

**The Pinochet Precedent:
Pushing Human Rights Standards in International Law**

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Abstract

The case against Augusto Pinochet reflects the critical, if often overlooked, link between international law and global politics. The details of the case provided here show how global networks of human rights advocates utilize the tools provided by international law to effectively “push” political norms (and customary law) in a given direction. The normative “push” represented in the Pinochet case aims to erase immunity for heads of state who terrorize their citizens. Such a shift has profound implications for our specific legal concepts regarding international jurisdiction, our general *realpolitik* notions about state sovereignty, and our theoretical models of normative change on the global stage.

THE PINOCHET PRECEDENT: PUSHING HUMAN RIGHTS STANDARDS IN INTERNATIONAL LAW

I have faith in the destiny of Chile, to rise above this gray and bitter moment when treason prevails...I die knowing that there will come a moral law to punish the felony and the cowardice and the treason.

-- Last words written by Chilean president, Dr. Salvador Allende, as General Pinochet's forces were bombing the capital in the midst of the coup, September 11, 1973.¹

TURNING POINT

On December 2, 2000, in the midst of the United States' presidential election media frenzy, the *Washington Post* managed to squeeze news from another land onto its front page. The small headline read: "Pinochet Indicted for Chilean Atrocities." While General Augusto Pinochet's lawyers scrambled to have the former dictator's house arrest rescinded, human rights observers around the world applauded, recognizing this event as another significant, if surprising, step in the international move toward making tyrants account for their abominable crimes. Indeed, earlier in the year, when the British Home Secretary allowed Pinochet to return to Chile on the grounds that he was too ill to stand trial in Spain, few thought the Chilean courts would bring their former ruler to justice. Their assumptions were based on traditional notions of international law and *realpolitik* perspectives on international relations, both of which privilege the state as opposed to the individual as the primary actor on the global stage. The Pinochet Case challenges these conventional ideas and practices.

Even without the General's arrest in Chile, the Pinochet case stands as a potential turning point in international law and global politics. The actions surrounding the case and events following its initiation signal that the international legal and political immune system that protected former tyrannical heads of states from prosecution is weakening. Moreover, such a shift

in the concept of sovereign immunity for heads of state reflects slight cracks in the foundation of the traditional nation-state system.

On a broader scale, the Pinochet case reflects the critical, if often overlooked, link between international law and global politics. The details of the case provided here show how global networks of human rights advocates utilize the tools provided by international law to effectively “push” political norms (and customary law) in a given direction. The normative “push” represented in the Pinochet case aims to erase immunity for heads of state who terrorize their citizens. Such a shift has profound implications for our specific legal concepts regarding international jurisdiction, our general *realpolitik* notions about state sovereignty, and our theoretical models of normative change on the global stage.

What follows is a two-part analysis of the details and the relevance of the case against Augusto Pinochet. Part I provides a brief history of Augusto Pinochet’s rule in Chile and an outline of the crimes for which he was accused. This is followed by a short overview of the legal chain of events in Britain and then a more thorough breakdown of the critical legal arguments used against the former Chilean dictator. Given these details, part II attempts to bridge the gap between international law and international relations by discussing what makes the Pinochet case a landmark in international human rights law as well as a potential turning point in global politics.

PART I

Who Is Augusto Pinochet?²

General Augusto Pinochet came to power on September 11, 1973, in a military coup that overthrew the democratically elected Marxist President, Salvador Allende. Supported by cold war warriors such as Ronald Reagan and Margaret Thatcher and aided through military training and financing by the US Central Intelligence Agency, General Pinochet ruled as Chile’s head of state from 1973 to 1990. Upon taking control of the government, the General closed the National

Congress and the Constitutional Tribunal and even went so far as to burn voter registration cards. He reversed socialist measures, such as land reform, and enlisted the expertise of a team of University of Chicago economists to bring the economy in line with liberal free-trade economic principles. While such efforts at economic reform are often criticized for causing undue suffering on large portions of the population, the real tragedy of the Pinochet years was his brutal crackdown against his political opposition and the accompanying climate of fear that pervaded all levels of society.³

According to Geoffrey Robertson, “General Pinochet was not accused of participation personally in any single act of torture, but rather with directing them all through his personal command over the DINA [Directorate of Intelligence], the secret military police who staffed the torture centres in Santiago and elsewhere.”⁴ Thus, the Spanish prosecutor (and others who later followed suit) accuse General Augusto Pinochet of the universal crime of torture, as defined in the UN Torture Convention, and committed under his rule as Chilean president from 1973 to 1990. Interestingly, even Pinochet himself does not deny that he bears ultimate responsibility, claiming that “As a former president of the republic, I accept all the deeds that they say the army and the armed forces did.”⁵

Thirty specific and horrific “deeds” are enumerated in the Spanish prosecutor’s official charges against Pinochet. These include, for instance, the following excerpts:

...That you on the 24th June 1989 being a public official, namely Commander-in-Chief of the Chilean Army, jointly with others intentionally inflicted severe pain or suffering on Marcos Quezada Yanez, aged seventeen years old, by inflicting severe electric shocks causing his eventual death, in purported performance of official duties.

...and...

That you on or about 29th October 1976 being a public official, namely Commander-in-Chief of the Chilean Army, jointly with others intentionally inflicted severe pain or suffering on José Marcellino Gonzalez Malpu, by applying electric current to his genital organs, shoulders and ankles, and pretending to shoot his captive naked mother in front of him, in purported performance of official duties.

Prosecutors and human rights activists have gathered the facts of these cases, and many other more grisly and depraved acts, for which they consider General Pinochet responsible. According to the Rettig Report of 1996, produced by the Chilean government's Commission for National Truth and Reconciliation, 3,197 people died or disappeared during Pinochet's rule. These atrocities included kidnappings, torture, and executions throughout all levels of society. Pinochet's forces are accused of targeting rural and indigenous people, as well as leaders of labor unions, left-wing political parties, and political opposition groups. Additionally, it is claimed that Pinochet exported his project to destroy left wing opposition to neighboring countries in his bloody South American campaign known as "Operation Condor." From a legal perspective, according to Geoffrey Robertson, "What fixes Pinochet with personal responsibility, is that he set up an organization – DINA – [Directorate of Intelligence] within the military to supervise the operations of the torture centres under the directorship of Colonel Manuel Contreras, who reported daily and directly to him."⁶

In this climate of fear and intimidation, neither leaders of the Church, nor children, the elderly, foreign nationals or diplomats were safe from persecution. Amnesty International reports that during the first four months of the coup, 250,000 people were detained for "political reasons." By early 1975, Pinochet's practice of periodically releasing selected prisoners to spread the word of what happens to dissenters was, quite predictably, backfiring. While releasing former prisoners

succeeded in intimidating the population, it also generated numerous witnesses to the crimes. Soon, enough personal accounts and evidence mounted to generate international attention on Chilean human rights abuses.

In the mid 1970's, after denying that such practices had taken place in their country, Chilean representatives signed United Nations resolution No. 3452, recognizing torture as an international crime.⁷ Later, Chile became a signatory to the 1984 *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* ("Torture Convention"). This piece of international law was the linchpin in the case against Pinochet. As Human Rights Watch's veritable handbook on prosecuting tyrants claims, "Because of the Convention's clear and unambiguous command, torture charges may be the most fruitful in extraterritorial cases brought in [Convention-signing] countries."⁸

Pinochet's latest chapter began with a slow return to democracy and the drafting of the constitution in 1980. This document granted, among other things, nine more years of Pinochet rule. In 1988, Pinochet's attempt to solidify his position with a plebiscite failed and he was forced out of office. Nonetheless, he was able to secure his position as military leader until 1998, after which he would be granted "senator for life" status. It was in this capacity, as a distinguished former head of state and a Thatcher ally in the fight against communism, that he traveled to a friendly nation, Great Britain, for back surgery in October 1998. As Robertson relates, "he did not even bother to take the elementary precaution of obtaining a diplomatic visa: he was, so he thought, clad in the impregnable armor of state sovereignty, which had for centuries shielded every tyrant against legal attack."⁹ Unfortunately for General Pinochet, international forces were beginning to find holes in such armor, and his was to be challenged to the fullest extent.

Overview of the British Chain of Events

The first shot over the bow was fired by a Spanish magistrate, Balthasar Garzón, on October 16, 1998. Having learned of the General's visit to London via media coverage, Garzón requested that the British government extradite Pinochet to Spain in accordance with the *European Convention on Extradition* of 1957 (also covered by UK law under the Extradition Act of 1988)¹⁰ on the basis that from September 11, 1973, to December 31, 1983, General Pinochet had murdered Spanish citizens in Chile. Under Spanish laws regarding jurisdiction, he could be tried in Spain. The first legal hurdle was to convince the British courts to extradite.

A Divisional court formulated the first legal reaction. The Chief Justice claimed that Pinochet was immune to extradition for crimes against humanity because of his status as an ex-head of state. This decision rested on the traditional notion that acts performed by a head of state, are by definition, official acts, and therefore, not subject to legal judgement. One judge, Collins J., agreeing with the ruling, even claimed, "history shows that it has indeed on occasions been state policy to exterminate or oppress particular groups."¹¹ This ruling upholds traditional principles of international law for crimes committed by heads of state and denies emerging norms respecting human rights. However, the prosecution's appeal was promptly forwarded to the House of Lords, Britain's highest court, where a more thorough examination of international law was accomplished.

Justices at this stage allowed human rights lawyers from Amnesty International and Human Rights Watch to advise them in their proceedings. The ruling, known as *Pinochet I*, denied the General immunity based on the fact that immunity can be granted only with respect to "official acts," performed in his duties as Head of State. Torture, for which he was charged, was not considered by the Lords to be an "official" act. Moreover, they asserted that the authority for determining the "line" between *official* and *private* acts rests in international, rather than

municipal law. However, the ruling in *Pinochet 1* was compromised when Lord Hoffman, a prior director with Amnesty International, was accused of being biased.

The House of Lords then issued another ruling, *Pinochet 2*, which addressed only the matter of bias. The majority in *Pinochet 2* determined that “links between one of the members of the Appellate Committee who heard the appeal, Lord Hoffman, and Amnesty International (“AI”) were such to give the appearance that he might have been biased against Senator Pinochet.”¹² Thus, *Pinochet 1* was “set aside” and the House of Lords was required to hear the full appeal a second time. The final ruling on the matter was determined, albeit through different legal logic, in *Pinochet 3*.

Whereas the decision in *Pinochet 1* rested on the definition of “official acts” of heads of state, the decision in *Pinochet 3* rested on notions of *double-criminality*. Specifically, *double-criminality* dictates that for a state to extradite the accused, the alleged crimes must be deemed criminal acts in both states. The issue was not whether torture was outside the realm of “official” duties of heads of state, but rather, *when* torture became a criminal act in the UK. That date, according to the majority in *Pinochet 3*, turns out to be September 29, 1988, the date on which the *Torture Convention* was incorporated into UK law by section 134 of the UK’s Criminal Justice Act of 1988.¹³ Thus, Pinochet could only be tried for acts committed after that date. Spanish prosecutor, Garzón, had little trouble identifying 30 more torture charges against the former dictator for the given time period, and thus the Bow Street Magistrate ordered the General’s extradition on October 8, 1999.

Under UK law, the final responsibility for the execution of extradition rests with the Home Secretary, in this case, Jack Straw. After *Pinochet 1*, Straw had resisted political pleas from Margaret Thatcher and others, who claimed “compassion” for an old, sick man was in order. Additionally, he rejected pleas from states rights’ advocates in and out of the Chilean government,

who appealed to notions of sovereignty and also dismissed Chilean claims that extradition would subvert their attempts at “national reconciliation” through the granting of amnesty. However, while stating his concurrence with the merits of *Pinochet 3*, Mr. Straw determined that Senator Pinochet’s poor health made him unfit to stand trial. In the early afternoon, March 2, 2000, prior to final determination of a Pinochet appeal, the General secretly boarded a Chilean jet bound for home - in what *The Economist* labeled “an unnecessarily shabby end to an extraordinary legal case which, for all its twists and turns over nearly 17 months, has proved a landmark in international law.”¹⁴

The Legal Arguments

In order to understand why this case is a landmark, we must delve deeper into the details of the legal proceedings. It is not enough to say that the Pinochet Case proves heads of state are no longer immune from justice. We must understand what tools in international law are sharp enough to pierce the armor of immunity worn by such leaders. For this case, the primary “tools” were the *Torture Convention of 1984* and the legal principle of *universal jurisdiction*.

In short, *universal jurisdiction* implies that “every state has an interest in bringing to justice the perpetrators of particular crimes of international concern, no matter where the crime was committed, and regardless of the nationality of the perpetrators or their victims.”¹⁵ The crime under consideration was the torture of Spanish citizens by those serving under General Pinochet’s command. Citing universal jurisdiction and the *Torture Convention of 1984*, the Spanish judge requested Pinochet’s extradition from the U.K.¹⁶

That torture is considered a *jus cogens* crime (and thus subject to *universal jurisdiction*) was most formally affirmed in the landmark *Filartiga* case (1980) in which the US court stated “the torturer has become like the pirate and slave trader before him *hostis humanis generis*, an enemy of all mankind.”¹⁷ The *Torture Convention of 1984* rests on this *jus cogens* nature of

torture as a crime to describe the actions to be taken by the parties to the treaty when faced with violations. For the British Lords deciding the Pinochet case, the Convention provided a definition of torture and the legal framework for the extradition question.

Torture Convention

The Convention outlines the proper criteria for jurisdiction in Article 5:

1. *Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses referred to in article 4 in the following cases:*
 - a. *When the offences are committed in any territory under its jurisdiction or on board any ship or aircraft in the State;*
 - b. *When the alleged offender is a national of that State;*
 - c. *When the victim is a national of that State if that State considers it appropriate.*
2. *Each State Party shall likewise take such measure as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.*
3. *This Convention does not exclude any criminal jurisdiction exercised in accordance with international law.*

While paragraph 1(c) gives Chile the authority and the discretion to try Pinochet, paragraph 2 requires the U.K. to extradite the General for this trial. As Lord Browne-Wilkinson claims, when an alleged offender is in the territory of a signatory to the Convention and is requested for trial by another signatory, the former is required to act on the latter's request: "The purpose of the Convention was to introduce the principle *aut dedere aut punire* – either you

extradite or you punish.”¹⁸ Thus, under this Convention (which had been incorporated into British law in 1988), Britain had to act.

The two rulings, *Pinochet I* and *Pinochet III* took different starting points in their lines of logic. For *Pinochet I*, the main question centered on the definition of torture as a crime for which a head of state can be said to have committed. This is, essentially, the critical question of sovereign immunity. In contrast, for *Pinochet III*, the notion that a head of state could be said to have committed torture was understood. Instead, the critical legal roadblock was to determine when torture became a crime under British law. As explained above, this occurred when the *Torture Convention* was adopted into British Law. In both cases, what is important is not only that official heads of state were not considered immune, as explained below, but also that it was the *Torture Convention*, an international legal agreement, that was considered by the Lords to be the critical legal reference.

(a) Torture and Sovereign Immunity

The Lords in *Pinochet I* addressed the critical puzzle concerning immunity. Simply put, if Pinochet maintained immunity for alleged crimes of torture, then the issue of jurisdiction for extradition was inconsequential. The question was: Does the Torture Convention exclude heads of state? In many ways, this is the critical political issue because the answer reflects current understandings about sovereign immunity (discussed below). Focusing on the language of Article 1 of the *Torture Convention*, the Lords uncovered cracks in the General’s armor of sovereignty.

The *Convention* identified torture as follows:

...the term ‘torture’ means any act by which severe pain or suffering...is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed...when such pain or

suffering is 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.”

Thus, the clear question for the Lords was: What legally defines an act as being undertaken in “official capacity?” What is a legitimate act by a Head of State? As Jamison White states, “it is already well established law that heads of state are not immune from personal acts or public actions committed for personal gain while in power...this sample of jurisprudence thus recognizes the possible need to withhold heads of states’ immunity in certain instances due to the nature of their action, a phenomenon in accordance with the principles of universality”¹⁹ Even Collins J, the Divisional Court Justice who spoke on the first ruling affirming Pinochet’s immunity, revealed his frustration over distinguishing between public and private acts by heads of state when he asked rhetorically, “Where is the line to be drawn?”²⁰ In *Pinochet I*, Lord Steyn picks up this question with the often-quoted analogy:

If a Head of State kills his gardener in a fit of rage, that could by no stretch of the imagination be described as an act performed in the exercise of his functions as Head of State. If a Head of State orders victims to be tortured in his presence for the sole purpose of enjoying the spectacle of the pitiful twitchings of victims dying in agony (what Maigne described as the farthest point that cruelty can reach) that could not be described as acts undertaken by him in the exercise of his functions as a Head of State.

The Lords examining Pinochet’s case agreed that the definition of “official acts” are to be found in what is recognized by *international law* (as opposed to municipal law) as official functions of heads of state; which as White points out above, seems to lead toward an examination

of principles of universality.²¹ On this point the nature of international law may prove to be a reflection of changing norms in international society. In *Pinochet I*, Lord Steyn acknowledges the changing nature of international norms with respect to the Pinochet Case:

...the development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d'etat, and certainly ever since, international law condemned genocide, torture, hostage taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State. ...what he is alleged to have done is no more to be categorized as acts undertaken in the exercise of the functions of a Head of State than the examples already given of a Head of State murdering his gardener or arranging the torture of his opponents for the sheer spectacle of it.

With this reasoning, the House of Lords, in *Pinochet I*, overturned the ruling of the Divisional Court by a vote of 3-2. Their ruling asserted that torture was a crime for which heads of state could not claim immunity. Thus, the Torture Convention dictated that extradition was in order. As explained above, *Pinochet III*, did not refute this.

(b) Opposing Logic

Dissenters in the ruling focused on the relative strengths of torture vs. immunity as practiced in international law and on whether the authors of the Torture Convention intended to erase immunity for heads of state. Jonathan Black-Branch explains that the dissenters were correct by arguing that Pinochet has immunity under the principle of *jus cogens*. *Jus Cogens*

refers to “a rule or principle in international law [often referred to as a “peremptory norm”] that is so fundamental that it binds all states and does not allow any exceptions.”²² Black-Branch claims that, arguably, both torture and immunity for heads of state could be considered *jus cogens* laws. However, “...state immunity has had longer support in more countries throughout the world and therefore takes priority in the hierarchy of principles.” Because of this obvious priority in international law, Black-Branch claims, “...had the framers [of the Torture Convention] intended former heads of state to be liable for alleged acts, they would have made express reference to such leaders.”²³

This line of reasoning dismisses that international law has the capacity to change at all. Part I(1)(1) of the Torture Convention, as quoted above, clearly identifies “public officials” in its very definition of torture. Thus, according to Robertson, “the Torture Convention, by defining ‘torture’ as a crime which could be committed only by a person acting in an official capacity, had (for cases of torture) abolished sovereign immunity altogether!”²⁴ Thus, it seems more likely that had the framers intended to exempt heads of state, they would have made “express reference” to that exemption, else we be stuck with the “self-defeating syllogism: Only public officials can commit torture; Public officials are immune from prosecution; Nobody can ever be prosecuted for torture.”²⁵

In sum, the Torture Convention is critical to the Pinochet case because of its solidification of torture as a universal crime against humanity as well as its language relating the definition of ‘torture’ to official acts. This link made the notion of immunity for heads of state questionable and provided prosecutors with the temerity to request extradition in the first place. The court’s ruling further enhances this strategy as a viable method of bringing cases against despotic rulers demonstrating how international legal instruments such as international conventions serve to strengthen international legal practice.

PART II

Cracks in the Armor: Why the Pinochet Case is a “Landmark”

Historically, the armor worn by state leaders such as General Pinochet, has been impregnable, as it has been forged from the traditions in international law designed to protect state sovereignty and maintain international order and comity among nations. However, as the following discussion makes clear, such traditions are being increasingly challenged. The Pinochet Case is a critical event on this trendline.

(a) The Changing Nature of State Sovereignty and International Law

It is true, as Black-Branch asserts above, that the notion of sovereign immunity has a long and solid history. Since the establishment of the Westphalian system in 1648, at the end of the 30 Years War in Europe, the preeminence of the nation-state as the fundamental actor on the world stage has been upheld in international law and international relations. Indeed, it was precisely because European monarchs shared a fear of challenges to the legitimacy of their rule, that they agreed to come together to construct the Westphalian system in the first place.²⁶ Thus, the very foundation of the modern nation-state system is the individual ruler, who was not to be divorced from the concept of the state itself. There was little need to craft international provisions addressing the behavior of individuals, much less heads of state, as the former were to be handled as the latter saw fit. Thus, only the external behavior of the state and its role in the maintenance of a balance of power in the international system concerned the leadership of the international community.

In 1945, the UN Charter, Article 2(7) reaffirmed the independence of individual member states and the command of domestic jurisdiction. Likewise, the 1970 *Declaration on the*

Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, the so-called “Friendly Relations Resolution,” stated that:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State...all forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements, are in violation of international law

However, WWII demonstrated how certain “internal” and “external” behavior by states could be deemed unacceptable in international law. Not surprisingly, a closer look at the UN charter reveals an inherent dichotomy. While Article 2(7) affirms state sovereignty on the one hand, Chapter VII outlines the ways in which the international community might intervene, or otherwise take action, “with respect to threats to the peace, breaches of the peace, and acts of aggression.”²⁷ Likewise, the Nuremberg tribunal defined certain “war crimes,” “crimes against humanity,” and “crimes against peace,” which would not be tolerated by the international community, and from which leaders, like Hitler or his generals, were not immune:

...The principle of international law, which under certain circumstances protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceeding.²⁸

The problem arises, however, in how to prosecute such crimes in a world of sovereign states. As Belinda Cooper claims, “...over the fifty years that followed [WWII], realpolitik

seemed to negate the principles of responsibility and accountability declared at Nuremberg...international cooperation to enforce norms against war crimes and other violations of humanitarian law seemed little more than a utopian notion.”²⁹ This reality did not deter a number of “utopian” diplomats and lawyers, who continued the fight by seeing to it that numerous international Conventions and Agreements were passed during the dark days of the Cold War. Documents ranging from the 1948 *Genocide Convention* and the *Universal Declaration of Human Rights*, to the 1984 *Torture Convention*, and others in between and since, contain statements aimed at upholding and codifying the Nuremberg principles. Unfortunately, as Cooper points out, many viewed these efforts as mere lip service to a utopian ideal, not legal documents that had any real teeth.

The fact that Pinochet and other alleged perpetrators of state-sponsored torture signed the Torture Convention might reflect the lack of respect many in the political sphere have for international law. Black-Branch may be missing the point when he claims that it was the fundamental assumption that sovereignty would take precedence when heads of state were accused of torture that led Pinochet to sign a document that would seemingly seal his legal fate. Black-Branch states, “In that regard it is highly unlikely that Pinochet would have signed a document which would eventually render himself liable. It is ironic that the very convention which Pinochet, as head of state, signed has led to his possible extradition to Spain for alleged acts of torture.”³⁰ It seems much less “ironic” when one considers the possibility that Pinochet and others never expected such a document to have any real “legal teeth” in the first place.

That the document did eventually come to provide a legal basis for action against a former head of state points to normative shifts in the global system. A critical shift was evident after the end of the Cold War, when ethnic conflict erupted in the Balkans and Africa. Recalling the horrors of the Nazi genocide, the international community took action. In a new, more

internationally cooperative and globalized world, the UN Security Council established war crimes tribunals for Yugoslavia and Rwanda modeled on the Nuremberg precedent. While these tribunals have had some success (not the least of which has been the incorporation of rape in the war crime category), their ad-hoc nature and limited jurisdiction has been a source of frustration.³¹ In 1998, 120 countries voted in Rome to establish a permanent International Criminal Court, whose purpose would be to address the “most serious crimes of concern to the international community as a whole,”³² such as genocide, torture, and other crimes against humanity. This series of events from Nuremberg to Yugoslavia, Rwanda and an ICC, along with the many international human rights Conventions adopted thus far, reflect serious attempts by the international community to address the gravest crimes against humanity. These political and normative shifts are reflected in the international legal debate over the case of Augusto Pinochet and raise questions about the links between international law and international relations.

(b) Pushing Norms Through International Law

Ellen L. Lutz and Kathryn Sikkink claim that international law provides a potent pathway for norm transfer. As countries sign on to treaties and conventions, regardless of their intentions at the time, these decisions become what they call *norm-affirming events*:

Norm-affirming events can take various forms – they can be formal articulations of norms in declarations or treaties, they can be statements in speeches of government officials, or they can be incorporated into domestic legislation that makes reference to international norms.³³

One of the most interesting aspects of Lutz and Sikkink’s argument is their claim that because of the power of norm-affirming events, leaders may accidentally take themselves and their

states down unintended paths. For example, “when Pinochet agreed to allow Chile to ratify the Convention Against Torture in 1988, he had no idea that the words of the convention would justify his arrest in the United Kingdom ten years later.”³⁴

Geoffrey Robertson, makes the same observation, noting that the Lords ruling on the Pinochet Case nearly a generation after the Convention had been signed simply read the document as it stood and applied the law as they saw fit:

...what nobody could have anticipated is that the English judges would approach this treaty as if it were a contract or a parliamentary statute, without a trace of the skepticism that affects anyone who knows with what hypocrisy these conventions are drafted and ratified, by diplomats who never intend them to have any effect beyond inducing a feel-good factor and a good human rights rating to wave in front of aid-donors.³⁵

Outside speculation about what Pinochet and others hoped to gain from signing the Torture Convention, it seems fairly clear that they feared they had little to lose. This sense of security stems from the historic disregard in global politics for the instruments of international law. The Pinochet Case shows that adopting such an attitude is becoming unwise and unrealistic. The case’s details demonstrate that there are ways to try a former despot and they are becoming increasingly acceptable.

In sum, this is another aspect of the legal developments that make the Pinochet Case a landmark. Not only is it remarkable that the ruling’s substance asserts heads of state are not automatically immune (although this is critical to international relations); but significantly, an attempt to force a moral norm in international law seems to have borne fruit. Robertson asserts that the *Torture Convention* was ratified by dozens of heads of state who practiced torture, “as

another exercise in cynical diplomacy, without any belief that it would be enforced.”³⁶ But, once the Convention was actually put to the test, the law Lords of Britain, however naively, read the document in the manner the framers had hoped rather than how many of the signers had supposed. It appears that those “optimistic,” “idealistic,” and “utopian” human rights advocates turned out to be quite prescient. Thus this incident stands as an indication of how norms can be forged by hopeful activists, and unwittingly cynical diplomats. Such activists are hard at work to secure the ground they have already gained by searching out others who can be brought to justice.

THE PINOCHET LINK IN THE MARCH TOWARD GLOBAL JUSTICE

The Pinochet Case is a significant step in the path toward an international legal norm that respects human rights and does not stand for heads of state who abuse their country’s own citizens. Legally, this increased emphasis on morality over sovereignty is demonstrated in each step that has been taken by “idealistic” human rights advocates this century. From Nuremberg to other war crimes tribunals in Yugoslavia and Rwanda, to the current idea of a permanent International Criminal Court (ICC), these efforts reflect the standards underlying the many Conventions and Treaties also forged by this transnational group of human rights advocates. Such efforts include, the *UN Charter* itself (1945), which in its preamble, reaffirms “faith in fundamental human rights;” as well as the *Genocide Convention* (1948), the *Universal Declaration of Human Rights* (1948), the *European* (1950) and *American* (1969) *Conventions for the Protection of Human Rights and Fundamental Freedoms*, the *African Charter on Human and People’s Rights* (1981), the *Torture Convention* (1984), and many others.

Politically, this concern for the welfare of innocents is also reflected in the proliferation of military interventions for “humanitarian” purposes. While there are, admittedly, many questions associated with such humanitarian interventions - such as who can legally intervene where, or

what are the appropriate means for intervention - the very fact that humanitarianism is being increasingly cited as justification for international action signals the presence of an emerging international moral norm. In such an environment, the Pinochet Case is not likely to become filed as an “anomaly” in international law. Already, it is being cited in other efforts to bring former dictators to court.

Tyrants on the Run?

According to David Bosco, “As soon as Pinochet was detained in London, human rights activists and victims scanned the horizon for other ex-dictators who might be brought to justice.”³⁷ For such activists, the Pinochet Case provides a road map for how to proceed. Indeed, in March 2000, Human Rights Watch published *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad*, a veritable handbook, available free on the internet, outlining all the legal tools one can use to pursue and prosecute such criminals.³⁸ Additionally, it provides a laundry list of other perpetrators it feels should no longer enjoy luxurious retirement free from prosecution.

The Human Rights Watch list of former leaders responsible for atrocities includes: *Idi Amin*, of Uganda, living under the protection of the Saudi Arabian government; *Milton Obote*, also of Uganda, living in Zambia; *Mengistu Haile Miriam*, of Ethiopia, residing in Zimbabwe; *Raoul Cedrés* and *Philippe Biamby*, of Haiti, granted asylum in Panama; *Emmanuel “Toto” Constant*, Haiti’s death squad leader, now in New York; *Alfredo Stroessner*, of Paraguay, enjoying life in Brazil; and *Jean-Claude “Baby Doc” Duvalier*, Haiti’s “president for life,” living in France.

In an article published in *The Nation*, Roane Carey adds to this list a veritable *who’s who* of graduates from the U.S.-run School of the Americas, (SOA), as well as others who capitalized on cold war tensions to initiate bloody coups of their own: *Michel Froncois*, a former “CIA asset,”

who lives in Honduras; *Romeo Lucas Garcia* and *Efrain Rios Montt*, of Guatemala, living “in quiet retirement in Venezuela” and serving in elected Guatemalan office, respectively; *Elizaphan Ntakirutimana*, a Rwandan living in Texas; *Henry Kissinger* of the US; *Ariel Sharon* of Israel; and the following graduates of the US-SOA: El Salvadoran Generals, *Jose Guillermo Garcia*, and *Carlos Eugenio Vides Casanova*, living luxurious lives in Florida; and Argentinean military officers, *Leopoldo Galtieri* and *Roberto Viola*.³⁹

Those who would prefer to ignore the significance of the Pinochet case might point to the fact that the vast majority of efforts to bring such offenders to justice have failed: The Saudi government promises to refuse any extradition requests for Idi Amin citing “Bedouin Hospitality;” both Zimbabwe and South Africa have refused or ignored requests to extradite Miriam to Ethiopia; and Panama refused to extradite or prosecute Cedrás and Biamby. However, such cases are increasingly balanced by more successful efforts elsewhere.

There are a number of other instances in which the Pinochet strategies are starting to bear fruit. Independent activists, emboldened by *Pinochet*, are challenging old norms as well as political pressures in their prosecutions. According to a London newspaper, the French government was embarrassed when French courts accepted a lawsuit implicating Libyan leader, Muammar al-Gaddafi, in the bombing of an airliner in 1989.⁴⁰ In this effort, the Pinochet Case was cited as proof that heads of state did not enjoy unrestricted immunity and the government found it had little choice but to let the legal system act.⁴¹ In Florida, two former El Salvadoran Generals are fighting legal battles brought in a civil suit by the families of four American nuns, allegedly slain under the orders of these two men.⁴² What is encouraging to these activists, regardless of the eventual outcomes, is that these courts are recognizing jurisdiction and agreeing to hear the cases.

Similarly, while on the surface the following two cases in the United States and France appear to have dealt a blow to human rights activists, in other ways, they clearly support the notion of changing norms. First, when Haiti requested the extradition of “Toto” Constant, the United States was faced with the political embarrassment of the CIA having allegedly supported the man financially during his reign of terror. Nonetheless, instead granting asylum, the US arrested the accused torturer. Extradition was only thwarted politically, when Secretary of State Warren Christopher intervened to request he be deported to a third country instead.

In the second, French case, Duvalier escaped prosecution for crimes against humanity only because the French courts claimed that they could not try such crimes committed before the 1994 crimes against humanity law.⁴³ The silver lining in this case is the implication that similar future cases (i.e. crimes committed after 1994) would not escape legal scrutiny. While these cases were not able to fully capitalize on a Pinochet Precedent, they still demonstrate the willingness by national and local courts to hear such cases, as well as their ability to reject diplomatic immunity claims regarding torture or crimes against humanity.

The most significant case following the Pinochet Precedent is that of Chad’s former dictator, Hissene Habre, who lives in “luxurious exile” in Senegal. Habre is facing potent legal pressures by local human rights groups, invigorated by the help of Human Rights Watch’s Reed Brody, and Peter Rosenblum, of Harvard Law School’s human rights program.⁴⁴ In February, 2000, armed with a mountain of evidence surreptitiously gathered over the past eight years, former political prisoner, Suleyman Guengueng and others victim and activists, convinced a Senegalese court, to issue an indictment.⁴⁵ According to Delphine Djiraibe, president of the Chadian Association for the Promotion and Defense of Human Rights, the Pinochet Case caused a “shift” in the environment that made a Habre prosecution finally conceivable: “...the Pinochet

case...brought recognition under international law that human rights violators could be prosecuted anywhere.”⁴⁶

Such examples of successful, or even nearly successful, prosecutions may indeed give the most notorious members of the various “most wanted” lists reason to worry. As Brody claims, “These cases sound an alarm for dictators across the continent. They know their impunity can be questioned. First Pinochet, then Habre, and they know maybe they could be next. It shows accountability is possible.”⁴⁷

Likewise, war crimes tribunals in Yugoslavia and Rwanda have emboldened national governments such as Belgium, Germany, Denmark, the Netherlands, Switzerland, and France, to act when one of those wanted by the tribunals has been found in their territory. According to Human Rights Watch, these countries indicted a number of suspects for war crimes in this manner.⁴⁸ In each of these cases the perpetrators were tried based on *universal jurisdiction*. These cases further demonstrate how changing norms in international human rights law are starting to pierce the boundaries of national sovereignty.

Finally, it is not just in Europe that standards may be starting to shift more in line with global norms. Either in efforts to avoid international scrutiny, or otherwise feeling emboldened by the notion that the “international community” supports legal actions against human rights abusers, national governments are increasingly making preemptive moves to demonstrate their compliance. Sierra Leonean president, Kabbah, asked the UN for help to set up his own special criminal court, the purpose of which would be “to try to bring to credible justice ‘those member of the RUF (Revolutionary United Front) and their accomplices’ who have committed war crimes against the people of Sierra Leone.”⁴⁹ Likewise, the Indonesian government is contemplating constructing a Truth and Justice Commission. One goal of this Commission would be to collect evidence for a future trial against former President Suharto.⁵⁰ Of course there is the dramatic example of Chile

itself, whose judiciary, on December 1, 2000, having been “emboldened following Pinochet’s arrest on Oct. 16, 1998 in London,”⁵¹ issued a warrant for the General’s arrest, having claimed all along that bringing Pinochet to justice was a matter for their own government. Even if the General’s case is eventually dismissed due to his ill health, the extradition ruling in the U.K., the subsequent issuing of a warrant for his arrest and questioning in January 2001 are significant legal events in the international human rights campaign.

Vivian Diaz, president of the Association of the Relatives of the Disappeared in Chile, stated “I never thought I would live to see the day that Pinochet was put under arrest, even house arrest, in Chile. This is a momentous day for Chilean democracy...”⁵² Indeed, for human rights activists and victims alike, the Pinochet Case is a momentous step in the evolution of international human rights law.

¹ Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: New Press, 2000), 368.

² Background information gleaned from the following sources: Robertson (Ibid); “Pinochet’s Chile”, background essay from the Washington Post, on-line, available at <http://www.washingtonpost.com/wp-srv/inatl/longterm/pinochet/overview.htm#Allende>; and numerous documents on-line at Human Rights Watch, www.hrw.org.

³ John Rapley, *Understanding Development, Theory and Practice in the Third World* (Boulder: Lynne Rienner, 1996).

⁴ Robertson, 391.

⁵ Anthony Faiola and Pascale Bonnefoy, “Pinochet Indicted for Chilean Atrocities,” *The Washington Post*, 2 December 2000, A01.

⁶ Robertson, 369.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid, 371.

¹⁰ Many countries, including the UK, must incorporate international treaties into their own legal codes with separate statutes after a treaty is ratified. Thus, the UK's Extradition Act, brings the European Convention into UK law. Likewise, the 1984 UN Convention on Torture, was not incorporated into UK law until 1988 – a key issue in the Pinochet Case.

¹¹ *R. v. Evans, ex parte Augusto Pinochet Ugarte* (28 October 1998), Divisional Court (Bingham CJ, Collins J (quoted) and Richards J). Quoted in Robertson, 372, and also quoted in *Pinochet I* by Lord Steyn.

¹² *Pinochet 2: Pinochet 1, Pinochet 2, and Pinochet 3* are published in full in Diana Woodhouse, *The Pinochet Case, A Legal and Constitutional Analysis* (Portland, OR: Hart Publishing, 2000).

¹³ *Pinochet 3*. Comments by Lord Browne-Wilkinson.

¹⁴ "The General Sneaks Away," *The Economist*, March 4, 2000, 57.

¹⁵ Human Rights Watch, *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad*, published on-line at www.hrw.org/campaigns/chile-98/brochfln.htm. Accessed December 2, 2000.

¹⁶ Spain's first attempt to have Pinochet extradited failed because it was issued under the principles of *passive personality*. Because several of Pinochet's victims were Spanish, *passive personality* deemed that, under Spanish law, Spain could claim jurisdiction. Unfortunately, British law did not recognize the assertion of *passive personality*, and thus a second warrant was issued using the principle of *universality* to overcome the jurisdiction question.

¹⁷ *Ibid.* and *Filartiga v Pena-Irala* 1980.

¹⁸ Human Rights Watch, "The Pinochet Precedent."

¹⁹ White.

²⁰ Lord Chief Justice Collins J, quoted in *Pinochet I* by Lord Steyn.

²¹ Discussed by Lord Steyn in *Pinochet I*.

²² Jonathan Black-Branch, "Sovereign Immunity Under International Law: The Case of Pinochet," in *The Pinochet Case, A Legal and Constitutional Analysis* ed. Diana Woodhouse (Portland, OR: Hart Publishing, 2000), 101.

²³ *Ibid.*, 101.

²⁴ Robertson, 394.

²⁵ *Ibid.*

²⁶ Charles W. Kegley and Gregory A. Raymond, *Exorcising the Ghost of Westphalia 21st Century World Order* (Upper Saddle River, N.J.: Prentice Hall, forthcoming); Fareed Zakari, "The Empire Strikes Out, The Unholy Emergence of the Nation State" *The New York Times Magazine*. April 18 1999.

²⁷ Charter of the United Nations (as amended) (26 June 1945).

²⁸ Judgement quoted in Robertson, 384.

²⁹ Belinda Cooper, *War Crimes, The Legacy of Nuremberg* (New York: TV Books, 1999), 11.

³⁰ *Ibid.*, 101.

³¹ Seyom Brown, *Human Rights in World Politics* (New York: Longman 2000), 146.

³² ICC Statute, quoted in Seyom Brown, *Human Rights and World Politics* (New York: Longman, 2000), 146.

³³ Ellen Lutz and Kathryn Sikkink, "International Human Rights Law and Practice in Latin America." *International Organization* 54, 3 (Summer 2000) 633-659.2000, 655-666.

³⁴ *Ibid.* 658.

³⁵ *Ibid.*, 396.

³⁶ *Ibid.*

³⁷ David Bosco, "Dictators in the Dock," *The American Prospect* (August 14, 2000): 26.

³⁸ Human Rights Watch, "The Pinochet Precedent."

³⁹ Roane Carey, "The Pinochet Principle," *The Nation* 270 (February 21, 2000): 22.

⁴⁰ John Lichfield, "France to Seek Arrest of Gaddafi Over Killing," *The Independent* (London), 21 October 2000, 15.

⁴¹ National Public Radio's *All Things Considered*, October 20, 2000.

⁴² Sue Anne Pressley, "Justice Sought in Trial of Salvadoran Generals," *The Washington Post*, 30 October 2000, A3.

⁴³ Brief outline of these two cases given in Human Rights Watch, "The Pinochet Precedent."

⁴⁴ Douglas Farah, "Chad's Torture Victims Pursue Habre in Court," *The Washington Post*, 27 November 2000, A12.

⁴⁵ Bosco.

⁴⁶ Farah.

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- ⁴⁷ Ibid.
- ⁴⁸ Human Rights Watch, “The Pinochet Precedent”
- ⁴⁹ Simon Bureh Kamara, “Who’s Afraid of the War Crimes Tribunal?” *New African*, London England, (October 2000). Published in *World Press Review* (January 2001): 8.
- ⁵⁰ *World Press Review* (January 2001): 14.
- ⁵¹ Failoa and Bonnefoy
- ⁵² Ibid.