Lords ruled that "heads of state cannot claim statutory immunity for crimes under international law, such as torture and crimes against humanity."\footnote{A Half-Closed Case: Pinochet Will Leave Questions Behind if He Flies Home, TIMES (London), Jan. 13, 2000, at 25.} This decision, however, was annulled as a result of one majority law lord's association with Amnesty International, a group promoting the extradition of Pinochet for crimes against humanity.\footnote{See Pinochet for Beginners, supra note 27.} Thus, the House of Lords would have another chance to review the case and determine how to apply international law. The result would be that the minority's narrow view of national law incorporating international law would prevail over the majority view of directly applying international law.

\subsection*{E. The House of Lords' March 1999 Ruling}

In this decision, the House of Lords placed more emphasis on the issue of extradition and the crimes for which Pinochet could be extradited. By the time this rehearing came before the House of Lords, Spain specified the charges against Pinochet as torture, conspiracy to torture, conspiracy to murder, attempted murder, and murder.\footnote{See Regina v. Bow St. Metro., [1999] 2 W.L.R. at 828.} The majority held that under Section Two of the Extradition Act of 1989, double criminality applied so that the crime had to be a crime in England and a crime in Spain at the time the alleged offense occurred.\footnote{See id.} Extraterritorial torture was not a crime in England until September 29, 1988, when England incorporated the Convention Against Torture Act into its legal system through section 134 of the Criminal Justice Act. Thus, the alleged offenses of torture and conspiracy to torture, and murder and conspiracy to murder occurring in Chile before that date were not crimes for which Pinochet could be extradited.\footnote{See id.} The House of Lords paid no heed that under customary international law, Pinochet's alleged acts of torture could be punished in both the U.K. and Spain by universal jurisdiction.

Therefore, the House of Lords granted partial immunity to Pinochet. The majority held that the State Immunity Act of 1978 granted a former head of
state immunity for official acts. The Lords recognized that torture was an international crime, but that it did not become punishable by universal jurisdiction until the Convention Against Torture Act. The Lords reasoned that since Chile, Spain, and the United Kingdom had all made the Convention Against Torture part of their respective national legal systems by December 8, 1988, then Pinochet could not claim immunity for acts of torture after that date. Thus, since the worst acts of torture occurred in the 1970s, Pinochet won a partial victory. Nonetheless, the Pinochet regime perpetrated enough acts of torture and conspiracy to torture between 1988 and 1990 to keep the extradition proceedings alive.

The House of Lords’ decision to grant Pinochet partial immunity for acts of torture occurring before the 1988 ratification of the Convention Against Torture by Chile, Great Britain, and Spain was inaccurate. Torture was not first outlawed in these countries by the Convention Against Torture. As stated from a study of the Convention Against Torture Act:

Many people assume that the Convention's principal aim is to outlaw torture and other cruel, inhuman or degrading treatment or punishment. This assumption is not correct insofar as it would imply that the prohibition of these practices is established under international law by the Convention only and that this prohibition will be binding as a rule of international law only for those states which have become parties to the Convention. On the contrary, the Convention is based upon the recognition that the above-mentioned practices are already outlawed under international law. The principle aim of the Convention is to strengthen the existing prohibition of such practices by a number of supportive measures.

Under customary international law, these countries had already outlawed torture. The Convention Against Torture Act was merely meant to strengthen customary international law, not necessarily to establish the illegality of torture. The Convention Against Torture Act emphasized the responsibility of public officials or those acting in an official capacity by holding them accountable for violating the customary international law prohibiting the use of torture. Thus,

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90 See id.
91 See id.
92 BURGERS & DANELIUS, supra note 9, at 1.
93 See id.
the House of Lords wrongly placed more emphasis on the date that the Convention Against Torture Act became effective in British national law rather than on the fact that customary international law outlawed torture for years before the Pinochet regime was even established. They erred in granting Pinochet immunity for the years between 1973 to 1988.

In this decision, the House of Lords applied a narrow view of international law, making it applicable only when enacted directly in their national law. Lord Browne-Wilkinson noted that since the Nuremberg trials, international law has recognized international crimes. During the Nuremberg trials, the International Military Tribunal found that individuals could be held accountable for war crimes, crimes against humanity, and crimes against peace. The House of Lords further recognized that the torture to which Chile admitted violates a preemptory norm under customary international law. The House of Lords, however, overlooked these issues. Instead, they focused on the principle of double criminality to justify Pinochet's partial immunity because torture outside Great Britain was not a crime under British law until September 1988.

Various Lords debated the issue of whether double criminality required the conduct to be criminal under British law at the date it was committed or merely criminal at the date of extradition. The majority of the Lords agreed that the Extradition Act of 1989, Section Two, defines an extradition crime to be a crime under double criminality for an offense at the conduct date of the offense rather than the request date of extradition for the offense.

Among the Lords, there were those who did not doubt that torture was an international crime before the Convention Against Torture. But, their argument included the view that there was no tribunal or court to punish this international crime and universal jurisdiction was not recognized until the Convention Against Torture Act. Thus, the Lords declined to expand international law beyond what they viewed to be the customary practice of torture being under the local jurisdiction of the states within the preemptory norm that torture was an international crime. The Lords viewed the goal of the

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94 See Regina v Bow St. Metro., [1999] 2 W.L.R. at 832.
95 See ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 6 (1962).
97 See id. at 832.
98 See id.
99 See id.
100 See id. at 841.
101 See id.
Convention Against Torture Act as now providing no safe haven for the torturer within his local jurisdiction.\textsuperscript{102}

\textit{F. National Politics as the Final Factor in Deciding the Issue of Extradition}

After the House of Lords held that Pinochet could legally be extradited to Spain by Great Britain for torture crimes that occurred after 1988, Magistrate Bartle determined that the extradition formalities were complied with because Spain had legal charges and jurisdiction to try Pinochet. Yet, the ultimate discretion on whether Pinochet would actually be sent to Spain was left to the Home Secretary, Jack Straw.

Under Great Britain's Extradition Act, Straw had authority to not extradite Pinochet if extradition would be inhumane or unjust.\textsuperscript{103} A government official should not have this subjective determination concerning extradition in cases dealing with violation of international law. Once again, national law dominated over international law since the extradition proceedings concerning the charges of torture were left to national political systems rather than a more objective international forum.

\textit{G. The Need for an International Forum for Issues of International Law}

From the outcome of the Pinochet extradition proceedings, the manner of the enforcement of international law apparently has not finished developing. Great Britain is an example of the problem of adjudicating international criminal law primarily in national courts. Typically, national courts will decide the question of whether an individual, an entity, or a government has committed an international crime only as applied by its interpretation of international law through its national law.\textsuperscript{104} As international law continues to develop,\textsuperscript{105} there needs to be a formalization of the customary law, treaties, and conventions of international law that is not reliant upon an interpretation of its application under national law.


\textsuperscript{103} See Extradition Act, supra note 20.

\textsuperscript{104} See ELIZABETH F. DEFEIS, LEARNER'S GUIDE INTERNATIONAL LAW VIDEO COURSE 96 (1995).

\textsuperscript{105} "Step by step over the last half-century, governments and international bodies have given shape to public attitudes with a succession of agreements and conventions. Some define human rights; others establish violations such as genocide and torture." Richard Blystone, \textit{Pinochet Case a Defining Moment for International Law} (visited Jan. 13, 2000) <http://www.cnn.com/WORLD/europe/9811/24/pinochet.legalities/>. 
A possible solution would be to form an International Criminal Court with the purpose of dealing with the serious crimes against humanity such as torture. The crimes would be recognized worldwide as being a violation of international law. An example of how to establish this type of court can be seen by the “ad hoc international criminal tribunal . . . established by Security Council resolution in 1993 to try individuals for violations of international humanitarian law committed in the former Yugoslavia since 1991.”

Instead of a lengthy process within a nation’s legal system, an international legal system should be established that would be uniform in applying an international system of justice. An International Criminal Court has been adopted and will become ratified and operational for the world community upon sixty states becoming signatories. For this court to be successful, states are in agreement that “the court should have jurisdiction only over individuals and not states . . . initially, it should not be a standing body, . . . [and] that such a court would assume jurisdiction only with the consent of the states’ parties and must guarantee due process, independence, and impartiality.” This type of court, however, cannot be established until states are ready to let go of the narrow view of implementing international law only through national law. There also needs to be a plan of how those suspected of committing crimes against humanity would be apprehended and where they would serve their sentence if convicted by an international criminal court system. Even though Pinochet would not be “subject to the court’s jurisdiction as it is non-retroactive in nature,” his case should be an example to study in addressing the issues of universal jurisdiction and accountability for the repressive regimes and torture crimes of dictators in the future.

IV. CONCLUSION

The Pinochet case serves as an example of why the International Criminal Court needs to be ratified and effective worldwide. National courts are not the

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106 Defeis, supra note 104, at 97. A similar tribunal was established to cover war crimes in Rwanda.
107 See White, supra note 3, at 167.
108 Defeis, supra note 104, at 96-97.
109 See id. at 97; see also UK to Propose Dropping Extradition Process-Paper (visited Oct. 18, 1999) <http://www.aol.com/mynews/news/story.adp-1999100903228499.html> (commenting on the British proposal at a forthcoming European Union summit on justice to abolish extradition proceedings between EU member states. With the British proposal, Eurowarrants could be used for the arrest of criminals that would be enforceable across the EU).
110 White, supra note 3, at 167.
best forums in which to try international crimes because politics and varying interpretations of national law can affect the justice being sought under international law. Since the 1940s, international law has recognized that torture crimes and crimes against humanity should be outlawed. Thus, the prohibition of torture and crimes against humanity became a preemptory norm under international law. The House of Lords recognized that a peremptory norm has the highest ranking among international law in order to have a deterrent effect that all nations must stay true to its authority. Yet, they chose to ignore it since national law did not have a way of punishing this norm until the enactment of the Convention Against Torture Act.

National law should not determine the outcome of violations of international law. The Pinochet case has helped international law by setting the precedent of enforcement of universal jurisdiction from this point onward. But, unfortunately, there may be no justice for the victims who suffered under Pinochet's regime of torture. Their suffering should not be in vain, and we should strive to reform by upholding international law without the infringements of individual national laws.
