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*PINOCHET EXTRADITION CASE: SELECTED LEGAL
ISSUES*

David M. Ackerman, American Law Division

Updated March 3, 2000

Abstract. On March 24, 1999, a judicial panel of Britain's House of Lords issued a precedent-setting ruling that General Pinochet of Chile has no immunity as a former head of state from arrest and possible extradition to Spain for trial on alleged human rights abuses. The panel, however, substantially narrowed the scope of the charges for which Pinochet might be extradited and directed the Home Secretary to reconsider whether Spain's extradition request ought to be allowed to move forward. This report gives an overview of the tangled and unprecedented proceedings against Pinochet.

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Updated March 3, 2000

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ABSTRACT

On March 2, 2000, British Home Secretary Jack Straw terminated proceedings to extradite General Pinochet of Chile to Spain for trial on alleged human rights offenses on the grounds Pinochet was no longer mentally fit to stand trial. Pinochet immediately returned to Chile. Notwithstanding the absence of a trial on the merits, the case resulted in an unprecedented ruling by Britain's highest court that Pinochet had no immunity as a former head of state from arrest and extradition to Spain for trial on human rights atrocities allegedly committed in Chile. This report reviews the tangled and unprecedented proceedings against Pinochet and will no longer be updated.

Pinochet Extradition Case: Selected Legal Issues

Summary

On March 2, 2000, Britain's Home Secretary Jack Straw terminated the unprecedented proceeding to extradite General Pinochet of Chile to Spain for trial on alleged human rights violations committed while he was in power in Chile and allowed him to return home. The reason cited by the Home Secretary was that several strokes suffered by Pinochet in the fall of 1999 had rendered him "mentally [in]capable of meaningful participation in a trial."

The proceeding stemmed from two requests for Pinochet's extradition made by Spanish authorities in mid-October, 1998, when they discovered Pinochet was in England for back surgery and other purposes. Both requests alleged Pinochet's culpability for numerous human rights violations committed during his time in power. A trial court initially held him to be absolutely immune as a former head of state from arrest and extradition. But in a seminal decision on November 25, 1998, a panel of the Lords of Appeal of the House of Lords held, 3-2, that the international law of human rights has evolved to the point that it overrides the long-standing doctrine of immunity. On December 17, 1998, however, that decision was set aside on the grounds one of the judges in the majority had failed to disclose that he had a continuing association with Amnesty International, a private organization which had been permitted to intervene in the case.

As a consequence, a differently constituted panel of Law Lords, after twelve days of oral argument, issued a new decision on March 24, 1999. That decision substantially narrowed the charges against Pinochet to just a few instances of torture allegedly committed after September 29, 1988, because prior to that time neither England nor Chile had ratified the Torture Convention. But the court again held that Pinochet possessed no immunity as a former head of state from the charges of torture. Because its limitation of the charges for which Pinochet might be extradited and its ruling on immunity constituted a "substantial change in circumstances," however, the court in that decision invited the Home Secretary to exercise the statutory power he has over extradition requests and to reconsider whether Spain's extradition request ought to move forward.

The Home Secretary did so; and on April 15, 1999, he concluded that the extradition proceedings ought to be allowed to continue. On October 8, 1999, a British magistrate ruled that Spain's extradition request met the standard of dual criminality set forth in the European Convention on Extradition and England's implementing statute and that, therefore, Pinochet should be extradited to Spain. In early January 2000, however, the Home Secretary reported that he was "minded" to terminate the extradition proceeding because of recent deterioration in Pinochet's mental health. Spain, Belgium, France, Switzerland and several human rights organizations protested. But on March 2 the Home Secretary issued a statement detailing his reasons and terminated the proceeding. General Pinochet immediately boarded a Chilean plane and returned to Chile.

This report summarizes these complex and precedent-setting proceedings. It will not be updated.

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Pinochet Extradition Case: Selected Legal Issues

Introduction

In mid-October, 1998, Spanish authorities formally petitioned their counterparts in England to arrest General Augusto Pinochet of Chile, who was then in a hospital in London, and to extradite him to Spain for trial on charges that he participated in extensive violations of human rights during his time in power. The petitions sought his extradition not only for a few crimes he allegedly committed against **Spanish** citizens in both Chile and Spain but also for numerous crimes of murder, torture, hostage-taking and terrorism he allegedly committed against **Chilean** nationals. These petitions set in motion an unprecedented legal drama in England which, *inter alia*, posed a number of fundamental questions about international law. Does a sitting head of state have absolute immunity under international law from proceedings in the courts of other states for his actions? If so, does that immunity still apply after he has left office, *i.e.*, to a former head of state? Has the traditional doctrine of head-of-state immunity been eroded by the development of the international law of human rights? Does that law now countenance the exercise of universal jurisdiction over human rights violations, so that any country can put alleged violators of human rights on trial even though the crimes were committed outside that country's territory against persons who are not its own nationals?

The English extradition proceedings were complicated not only by these difficult issues of international law and the political turmoil the Spanish request precipitated but also by allegations of a conflict of interest by one of the British judges involved in the case and by the recurring involvement of the British Home Secretary pursuant to the terms of England's extradition statute. On March 2, 2000, the Home Secretary exercised his discretion and terminated the extradition proceeding on the grounds Pinochet was no longer mentally fit to stand trial; and Pinochet returned to Chile. But prior to that decision Britain's highest court had ruled that Pinochet had no immunity as a former head of state from charges that he committed human rights violations while in power and that he could be tried for those violations in a country other than Chile. Notwithstanding the absence of a trial on the merits, this ruling was unprecedented and marked a dramatic expansion in the international law of human rights.

This report summarizes the various proceedings in the case in chronological order. It will not be updated.

Background

General Augusto Pinochet came to power in Chile in a military coup in September, 1973. That coup displaced the socialist government of Salvador Allende that had been elected in 1970 and resulted in numerous deaths, including Allende's.

Pinochet remained in power until March, 1990, when a democratically elected government took control, and remained head of the army until 1998, when he became a Senator for life. In 1990-91 a Chilean Commission for Truth and Reconciliation investigated human rights violations allegedly committed between 1973 and 1990 and concluded, *inter alia*, that there had been at least 3197 cases of murder and “disappearances” under Pinochet’s rule.¹ The Commission did not investigate allegations that thousands of persons had also been tortured during that time.

Although a number of private suits were filed against Pinochet after he relinquished power, he had not been charged or tried in Chile for any of the human rights atrocities allegedly committed during his reign. In 1978 the Chilean legislature, in the interest of “general tranquility, peace and order,” had granted a general amnesty to all persons involved in criminal acts (with certain exceptions) between 1973 and 1978; and Pinochet also reportedly negotiated a guarantee of immunity from prosecution in Chile before he relinquished power in 1990.

Baltasar Garzon, a judicial magistrate in Spain, had for some time been investigating alleged human rights violations in both Chile and Argentina during that time period. Discovering that Pinochet was in England in the fall of 1998, Garzon made two requests for his extradition. The first request alleged Pinochet’s responsibility for the murder of Spanish citizens in Chile between 1973 and 1983 and resulted in Pinochet’s provisional arrest on October 16, 1998, at the clinic where he was recuperating from back surgery. The second request two days later alleged Pinochet’s responsibility for torture, hostage-taking, genocide, and murder in various periods between 1976 and 1992. The alleged crimes in the latter request were not limited to those against Spanish citizens but included atrocities against Chilean nationals and others. The requests sought Pinochet’s extradition to Spain for trial there on these charges.²

Decision of the Divisional Court

On October 28, 1998, a Divisional Court of the Queen’s Bench quashed both warrants for Pinochet’s arrest that had been issued in response to Spain’s request. The court found the first warrant deficient for the reason that the murder of a British citizen outside of England by a person who is not a British citizen is not a crime under British law. Thus, even though the murder of a Spanish citizen outside of Spain by a person who is not a Spanish citizen was a crime under Spanish law, the court found that Spain’s extradition request lacked the essential element of duality required by the European Convention on Extradition, *i.e.*, the crimes charged were not crimes under the laws of both Spain and England.

The Divisional Court quashed the second warrant on the grounds Pinochet had absolute immunity from arrest and prosecution outside Chile as a former head of state.

¹ For further background on Chile and U.S.-Chilean relations, see Chile: Political/Economic Conditions and U.S. Relations, CRS Report RL30035, by Mark P. Sullivan.

² It might be noted that Belgium, France, and Switzerland subsequently filed requests for Pinochet’s extradition as well; but these were held in abeyance pending disposition of Spain’s request.

But it stayed the decisions pending an appeal to the Lords of Appeal, the highest appellate court in England, on the issue of Pinochet's immunity.

November 25, 1998, Decision of the Lords of Appeal

In an unprecedented ruling, a five-member panel of the Lords of Appeal of the House of Lords on November 25, 1998, ruled, 3-2, that Pinochet had no immunity as a former head of state from Spain's request for extradition.³ The question before the court in *Regina v. Bartle* was not Pinochet's guilt or whether he should be extradited but solely whether Pinochet was entitled to immunity from arrest and extradition proceedings in the United Kingdom with respect to acts committed while he was head of state.

Lords Nicholls, Steyn, and Hoffmann recognized that customary international law has long afforded heads of state absolute immunity from trial in the courts of other states for their actions while in office. But they concluded that the international law of human rights has evolved to the point that acts of torture, hostage-taking, and murder on a large scale can no longer be considered legitimate functions of government and that, therefore, no former head of state ought to be able any more to claim the immunity traditionally afforded. They also concluded that English statutes implementing the Torture Convention and the Convention Against the Taking of Hostages superseded the doctrines of non-justiciability and act of state.

Lord Nicholls noted in his opinion⁴ that international law customarily has afforded a former head of state immunity "with respect to acts performed by him in the exercise of his functions as a head of state." The question, he said, is "whether the acts of torture and hostage-taking alleged against Senator Pinochet were done in the exercise of his functions as head of state." That question he answered in the negative:

[I]nternational 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

At least from the time of the Nuremberg Tribunal in 1945, he said, "no head of state could have been in any doubt about his potential liability if he participated in acts regarded by international law as crimes against humanity." Such acts are simply not legitimate functions of a head of state, he asserted. Thus, he concluded, Pinochet was not entitled to immunity from arrest and extradition as a former head of state

Lord Steyn stressed the gravity of the charges against Pinochet in the extradition request, namely, that he allegedly ordered a systematic campaign of repression and terror that employed murder, hostage-taking, and torture against opponents of his regime, primarily in Chile but also elsewhere. Under England's State

³ This decision and the subsequent one of a different panel of Law Lords on 3/24/99 are entitled *Regina v. Bartle and the Commissioner of Police for the Metropolis and Other Ex Parte Pinochet* accessed at www.parliament.the-stationery-office.co.uk/pa/ldhome.html

⁴ The Law Lords still adhere to the practice that each judge files his own opinion.

Immunity Act of 1978 and the Diplomatic Privileges Act of 1964, he said, a former head of state is immune from criminal prosecution in England only for “his official acts performed in the exercise of his functions as Head of State.” But what are properly deemed “official acts” must be determined, he claimed, in light of international law; and, he asserted, international law no longer deems the acts of which Pinochet was accused to be proper functions of a head of state. Thus, he concluded, Pinochet had no immunity under English law or international law for the crimes charged.

In the deciding opinion, **Lord Hoffmann** briefly stated that he, too, concluded that Pinochet had no immunity from the arrest and extradition proceedings, citing in justification the reasons given in Lord Nicholls’ opinion.

Lords Slynn and **Hadley** in the minority, on the other hand, contended that the international law of human rights has not yet evolved to the point where the traditional rule of immunity afforded heads of state from proceedings in the courts of other states should be deemed to be overridden. The judges contended as well that such acts ought to be deemed nonjusticiable in English courts.

Lord Slynn reasoned that under England’s Diplomatic Privileges Act of 1964 and the State Immunity Act of 1978, the immunity of “a sovereign or other head of State” in England is governed by the Vienna Convention on Diplomatic Relations of 1961, subject to “any necessary modifications.” Because the Vienna Convention bars the arrest or detention of any diplomatic agent and makes such agents immune from the criminal jurisdiction of the receiving state even after leaving office for their official acts (Articles 29, 31(1), and 39), Lord Slynn argued that Pinochet is statutorily immune from the criminal jurisdiction of England for his official acts.

Taking a “cautious approach” on the international law question, Lord Slynn contended that the immunity traditionally afforded former heads of state from the jurisdiction of other states has not as yet been eroded by developments in the international law of human rights. He argued that a limitation on such immunity should only be prospective, not retroactive, and should be accomplished through an international convention that clearly defines the international crime, grants national courts universal jurisdiction over the crime, provides that heads of state are not immune, and has been given the force of law both in the state asserting immunity and the state seeking to deny it. Existing international law, he claimed, did not meet that standard.

To buttress his view, Lord Slynn parsed various instruments of human rights law. The charters of the international tribunals created to try violations of human rights laws — the Nuremberg Tribunal and the Tokyo Tribunal after World War II, the Yugoslav and Rwanda tribunals now in existence, and the provisions of the Rome Statute of the International Criminal Court concluded in the summer of 1998 — all provided that position as a head of state or other public official would be no defense, he noted. But none of these charters, he stated, conferred universal jurisdiction on national courts. In contrast, he observed, the Torture Convention of 1984 does confer universal jurisdiction on national courts and requires offenders either to be prosecuted or extradited; but, he said, the Torture Convention explicitly eliminates immunity only for “public officials” and not for heads of state. The Genocide

Convention, Lord Slynn asserted, makes “constitutionally responsible rulers” liable but authorizes prosecution only in the state in which the act was committed or in an international tribunal. In addition, he contended, the Taking of Hostages Convention provides for universal jurisdiction but does not explicitly abrogate the immunity of a head of state. Thus, none of the human rights instruments adopted or entities established in the past half century, he said, clearly met the standards necessary to abrogate Pinochet’s immunity for the crimes charged.

Finally, Lord Slynn stated that the act of state doctrine counseled judicial restraint in this area of the law. In British and American courts, he said, that doctrine generally has meant that the courts will not sit in judgment on the validity or legality of the official acts of other sovereign states taken within their own territory, both for reasons of comity and in order not to interfere with the conduct of foreign relations.

Lord Lloyd traced much of the same legal reasoning. Customary international law, he stated, affords immunity to heads of state and to former heads of state for their official acts (but not acts for their private benefit) “unless immunity is waived by the current government of the state of which he was once the head.” Lord Lloyd rejected the argument that the “horrific” nature of the crimes alleged against Pinochet requires that an exception be read into the customary international law principle of immunity: “[I]t would be unjustifiable in theory, and unworkable in practice, to impose any restriction on head of state immunity by reference to the number or gravity of the alleged crimes.” He also concluded that head of state immunity has not been abrogated either in the specific provisions of the International Convention Against the Taking of Hostages or the Torture Convention or in state practice. If there were a general international legal obligation to prosecute or extradite in cases of torture or hostage-taking, he argued, the amnesties that have been granted by numerous states for past violations of human rights would not be valid or binding. Moreover, he said, the provisions abrogating head of state immunity in the charters of the various tribunals that have been established to try human rights violations show that such crimes “cannot be tried in the ordinary courts of other states,” because otherwise there would be little need for such international tribunals.

Finally, as an alternative ground for decision, Lord Lloyd asserted that the courts should apply the principle of non-justiciability. Because of its profound political implications, he said, the courts of the United Kingdom “are simply not competent to adjudicate” the matter and “should exercise judicial restraint by declining jurisdiction.”

December 9, 1998, Decision of the Home Secretary

With the issue of Pinochet’s immunity seemingly resolved, the question of whether his extradition ought to be allowed to proceed became a matter of decision for the Home Secretary, Jack Straw. Under England’s Extradition Act of 1989 the Home Secretary must make both an initial determination of whether an extradition request should be allowed to proceed and a final determination, after all judicial proceedings have concluded, on whether the person ought to be surrendered to the requesting country. In both determinations the Home Secretary can consider both legal and non-legal matters. On December 9, 1998, Mr. Straw concluded that extradition proceedings against Pinochet could go forward and issued an “Authority to Proceed.” He rejected arguments based on Pinochet’s health, the political

implications of the matter, and the possible bias of one of the Law Lords. He did rule, however, that genocide is not an extraditable offense under English law.⁵

December 17, 1998, Decision of the Law Lords

But on December 17, 1998, a different judicial panel of the House of Lords, for one of the few times in the history of the Law Lords, unanimously set aside the November 25 decision holding Pinochet to have no immunity from arrest and extradition on the grounds one of the judges in the majority – Lord Hoffmann – had had an undisclosed conflict of interest in the matter. Amnesty International (AI), a private human rights organization, had been permitted to intervene in the case and had participated in the earlier argument, but Lord Hoffmann had failed to disclose that he was a director of a charitable wing associated with the group.

In a subsequent opinion on January 15, 1999, the Law Lords explained their reasons.⁶ **Lord Brown-Wilkinson** noted that Lord Hoffmann was a director and chairperson of Amnesty International Charity Limited (AICL) and that AICL carried out research on human rights violations and also provided assistance to victims. One of its reports, he said, had concerned human rights violations in Chile. Thus, he concluded, Lord Hoffman had a personal interest in the case and was, in effect, serving as a judge in his own cause. Consequently, he said, Lord Hoffmann should have been automatically disqualified:

In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he had made sufficient disclosure.

The other opinions concurred in Lord Brown-Wilkinson’s reasoning. **Lord Goff** concluded:

Lord Hoffmann, as chairperson of one member of that organization, AICL, is so closely associated with another member of that organization, AI, that he can properly be said to have an interest in the outcome of proceedings to which AI has become party ... and so was disqualified from sitting as a judge in these proceedings.

Lord Nolan, emphasizing that “the appearance of the matter is just as important as the reality,” simply concurred with Lord Brown-Wilkinson without further opinion. **Lord Hope of Craighead** opined that Lord Hoffmann had run afoul of the cardinal rule that “[w]here a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind, he must be seen to be

⁵ It might also be noted that on December 5 Baltasar Garzon formally issued a 287-page indictment of Pinochet “for the crimes of genocide, terrorism, and torture.”

⁶ The panel’s explanation is entitled Judgment — In Re Pinochet (Jan. 15, 1999) and can be found on the home page of the House of Lords — www.parliament.the-stationery-office.co.uk/pa/ldhome.html

impartial.” Finally, **Lord Hutton** stated that the links between AI and Lord Hoffmann “were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand.”

March 24, 1999, Decision of the Law Lords

Nonetheless, General Pinochet remained under house arrest in an estate near London. Beginning on January 18, 1999, a differently constituted panel of seven Law Lords heard twelve days of oral argument on Pinochet’s immunity as a former head of state and whether the crimes charged were extraditable offenses. On March 24, 1999, the court ruled as follows:

- By a 6-1 margin the court held the charges against Pinochet in Spain’s petition for crimes allegedly committed prior to September 29, 1988, not to be valid bases for extradition, because they did not satisfy the dual criminality rule.
- Unanimously, the court held three charges of torture and conspiracy to commit torture in Chile **after** September 29, 1988, and a single charge of murder and conspiracy to commit murder in Spain in 1975-1976 to satisfy the dual criminality test and to be valid bases for extradition.
- By a 5-2 margin the court held Pinochet to be entitled to claim immunity with respect to the charge of murder and conspiracy to commit murder in Spain in 1975-76.
- By a 6-1 margin the court held Pinochet **not** to be entitled to claim immunity with respect to the three remaining charges of torture and conspiracy to torture allegedly committed after September 29, 1988.

Thus, the court substantially narrowed the scope of the extradition case against Pinochet to three charges of torture and conspiracy to commit torture in Chile after September 29, 1988. For that reason six of the Law Lords suggested that the Home Secretary should consider anew whether to allow Spain’s extradition request to continue to move forward in the English courts.

As noted above, the dual criminality test means that the crimes alleged in an extradition request must be criminal under the laws of both the requesting and the requested state — Spain and England in this case. **Lord Hope** set forth the primary analysis on this matter for the court and found that most of the charges in the Spanish request did not meet that test or were otherwise defective. He concluded as follows:

- The petition’s allegation of an instance of hostage-taking did not, in fact, describe the crime of hostage-taking and, thus, was substantively defective.
- The charges of murder and conspiracy to murder outside of Chile were not valid with respect to offenses allegedly committed in 1975-1976 in France, the United States, Portugal, and Italy, because the English courts did not gain jurisdiction over such extra-territorial crimes until England’s adoption of the Suppression of Terrorism Act on August 21, 1978.

- The charges of murder and conspiracy to murder outside of Chile did meet the dual criminality test with respect to a single act of murder and conspiracy to murder allegedly committed by Pinochet in Spain in 1975-1976, because such offenses by a non-national would have been crimes in England at that time if they had been committed in England. (But Pinochet retained his immunity from that charge.)
- Most of the allegations of torture and conspiracy to torture in Chile and elsewhere failed to satisfy the dual criminality test. While the torture of non-Spanish citizens outside of Spain had long been a crime in Spain, the torture of non-English citizens outside of England only became a crime in England on September 29, 1988, when England adopted § 134 of the Criminal Justice Act. That section implemented the Torture Convention of 1984 and gave the English courts jurisdiction over the crime of torture and related crimes wherever committed and by persons of whatever nationality. As a consequence, the crimes of torture and conspiracy to torture allegedly committed by Pinochet prior to that date (which constituted the bulk of the alleged atrocities) did not meet the test of dual criminality.⁷
- The charges of torture and conspiracy to commit torture did satisfy the dual criminality requirement only with respect to three instances alleged to have been committed at Pinochet's direction in Chile after September 29, 1988, because after that date England as well as Spain had extraterritorial jurisdiction over such crimes.

Lords Brown-Wilkinson, Goff, Hutton, Saville, and Phillips concurred in this analysis. **Lord Millett** also agreed but contended that English courts could have exercised universal jurisdiction over the crime of torture under customary international law as early as 1973, even absent a statute. Thus, he said, all of the torture crimes alleged met the test of dual criminality.

The decision on Pinochet's immunity as a former head of state involved the interplay of English statutory law and international law regarding torture. All of the Law Lords agreed that customary international law affords a **sitting** head of state absolute immunity from the jurisdiction of the courts of foreign states. But the immunity of a **former** head of state, the majority said, is controlled in England by the State Immunity Act of 1978. That Act does not explicitly address the immunity of a former head of state but provides that heads of state have immunity, subject to "any necessary modifications," equivalent to that afforded diplomats under the Vienna Convention on Diplomatic Relations. The Vienna Convention, in turn, affords diplomats absolute immunity while they are in their posts but limits their immunity once they leave their posts to "acts performed by such person in the exercise of his

⁷ It might be noted that there was some confusion in the decision about the date on which the extraterritorial crime of torture became triable in England. Section 134 of the Criminal Justice Act was adopted on September 29, 1988, and Judge Hope consistently use that date as the demarcation point between torture offenses that met the requirement of dual criminality and those that did not. But he also noted in his opinion that § 134 did not come into force until two months after its adoption. That would make the critical date November 29, 1988.

functions as a member of the mission,” *i.e.*, to their official acts while in office. Thus, the majority concluded, under English law former heads of state have immunity only for acts they perform in their official capacities while in office and not for acts that are for their personal benefit or that are deemed not to be official functions.

The key question, thus, as it was for the first panel of Law Lords, was whether torture and murder could be deemed official functions of government for which immunity could legitimately be claimed. All of the Law Lords concluded that international law now places torture outside of the realm of the legitimate functions of states but they differed on when torture achieved that status and whether the Torture Convention of 1984 waives the immunity of former heads of state. Several of the Law Lords cited the inclusion of torture as a crime against humanity in the charters of the Nuremberg, Tokyo, Yugoslavia, and Rwanda tribunals and the recent Rome Statute of the International Criminal Court; the General Assembly resolution in 1946 endorsing the Nuremberg principles; the prohibition of torture in the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights; and the trials of Eichmann and other alleged Nazi war criminals in Israel as evidence of an evolution in international law with respect to torture. **Lords Brown-Wilkinson, Hope, Hutton, Saville, and Phillips**, however, said that the elimination of torture as a legitimate function of government became certain only after the negotiation of the Torture Convention in 1984. Thus, they said, the heads of particular states could no longer claim immunity for allegedly “official” acts of torture once their countries had ratified the Torture Convention. Because Chile did so on October 30, 1988, and England did so on December 8, 1988, these Law Lords agreed that at least by the latter date Pinochet could no longer claim immunity for the crimes of torture and conspiracy to commit torture. With Lord Phillips disagreeing, however, they further agreed that the “ordinary rules of immunity” still applied with respect to the charges of murder and conspiracy to murder.

Lord Millett, in contrast, asserted that the prohibition of torture had become a *jus cogens* norm under international law at least by 1973 and that, therefore, Pinochet could claim no immunity for any of the crimes of torture charged in Spain’s extradition petition, nor could he claim immunity for the crimes of murder and conspiracy to murder. **Lord Goff** dissented entirely, saying that a waiver of immunity had to be express and that there was no indication in either the text or the legislative history of the Torture Convention that it addressed, or intended to address, the issue of immunity. He concluded, therefore, that “Senator Pinochet is entitled to state immunity” with respect to all of the charges of torture and murder against him that survived the dual criminality test.

April 15, 1999, Decision of the Home Secretary

On April 15, 1999, the Home Secretary, Jack Straw, responding to the Law Lords invitation to consider the matter anew, issued another “Authority to Proceed” authorizing the continuation of extradition proceedings against Pinochet. Stating that he had considered the matter “entirely afresh” and that the extradition petition was now limited by the Law Lords’ decision to the charges of torture and conspiracy to torture allegedly committed after December 8, 1988, he rejected a number of arguments in support of quashing the petition – that Pinochet had diplomatic immunity “as the head of a special mission,” that the crimes charged were of a

“political character,” that the “passage of time” since the alleged crimes were committed rendered the extradition proceeding “unjust or oppressive,” that the accusations were not made in good faith, that Pinochet ought more properly to be tried in Chile, and that Pinochet’s age and health made him “unfit to stand trial.” He also said that he had considered “the possible effect of extradition proceedings on the stability of Chile and its future democracy” and its effect “on the UK national interest.” Pinochet attempted to appeal the Home Secretary’s decision. But on April 17, 1999, Judge Ognall of the Law Lords ruled that judicial review at this point would be “premature” and “would needlessly disrupt the extradition process.”

October 8, 1999, Decision by the Metropolitan Magistrate

Subsequent to the Law Lords’ decision, Spain amended its extradition request to charge Pinochet with one count of conspiracy to torture and 34 specific incidents of torture against Chileans subsequent to 1988. On October 8, 1999, Metropolitan Magistrate David Bartle ruled that Spain’s amended request for extradition met the requirements of the European Convention on Extradition and England’s implementing statute.⁸ The magistrate emphasized that he was not ruling on the merits of the case and that the Convention does not even require that Spain make out a *prima facie* case. All that is required, he said, is that the charges made against Pinochet be serious crimes under the laws of both England and Spain and that Pinochet be found not to be immune. On both issues, he said, the Law Lords had spoken. The magistrate also ruled that he was not limited to considering only the three instances of torture and one count of conspiracy that had previously been before the Law Lords and the Home Secretary but could consider the additional information submitted by Spain. The magistrate ordered Pinochet to be held for extradition pending further proceedings.

Pinochet’s Decision To Appeal

Given the magistrate’s decision, Pinochet and his lawyers had to choose between appealing the judgment to a higher court (by means of a *habeas corpus* petition) or letting it stand as a final decision. As noted above, the English extradition statute requires the Home Secretary to make the final decision with respect to any particular extradition after all legal proceedings have been concluded. The statute also allows him to take into consideration factors other than those considered by the courts, including the General’s health and Chile’s demand that he be returned to Chile. Thus, acceptance of the magistrate’s decision as the final judgment would have put the matter in the hands of the Home Secretary immediately and allowed a rapid resolution of the matter.⁹ But such a course would also have risked the possibility that the Home Secretary would not allow Pinochet to return to Chile but would affirm his extradition to Spain.

⁸ The magistrate’s October 8, 1999, decision in *The Kingdom of Spain v. Augusto Pinochet Ugarte* can be found at <http://www.open.gov.uk/lcd/magist/pinochet.htm>

⁹ It might be noted that once the matter is in his hands, the Home Secretary has 15 days to receive representations from both sides and, subsequently, two months to render a decision. His decision is also subject to appeal to the courts.

On October 22, 1999, Pinochet and his lawyers chose the cautious course and filed an appeal of Judge Bartle's ruling in the form of a *habeas corpus* petition in the Divisional Court. Any decision by the appeals court would have been subject to further appeal to the House of Lords.

January 11, 2000, Announcement by the Home Secretary

Notwithstanding this appeal, on January 11, 2000, the Home Secretary, Jack Straw, issued a statement stating that he had had Pinochet undergo an extensive medical examination by four clinicians and that, as a consequence, he was "minded" to terminate the extradition proceedings without waiting for a final appellate ruling and let the General return to Chile. His statement said that

the unequivocal and unanimous conclusion of the three medical practitioners and the consultant neuropsychologist is that, following 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.

The Home Secretary invited Spain, Chile, and other interested parties (including France, Belgium, and Switzerland, who also had submitted extradition requests for Pinochet) to submit any additional information they wished him to consider on the matter within seven days.

March 2, 2000, Decision by the Home Secretary

On March 2, 2000, the Home Secretary terminated the extradition proceeding on the grounds General Pinochet was no longer mentally fit to stand trial. The Home Secretary stated that several strokes apparently suffered in September and October of 1999 had impaired Pinochet's memory for both recent and remote events, his ability to understand complex sentences and questions, and his capacity to express himself "audibly, succinctly and relevantly." The examining doctors, he said, had found "no evidence that Senator Pinochet was trying to fake disability"; nor had they found any likelihood that his condition would improve. As a consequence, he asserted, an order to extradite Pinochet would be "oppressive."

"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 stated. As a consequence, he continued, trial of Pinochet in any of the countries that were party to the European Convention on Human Rights would violate Article 6 of that Convention.

The Home Secretary stated that "he is aware that the practical consequence of refusing to extradite Senator Pinochet to Spain on account of his unfitness to stand trial is that he will probably not be tried anywhere." But, he concluded, "a trial of the charges against Senator Pinochet, however desirable, is no longer possible."

The Home Secretary also announced that he would not issue an "Authority to Proceed" with respect to the requests for Pinochet's extradition by Belgium, France, and Switzerland because none of the petitions alleged crimes of torture or conspiracy

to commit torture allegedly perpetrated after September 29, 1988; and thus none of the charges met the basic requirement of dual criminality. Even if they had met that test, he said, he would have refused to issue an Authority to Proceed “because he is satisfied that Senator Pinochet is unfit to stand trial and ... there is no likelihood of significant improvement.”

On March 2, 2000, General Pinochet boarded a Chilean jet and returned to Chile.