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# Augusto Pinochet and International Law

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This article explores the interplay between historicized law and normative standards of human rights law by considering how the House of Lords dealt with the question of General Pinochet's immunity. By selecting a normative account of state power, the law lords aligned themselves with evolving standards of humanitarian law, articulated in, for example, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the law of war, and the *Geneva Conventions*, and the recent intervention in Kosovo. Although appealing, the normative position is far from unassailable, from both principled and pragmatic angles. The author questions, for example, whether a foreign court can support universal jurisdiction and limitations of official acts of immunity based on normative customary international law, or whether this requires *ex ante* treaty assent by the state where the offence took place and by the state of the offender's nationality. How to avoid destabilizing new democratic regimes is another problem that attends the use of national courts to try extraterritorial crimes under universal jurisdiction. Legal and diplomatic questions such as this may be responsible for the hedged position the British government finally adopted in the case against Pinochet. Such questions also lend uncertainty to more recent cases, where governments have tried to enforce normative international law to apprehend a foreign state official for crimes against humanity. Despite the dangers of universal jurisdiction, however, the author concludes that the ambiguity of the *Pinochet* decision permits a nuanced application of its principles.

L'auteur, examinant la décision de la Chambre des Lords sur la question de l'immunité du général Pinochet, attire l'attention sur l'interaction entre le droit dans son contexte historique et les standards normatifs du droit international humanitaire. En adoptant une approche normative du pouvoir étatique, les lords se sont inscrits dans la mouvance des nouveaux standards du droit international humanitaire, tels qu'articulés dans la *Convention sur la torture*, le droit général de la guerre et les conventions de Genève, et tels qu'ils se sont manifestés, par exemple, par l'intervention récente au Kosovo. Cette position normative, bien qu'attrayante, est toutefois loin d'être incontestable, autant sur le plan des principes que d'un point de vue pragmatique. Par exemple, on peut se demander si une cour étrangère peut exercer une compétence universelle et limiter les immunités statutaires en se basant uniquement sur le droit coutumier international, ou si cela requiert l'assentiment préalable de l'État où la violation a eu lieu et de l'État de nationalité du responsable. La nécessité d'éviter de déstabiliser des régimes démocratiques émergents par l'utilisation de la compétence universelle pour amener des crimes extraterritoriaux devant la justice constitue également un problème important. Des questions légales et diplomatiques de cette nature sont peut-être à l'origine de la position ambivalente finalement adoptée par le gouvernement britannique dans l'affaire *Pinochet*. Elles soulèvent également de l'incertitude dans des cas plus récents, où des gouvernements ont tenté d'appliquer le droit international en appréhendant des responsables étatiques étrangers pour crimes contre l'humanité. Malgré les dangers de la compétence universelle, l'auteur conclut toutefois, de manière optimiste, que cette ambiguïté mènera à une application nuancée des principes de la décision *Pinochet*.

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Reading history through a legal lens has its dangers. The lawyer is trained to sift the past with a set of principles that often are hard to apply in situations of politics and strife. The lawyer reads from present to past perfect, arguing that even in war or civil collapse, some core of accountability and integrity of conduct must constrain the actors—even when the triumph or survival of a preferred regime or polity is at stake. To gain confidence in the act of judging, the lawyer may suppose that the principle of rationality, seeking “economy of force” in military conflict, assures that humane conduct will never jeopardize victory. But at heart, the law’s claim is more radical. It purports that the stakes of a war or civil conflict can never be worth winning badly. The jurist, applying law to armed conflict, supposes that even a desperate competition to claim state power or preserve national independence cannot justify disregard for the peremptory demands of decency. *Jus in bello*—limits on how a conflict is fought, including due regard for the lives of civilians—retains its force no matter the purpose or fault of the war. The law makes a chiliastic demand, to observe human values even in the abyss of doubted survival.

Many combatants have rejected this claim. In contests of left and right, and wars between nation states, engagement has often meant a willingness to indulge in instrumental lapses. Some have counted on victory as absolution; stooping to conquer, they gamble that winners can rewrite history and mask scabrous behaviour.

The forty-year contest between East and West, a Manichaeian combat of right and left with the hazard of nuclear engagement, often seemed to dwarf ordinary judgments of morality and law. Surely we will not see the world in this light again, at least in our lifetimes. And yet alongside the new consensus of cyber-citizens in a free trade economy, conflict continues in autarkic communities, with violence deployed by national groups that hope to gain historical standing or international personality. Men’s homage to necessity continues.

It is this quandary that marks the *Pinochet* case in the frame of historicized law. In the course of the military regime that ruled Chile from 1973 to 1990, General Augusto Pinochet’s supporters defiantly claimed that what happened was necessary to defeat communism and save the state. Military review, like judicial review, was a process to defend a larger constitutionalism. Defeating a hostile mode of political thought required, in Pinochet’s world view, a ruthless war upon the morale and survival of its proponents. Doubt about this argument, even among his supporters, is reflected in their alternative polite conceit that the general was unaware of the military violence against civilians in Chile.

Perhaps it is only with the anxieties of the cold war laid to rest that both sides can now treat this claim soberly. We know how the cold war ended, with the victory of democracy and free market economies, and the relationship of Pinochet’s terror to this triumph seems spurious indeed. With a greater clarity that the violence was superfluous, perhaps even its participants are willing to entertain the harder thought that instrumental goals should never justify the torturous treatment of individuals.

The renewed Pinochet controversy presented itself in an almost casual manner. A quarter century had passed since the 1973 Santiago *coup d’état* against socialist Salvador Allende that brought Pinochet to power. Pinochet’s self-confident agreement in

1988 to hold a nationwide plebiscite on his rule was followed by unexpected defeat at the polls, and he stepped down from the presidency in 1990. Like Daniel Ortega in Nicaragua, Pinochet was still to be reckoned with in Chilean politics, since he continued as commander in chief of the armed forces. Only in March 1998 did he also leave his military post, and became a senator-for-life with claimed immunity from arrest.

The Chilean general visited London several times, confident in his standing as a close ally of the United Kingdom in the Malvinas/Falkland Islands war with Argentina. He embarked for London again in September 1998, spurning the advice of a former member of the military junta who warned him that the environment was different, and that Spanish magistrate Baltazar Garzon was headlong into an investigation of the Chilean coup and the disappearances of Spanish civilians. It may be, indeed, that Pinochet's personal sense of historical justification was enough to blind him to a different calculus. Pinochet reveals himself as a man of an archaic period, unable to fathom the development of a European *jus commune* and international standards of human rights that might frame a different view of his rule.

Pinochet was arrested by English police from a hospital bed in London after treatment for a bad back, and placed under house arrest. The warrant was based upon a Spanish extradition request, charging him with murder and genocide (the latter according to Spanish law's particular account). The warrant was then amended to substitute the offences of hostage-taking and torture—crimes defined by international conventions<sup>1</sup> that embrace universal jurisdiction among treaty parties,<sup>2</sup> permitting any joining state to take jurisdiction of the case.

From the start, Pinochet's defence against extradition was based on a claim of procedural fairness and historical exception. He was Chile's head of state at the time of the commission of the acts, Pinochet's lawyers noted, and international practice has traditionally respected an absolute immunity in sitting heads of state, barring any exercise of the criminal legal process of foreign states. The black and white guarantee of treaty law is not available in this argument, of course; negotiations to codify the absolute immunity of ambassadors were completed in 1961,<sup>3</sup> but it is customary practice, not treaty law, that presidents and monarchs are given the same absolute immunity against arrest and criminal charges.

Pinochet tripped over the lesser immunity of figures in retirement. Under England's national law on immunities,<sup>4</sup> a former head of state was only to be accorded a

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<sup>1</sup> *International Convention Against the Taking of Hostages*, 4 December 1979, 1315 U.N.T.S. 205, 18 I.L.M. 1456 [hereinafter *Hostage Convention*]; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36, 23 I.L.M. 1027 (entered into force 26 June 1987) [hereinafter *Torture Convention*].

<sup>2</sup> *Hostage Convention*, *ibid.*, art. 5; *Torture Convention*, *ibid.*, art. 8.

<sup>3</sup> *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 U.N.T.S. 95, 23 U.S.T. 3227 (entered into force 26 June 1987) [hereinafter *Vienna Convention*].

<sup>4</sup> *State Immunity Act 1978* (U.K.), 1978, c. 33, s. 20, reprinted in 17 I.L.M. 1123.

limited immunity—patterned after the legal shield of a former ambassador who has finished his posting. This restrictive theory of immunity is based on the type of action rather than the person—an immunity *ratione materiae* rather than *ratione personae*. Pinochet was to be protected only for “official acts” undertaken on behalf of Chile, and so the question arose: What was an official act?

His lawyers claimed, of course, that any act committed in the discharge of his duties must be considered official, and that a president must determine the domain of his own duties. What was not, hypothetically, done for private gain must be, by definition, public. The defence against criminal process was initially sustained by the English High Court of Justice.<sup>5</sup> But on the Crown’s appeal to the House of Lords, determined by a bare majority of three law lords, a dramatically new account was given of the nature of public office.<sup>6</sup> The fact that an official believed he was advancing state interests would no longer suffice, as such, to prove that allegedly criminal conduct was an official act. In particular, heinous acts of torture, systematically committed, could not be counted as official duty, even if the abuse was committed in uniform, or through an official chain of command, or authorized by a recognized head of state. This was a normative theory of state power—uncertain in its reach, but radical in its result.

The initial House of Lords decision was vacated after an unnecessary controversy over the conflict of interest of one of the judges.<sup>7</sup> But on rehearing, a second panel came to the same result, rejecting Pinochet’s immunity.<sup>8</sup> The shared position of the two panels was partially masked, because the second group of judges narrowed the charges arrayed against Pinochet through the additional requirement of “mirror jurisdiction”. Only after the United Kingdom changed its criminal code to endow its courts with jurisdiction over extraterritorial murder (under the theory of universal jurisdiction) could such charges be brought, and a majority of the second panel supposed this jurisdictional change could not fairly be used to prosecute prior criminal conduct. The incorporation took effect on 29 September 1988, when section 134 of

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<sup>5</sup> *R. v. Bow Street Magistrates’ Court, Ex parte Ugarte* (28 October 1998), [1998] All E.R. (D) 509 (Q.B.D. Div. Ct.) (Lord Bingham of Cornhill C.J., Collins & Richards JJ.), online: Butterworths (All England Direct) <<http://www.butterworths.co.uk/aller/index.htm>>.

<sup>6</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte*, [1998] 4 All E.R. 897, [1998] 3 W.L.R. 1456 (H.L.) (Lord Slynn of Hadley, Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Steyn & Lord Hoffmann) [hereinafter *Pinochet (No. 1)*].

<sup>7</sup> See *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)*, [1999] 1 All E.R. 577, [1999] 2 W.L.R. 272 (H.L.) (Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Nolan, Lord Hope of Craighead & Lord Hutton), vacating *Pinochet (No. 1)* on grounds of potential conflict of interest.

<sup>8</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 All E.R. 97, [1999] 2 W.L.R. 827 (H.L.). The majority consisted of Lord Browne-Wilkinson, Lord Hope of Craighead, Lord Hutton, Lord Saville of Newdigate & Lord Phillips of Worth Matravers, Lord Millett dissenting in part, Lord Goff of Chieveley dissenting, affirming and reversing in part *Pinochet (No. 1)*.

the *Criminal Justice Act 1988* came into force.<sup>9</sup> Nearly coincidentally, Chile (surprisingly enough) deposited its ratification of the *Torture Convention* as a full state party. The difference a date makes, apart from the number of charges, was the important question of source of law. The rehearing panel did not need to ground its immunity decision on the more controversial bases of customary law or *jus cogens*. Instead, the lords could argue that the limitation of official immunity was based on Chile's own agreement to the *Torture Convention*. To be sure, the text of the convention does not explicitly reject head of state immunity. But the panel relied on a principle of construction that laments futile legal acts. The court noted that if all conduct in office is immune, *ratione materiae*, there would be no effective bite to the treaty at all, for the treaty only reaches acts of torture committed under colour of law. The act has to be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" to qualify as an international crime.<sup>10</sup>

Still, the interweaving of morals and law, and perhaps an implicit reliance on non-treaty sources of law, can be seen in the court's balance at the edge. A distinction could have been offered, had the second panel wished, between low-level officials and heads of state. In an older political tradition, heads of state were considered sovereign, and still are assumed to have responsibility for the most difficult judgments. The idea of greater deference to the judgment of a senior official on what lies within the compass of his office would be possible to entertain. Indeed, the law lords did not suppose that they could judge the outer limit of official duties against the rules of a domestic constitution; domestic illegality is not itself enough to exclude an act from official duties. So, too, even a single act of torture, though forbidden by the international convention, was not necessarily enough to abate the immunity of a former head of state. But a systematic practice of abuse and torture—in Pinochet's case, allegedly directed against three thousand citizens of varied politics, vocation, and prominence—was beyond the pale of modern government, according to the law lords, even for a head of state.<sup>11</sup> A claim of wholesale immunity for a former head of state was inconsistent with the obligations of the *Torture Convention* itself.

This normative assessment of the limits of official power is a comfortable cousin to the regime of international human rights law, which protects core individual entitlements regardless of the political circumstances of a particular regime. International human rights law has allowed substantial latitude to meet state emergencies, even

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<sup>9</sup> See *Statement of Home Secretary Jack Straw*, Answer to Parliamentary Question, Written No. 8, 2 March 2000, at paras. 40, 48, 54, online: LEXIS (News, Hermes Database) [hereinafter *Statement of Jack Straw*] reprinted in Hermes Database, Home Office, in Lexis-Nexis News Library.

<sup>10</sup> *Torture Convention*, *supra* note 1, art. 1(1).

<sup>11</sup> The case would be considered one of systematic torture, for purposes of determining immunity, even though most of the charged acts occurred before the date when Britain incorporated the *Torture Convention*. This may be considered the law lords' other quiet concession to the moral impetus of the case.

permitting suspension of the observance of some of its guarantees. But the core protection of integrity of the person, including freedom from physical abuse, has been held sacrosanct and non-derogable by all international legal regimes of human rights.<sup>12</sup>

So, too, the lords' account of the limits of state power finds traditional roots in the laws of war, which make clear that acts in government service can be criminal. The laws of war protect a soldier from personal liability for killing an armed adversary in military conflict. It is the state acting, not the soldier, and so the act of homicide is not considered a crime. But under the law of war, gratuitous attacks upon civilians and military prisoners are considered criminal—even if the soldier is prosecuting the war, even if he is acting under orders, for such an order would be manifestly unlawful. The laws of war—and their cognate standards in international humanitarian law, developed in the *Geneva Conventions* of 1949<sup>13</sup>—anticipate individual criminal liability for serious violations, giving no immunity by virtue of public office to a soldier or to a commander in chief. The absence of private motive is not enough to shield a heinous act.

In proffering a normative account of state power, the law lords could also claim alliance with the evolving standards for humanitarian intervention. The modern definition of sovereignty, as the secretary-general of the United Nations has suggested, does not include the right of a state to abuse its own citizens.<sup>14</sup> NATO's intervention in Kosovo in March 1999 bore the same premise as the *Pinochet* case—that there are limits to state power, guarded by an international right of concern and action. Though criminal sanction is a rigorous area of the law, demanding clarity, jurisdiction, and due process, its application to public acts through an international jurisdictional scheme may be likened to the emergent right of intervention in the case of gross and systematic violations of human rights and human life.

There is, of course, a coherent view that the criminal intervention by Spain and England was at odds with this century's lesson of history. Past transitions to democracy—in Spain, Portugal, South Africa, Namibia, El Salvador, Guatemala, Haiti, and elsewhere—seem to suggest that a compromise on justice is necessary. Reaching a political and military modus vivendi, and seeking to stabilize a new democratic re-

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<sup>12</sup> See *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 4, 6 I.L.M. 368 (entered into force 23 March 1976); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, art. 15, Eur. T.S. No. 5 (entered into force 3 September 1953); *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 123, art. 27, 9 I.L.M. 673 (entered into force 18 July 1978).

<sup>13</sup> See e.g. *Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135 at 236, 238, arts. 129, 130, 6 U.S.T. 3316 at 3418, 3420 (entered into force 21 October 1950) (*Geneva Convention III*); *Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 at 386, 388, arts. 146, 147, 6 U.S.T. 3516 at 3616, 3618 (entered into force 21 October 1950) (*Geneva Convention IV*).

<sup>14</sup> Address of Secretary-General Kofi Annan to the General Assembly (20 September 1999), UN Press Release SG/SM7136, GA/9596.

gime, may require suspending the standards of justice, forgoing the punishment of actors who have violated human rights. Why should another country have the right to disregard the considered view of a new democratic regime about the necessary compromises of justice?

This is a hard question, in principle and in practice. In principle, we do not ordinarily think that even democratic judgment can invade a certain core of rights. One would have to ask whether punishment of a violation—the vindication of the victim's harm—is not itself part of the entitlement of the rights-holder: whether one can separate right and remedy. The new voice of victims in domestic criminal justice systems might suggest that even in international justice, the views of those directly affected must be given special weight.

In addition, the domestic amnesties in Chile were imposed within severe constraints. The 1978 amnesty was imposed by a non-democratic regime. Even after his departure from the office of president, Pinochet continued his tenure as commander in chief of the armed forces until 1998, and this meant that the latitude of the new democratic government was limited. De facto protection was gained by the asserted exclusive jurisdiction of military courts over members of the Chilean military, and the refusal of Chile's military to surrender any of its members to the jurisdiction of civilian courts. The atmosphere was sufficiently delicate that in 1990, the Christian Democratic president Patricio Aylwin was unable to establish a truth commission with legislative support; he acted alone, by executive authority.

Nonetheless, it would have been serious beyond words if transnational judicial intervention had caused an interruption of Chile's democracy. Foreign judges may be willing to entertain cases under universal jurisdiction, but the limited resource of international military power and the daunting costs of conflict mean that a new democratic government will be on its own. There is no international security guarantee for a democratic regime against military overthrow.<sup>15</sup> The Security Council's intervention in Haiti is the exception that proves the rule.

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<sup>15</sup> The Organization of American States and the Organization of African Unity [hereinafter OAU] have pledged to use their diplomatic machinery to discourage illegal interruptions of democratic regimes. But neither regional organization has been willing to directly authorize military intervention for the restoration of democratic regimes. See OAS, General Assembly, 3d Sess., *Santiago Commitment to Democracy and the Renewal of the Inter-American System*, OR OEA/Ser.P/XXI.O.2 (1991) at 1; OAS, General Assembly, 5th Sess., *Representative Democracy* (Resolution 1080) OR OEA/Ser.P/XXI.O.2. (1991). See also "OAU Summit Closes with Calls for Democracy, Dignity", *Agence France Presse* (14 July 1999), online: LEXIS (News) (OAU Secretary General Salim A. Salim states that future coup leaders "shouldn't expect to be invited" to the next summit); compare chairman of OAU Abdelaziz Bouteflika's statement that "[h]e did not deny the right of the public opinion of the northern hemisphere to denounce the breaches of human rights where they existed ... However, the countries of the OAU remained extremely sensitive to any undermining of their sover-

A sense of the delicacy of this balance may account in part for the hedged position of the British government in the denouement of the *Pinochet* case. The principle of accountability was established as a matter of law for the future; the excuse of Pinochet's human decrepitude permitted an exit that avoided any chance of disaster. In any future exercise of universal jurisdiction within national courts, however, the question of democratic stability must weigh profoundly. It is justification for the participation of responsible political branches, as well as the judiciary, in the practical application of international requests for surrender.

The British chapter of the *Pinochet* case ended in the obscurity of a medical examination, rather than in the clarity of factual judgment. After Pinochet was held potentially liable to extradition, and the Bow Street magistrates approved the factual sufficiency of the Spanish presentation,<sup>16</sup> the Home Secretary nonetheless chose to refuse extradition on grounds of mental incompetence. An eighty-four-year-old defendant might seem frail in the best of circumstances, and Pinochet's mental acuity was said to have deteriorated with a series of strokes in September and October 1999. Interestingly for dualists (especially in light of Britain's outspoken position on the International Criminal Court), Home Secretary Jack Straw declared that he would give priority to English law on mental competence even if medical debility did not qualify as a ground for refusing extradition under the *European Convention on Extradition*.<sup>17</sup>

As with other intriguing precedents, it will remain to the future to untangle which of the circumstances in the *Pinochet* case were truly necessary to the radical puncture of criminal immunity. The dismissal of immunity does not depend on the internal theory of politics of the affected country, whether democratic or authoritarian—but the final *Pinochet* opinion may silently turn not only on Britain's incorporation of the *Torture Convention* but as well upon Chile's coincident ratification of the convention. It seems improbable that many authoritarian regimes will ratify such a convention and the domain of the *Pinochet* precedent could be limited by this.

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eignty" (*Implications of International Response to Events in Rwanda, Kosovo Examined by Secretary-General, in Address to General Assembly, Press Release GA/9595, 20 September 1999*).

<sup>16</sup> *Spain v. Augusto Pinochet Ugarte* (8 October 1999), 39 I.L.M. 135 (Mag. Ct.), online: The Magistrates' Courts Service <<http://www.open.gov.uk/lcd/magist/magistfr.htm>> (date accessed: 2 November 2000).

<sup>17</sup> Home Secretary Jack Straw stated that "the Secretary of State attaches great importance to the international obligations of the United Kingdom ... However, ... given the breadth of his discretion under section 12 of the [*Extradition*] Act there may be some occasions on which the requirements of the Convention are outweighed by other compelling considerations peculiar to particular cases" (*Statement of Jack Straw, supra* note 9 at para. 30); compare "Spanish and Belgian Experts Claim Pinochet Fit to Undergo Trial" *The Irish Times* (23 February 2000) 11 ("spokesman for the Swiss Federal Office of Police, said that under the terms of the European convention, extradition could not be refused on health grounds"). One British counsel later noted his dismay that Pinochet leapt out of his wheelchair upon his return to Santiago airport.



Other factual patterns may arise that press the question of which source of law is necessary in defeating official immunity and establishing universal jurisdiction. On 4 February 2000, shortly after Pinochet's return to Chile, an investigating judge in Senegal indicted the former president of Chad, Hissene Habre, as an accomplice to torture in connection with the deaths of members of the Sara, Hadjerai, and Zaghawa ethnic groups.<sup>18</sup> After his overthrow in December 1990, former Chad president Habre fled to Senegal and lived there for a decade, accused of taking 11.6 million dollars in his flight. The Senegalese case was supported by investigations conducted by a Chad truth commission and non-governmental organizations such as New York-based Human Rights Watch, Dakar-based African Assembly for the Defense of Human Rights (RADDHO), and Paris-based International Federation of Human Rights.

The willingness of Senegal to undertake the case may have had something to do with Senegal's public stance favoring the permanent International Criminal Court. Senegal was the first country to ratify the *Statute of the International Criminal Court*.<sup>19</sup> It ratified the *Torture Convention* in 1986, passing implementing legislation in 1996. The central legal obstacle, however, which distinguishes this case from the decision in *Pinochet (No. 3)*, was that Chad did not ratify the *Torture Convention* until 9 June 1995, five years after Habre left power.<sup>20</sup> The case thus renewed the questions sidestepped by the law lords in *Pinochet (No. 3)*: Can a foreign court support universal jurisdiction and limitation of official-acts immunity based upon customary international law and *jus cogens*? Or does it require *ex ante* treaty assent by the state where the offence took place and the state of the offender's nationality? Can treaty law be applied retrospectively on these two issues (since jurisdictional questions are often considered distinct from *ex post facto* bars)?

It is hard to tell what part of the denouement of the Senegalese case was politics or law. A new Senegalese president was elected in March 2000, and soon a new assistant state prosecutor called for dismissal of the charges. The president acting as presiding officer of the Conseil superieur de la magistrature removed the investigating

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<sup>18</sup> See "Ex-Chad Ruler Is Charged by Senegal with Torture" *The New York Times* (4 February 2000) A3.

<sup>19</sup> 17 July 1998, UN Doc. A/CONF.183/9, 37 I.L.M. 999 (not entered into force) [hereinafter *Rome Statute*].

<sup>20</sup> A second problem might consist in Senegal's late incorporation of the *Torture Convention* into domestic law. The application of 1996 implementing legislation to reach Habre's prior behaviour would require the view that jurisdiction falls outside *ex post facto* guarantees, or that the treaty or customary law automatically created jurisdiction within domestic law. Compare *Nulyarinma v. Thompson*, [1999] F.C.A. 1192, 39 I.L.M. 20: in a criminal case alleging genocide, Australian courts must "declin[e], in the absence of [implementing] legislation, to enforce the international norm. ... although torture is an international crime, nobody [among counsel in the *Pinochet* case] suggested Pinochet would have been triable in the United Kingdom before [1988] by reason of the incorporation into United Kingdom law of the international customary law about torture" (though note acknowledgement of Lord Millett's contrary view) (*ibid.* at paras. 26, 29, 30).

judge Demba Kandji from his post. On 30 June 2000 the head of the Senegalese Indicting Chamber announced that Senegal had no jurisdiction over Habre, and three days later, the chamber head was promoted to the Conseil d'État. Habre's lawyer was also hired as a legal consultant to the government. These acts prompted foreign concern that there was the appearance of political interference in judicial proceedings, although the case also faced legal obstacles.<sup>21</sup>

The legal and diplomatic delicacies of the *Pinochet* case will recur in other cases. In March 2000 a Belgian investigating magistrate announced his intention to investigate a complaint of torture and unlawful detention against former Iranian president Ali Akbar Hashemi Rafsanjani, based on the alleged abuse of a Teheran-born Belgian citizen imprisoned for six years.<sup>22</sup> Belgian jurisdiction was based on a 1993 law establishing universal jurisdiction in Belgian courts for genocide and crimes against humanity, as well as grave breaches of international humanitarian law.<sup>23</sup> No extradition request has been made in the case, and Rafsanjani continues to sit in the Iranian parliament. Iran has condemned the magistrate's action, and the parliament has suggested that diplomatic relations be frozen.<sup>24</sup>

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<sup>21</sup> "Justice Denied in Senegal" *The New York Times* (21 July 2000) A18; "Senegal Ends Case against Chad's Former Ruler" *International Herald Tribune* (6 July 2000) 4 (*Washington Post* service reports that Habre was "abruptly freed in a flurry of unusual moves").

<sup>22</sup> See T. Scheirs, "Belgium Opens Investigation into Alleged Human Rights Violations by Former Iranian President" (2000) 16 I.E.L.R. 6, online: LEXIS (News); "Rafsanjani is the latest in a series of world figures to be investigated under Belgian law. They include the President of the Democratic Republic of Congo, Laurent Kabila, three former leaders of Cambodia's Khmer Rouge, the former Moroccan interior minister Driss Basri and several Rwandan genocide suspects" ("Belgian Judge Uses Pinochet Case to Probe Former Iranian Chief" *Agence France Presse* (5 March 2000), online: LEXIS (News)).

<sup>23</sup> See *Act of 16 June 1993 concerning the punishment of grave breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977*, 5 August 1993, amended by the *Act concerning the punishment of grave breaches of international humanitarian law*, 10 February 1999, printed in 38 I.L.M. 918.

<sup>24</sup> The Iranian parliament issued a statement that "[w]e condemn this suspicious plot and ask the Belgian government to take a clear stance on this matter ... [or] ... we will take reciprocal action in asking the parliament's foreign affairs committee to put the continuation of diplomatic relations with Belgium on its agenda"; Italian foreign minister visiting Iran states that Belgium has "taken some steps which we do not understand ... They certainly do not speak for the whole of Europe." See K. Dorrane, "Diplomatic Row Breaks between Iran and Belgium over Court Case" *Agence France Presse* (5 March 2000), online: LEXIS (News); "Iranian Official Expects Freeze in Economic Ties with Belgium" BBC (7 March 2000), (broadcasting report of Iranian news agency that foreign ministry "has called on the Iranian economic organizations to reconsider their trade relations with Belgium"; between March 1995 and March 1998, Belgium was "one of the five major countries exporting goods to Iran"); I. Black, "Rafsanjani Inquiry Puts Belgium in Fear of Fatwa" *The Guardian* (7 March 2000) 17 (Ayatollah Hassan Saneii, head of the semi-official Khordad Foundation, stated "[o]ur reactions will not only be verbal").

A second Belgian case presents the equally delicate question of how the law should address a currently serving foreign official. In April 2000 Abdoulaye Yerodia, the acting foreign minister of the Democratic Republic of the Congo ("DRC"), was charged by the same active Belgian magistrate with "grave violations of international humanitarian law" for encouraging wanton violence in Kinshasa against Tutsi civilians. In August 1998, Yerodia had allegedly called in a radio speech for the "eradication and the crushing of the Rwandan and Ugandan invaders" who were described as "microbes", "vermin", and "cockroaches"—language reminiscent of the broadcasts of Radio-télévision libre des mille collines in Rwanda during the 1994 genocide. The broadcast was followed by violence against Tutsi civilians from Uganda and Rwanda.

The Belgian judge charged Yerodia with crimes against humanity and violations of the *Geneva Conventions* of 1949, as well as the 1977 *Additional Protocols I and II*. Belgium sent international arrest warrants to other states, including the DRC, in July 2000. Three months later, in October 2000, the DRC counterattacked in the International Court of Justice in The Hague, seeking a provisional measure for withdrawal of the Belgian warrant because it "prevents the Minister from departing ... for any other State where his duties may call him and, accordingly, from accomplishing his duties."<sup>25</sup> This action by Brussels was said to violate the sovereign equality of states as declared in the UN *Charter*,<sup>26</sup> the principle that one state "may not exercise its authority on the territory of another State," and the immunity guarantees of the *Vienna Convention*. It is doubtful that an acting foreign minister is directly covered, without more, by the *Vienna Convention*, and the DRC's sudden accession to ICJ compulsory jurisdiction is shaky (except insofar as issuance of a warrant may be considered a continuing event). But the substance of the application gives new visibility to the problematics of an at-large global magistracy.

The amendment of Canadian law on universal jurisdiction may present some of the same difficulties. The previous limit placed on Canadian competence by the *Finta*<sup>27</sup> case is well known. After the report of the 1986 Commission of Inquiry on War Criminals (the "Deschênes Commission"), Canadian law was amended to permit the national trial of war crimes and crimes against humanity occurring abroad, even by foreign nationals against foreign victims, so long as, at the time of the culpable act or omission, Canada "could, in conformity with international law, exercise jurisdiction over that person."<sup>28</sup> The 1987 innovation was effectively disabled, though, in the 1994 decision in *Finta*, concerning a former Hungarian policeman resident in Canada who

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<sup>25</sup> International Court of Justice, News Release 2000/32 (17 October 2000), online: International Court of Justice <<http://www.icj-cij.org>> (date accessed: 30 October 2000).

<sup>26</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7.

<sup>27</sup> *R. v. Finta*, [1994], 1 S.C.R. 701, 112 D.L.R. (4th) 513 [hereinafter *Finta* cited to S.C.R.].

<sup>28</sup> *An Act to amend the Criminal Code, the Immigration Act and the Citizenship Act*, R.S.C. 1985 (3d Supp.), c. 30, s. 1(1).

had helped to deport Hungarian Jews from Budapest to Auschwitz.<sup>29</sup> In that opinion, the Supreme Court of Canada ruled that the defendant should be allowed to argue to the jury that he believed Hungarian Jews to be “subversive and disloyal to the war efforts of Hungary.”<sup>30</sup>

In June 2000, in accord with Canada’s vocal support of the International Criminal Court, the Canadian Parliament acted to expand national court jurisdiction to overcome the *Finta* problem. The new statute recognizes jurisdiction in Canadian courts over genocide, crimes against humanity, and war crimes, even if the offence occurs outside Canada, so long as “after the time the offence is alleged to have been committed, the person is present in Canada.”<sup>31</sup> The new Canadian statute goes beyond the *Pinochet* decision (other than Lord Millett’s opinion) in rejecting the need for statutory incorporation of international law at the time of the criminal conduct. These most serious of international crimes occurring outside Canada can be prosecuted even where they took place “before ... the coming into force” of the new statute.<sup>32</sup>

The statute also rules out an “obedience to superior orders” defence in Canadian courts where the order was manifestly unlawful and the defendant’s claimed belief in its lawfulness was based on hate propaganda.<sup>33</sup> Orders to commit genocide or crimes against humanity are deemed manifestly unlawful per se.<sup>34</sup> But most crucially for our purposes, the new statute may permit prosecution of *sitting* heads of state<sup>35</sup>—an ambitious reach that presents all of the diplomatic and security problems seen in the earlier Belgian cases. For sitting heads of state, there is a powerful argument from prudence

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<sup>29</sup> See *Finta*, *supra* note 27.

<sup>30</sup> See *ibid.* at 847; see also J. Hippler Bello, “Case Report on *Regina v. Finta*” (1996) 90 A.J.L.L. 460 at 467, 473.

<sup>31</sup> *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, ss. 6, 8 [formerly Bill C-19].

<sup>32</sup> See *ibid.*, s. 6(1).

<sup>33</sup> *Ibid.*, s. 14(3) (“An accused cannot base their [obeying orders] defence ... on a belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group”).

<sup>34</sup> *Ibid.*, s. 14(2).

<sup>35</sup> See N. Ayed, “Bill Shuts Loopholes for War Crimes Suspects” *The Toronto Star* (11 December 1999) A31 (Foreign Minister Axworthy “said the legislation would also change current laws to allow the prosecution of sitting heads of state”). See also, on the third reading of Bill C-19, *House of Commons Debates* (13 June 2000) at 7916 (I. Cotler) (“basic principles underlying Bill C-19” include the “principle of non-immunity, the Pinochet principle and beyond. ... a person who is the subject of a domestic prosecution, including a head of state or senior official, will not be able to claim immunity from prosecution under common law or statute ...”). It is doubtful, however, that the *Crimes Against Humanity and War Crimes Act* means to go beyond the *Rome Statute* in regard to head of state immunity. Application of the International Criminal Court standards may require a distinction between immunity *ratione materiae* (precluded by the *Rome Statute*, *supra* note 19, art. 27(1)), and immunity *ratione personae* (protected by *ibid.*, art. 98, when a requested state has entered into an international obligation, but disregarded in the Court’s “exercising its jurisdiction” under art. 27(2)).

that criminal justice processes should be deployed, if at all, then only by a multilateral institution that can claim a broad consensus of view.

Nonetheless, perhaps the most interesting effect of the House of Lords' decision on immunity may be seen in Chile's own renewed national inquiry into the events of the Pinochet era. On 22 May 2000 the Court of Appeals for Chile voted thirteen to nine to remove the immunity of General Pinochet in connection with seventy-four charged deaths.<sup>35</sup> The Supreme Court of Chile affirmed the result in a vote of fourteen to six.<sup>37</sup> On 13 June 2000, the Chilean military agreed to search for the remains of twelve hundred persons who disappeared under Pinochet's regime, albeit with protection for the identities of informants.<sup>38</sup> The mixed motives of this co-operation—in part seeking to qualify within earlier amnesty provisions<sup>39</sup>—does not alter the fact that the Chilean military has changed its stance significantly from the recent past.

The ambiguity of precedent and decision often yields law's greatest creativity. While the dangers of universal criminal jurisdiction are amply shown by recent events, its impetus to a different politics—restoring the ability of democratically elected governments to act on their own—is equally in evidence.

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<sup>35</sup> R. Urbina, "Pinochet Loses Immunity, Opponents Seek Justice" *Agence France Presse* (5 June 2000), online: LEXIS (News); *Chilean Appeals Court Strips Pinochet of Immunity* (2000) 16 I.E.L.R. 7, online: LEXIS (News).

<sup>37</sup> The Chilean Supreme Court stripped Pinochet of his parliamentary immunity on 8 August 2000. See J. Langman, "Chilean Court Strips Pinochet of Immunity" *The [Toronto] Globe and Mail* (9 August 2000) A1; C. Krauss, "Pinochet Ruled No Longer Immune from Prosecution" *The New York Times* (8 August 2000) A3 [hereinafter "No Longer Immune"].

<sup>38</sup> C. Krauss, "Chile Military to Search for Victims of Its Rule" *The New York Times* (14 June 2000) A7 ("the dialogue made rapid progress after a decision by the Appeals Court that stripped General Pinochet of his senatorial immunity and opened the way to a trial in Chile").

<sup>39</sup> Investigating magistrate Juan Guzman has argued that an unresolved disappearance amounts to a continuing kidnapping that would not fall within the Pinochet regime's 1978 amnesty. The amnesty has also been challenged as inapplicable to crimes against humanity. See "No Longer Immune", *supra* note 37.

