

Holding State Sovereigns Accountable for Human Rights Violations: Applying the Act of State Doctrine Consistently With International Law

Rebecca A. Fleming

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Recommended Citation

Rebecca A. Fleming, *Holding State Sovereigns Accountable for Human Rights Violations: Applying the Act of State Doctrine Consistently With International Law*, 23 Md. J. Int'l L. 187 (1999).

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COMMENT

HOLDING STATE SOVEREIGNS ACCOUNTABLE FOR HUMAN RIGHTS VIOLATIONS: APPLYING THE ACT OF STATE DOCTRINE CONSISTENTLY WITH INTERNATIONAL LAW

I. INTRODUCTION

On March 24, 1999, six of seven Law Lords in the English House of Lords found that General Pinochet, former head of state of Chile, was not immune from prosecution for his part in the torture of Chilean citizens during his reign.¹ The Law Lords applied the act of state doctrine to international agreements, treaties, and English statutes pertaining to the crime of torture.² This decision was the first to offer such a dramatic cutting back of the traditional rule of absolute immunity regarding criminal prosecution. Although exceptions to the act of state doctrine have existed for several years pertaining to civil suits regarding acts committed by a sovereign, this was the first time that a foreign court determined that sovereign immunity was not a bar to criminal prosecution for acts committed by a head of state.³ This paper will argue that the act of state doctrine should not be used as a shield to protect heads of states from criminal prosecution for serious abuses of human rights.

II. THE BIRTH OF A NEW ERA

International law concerning human rights violations developed with rapid speed following the prosecution of several high ranking Nazi officers for the atrocities committed during the Holocaust.⁴ The Nuremberg Trials began in 1945, when the international community for the first time

1. *R v. Bartle and Commissioner of Police for the Metropolis and Others, ex parte Pinochet*, (H.L. 1999) [hereinafter *ex parte Pinochet* 1999].

2. *See id.* Specifically the Law Lords addressed the United Nations Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, The European Convention regarding torture and the Criminal Justice Act of 1988. All of these will be discussed in greater detail in this paper.

3. *See, e.g.*, the Foreign Sovereign Immunity Act, 28 U.S.C. § 1602.

4. Lara Leibman, Note, *From Nuremberg to Bosnia: Consistent Application of International Law*, 42 CLEV. ST. L. REV. 705 (1994). *See also*, *International Law and Human Right Edition: Revisiting a Conference Commemorating the Nuremberg Trials: A Commentary from a Nuremberg Prosecutor. An Introduction by Arthur L. Benney*, 17 B. C. THIRD WORLD L. J. 275 (1997) (casualties from the Holocaust included six million European Jews, gypsies, homosexuals, mentally ill persons and non-combatant Russians and Slavs).

held state leaders responsible for violations of human rights committed within their state against their own people.⁵ Over the next fifty years several conventions and commissions spearheaded by the United Nations were created to formalize the new commitment of the international community to preventing further abuses of human rights.⁶ One important objective of these commissions was to create a duty on the part of its members to prevent and punish abuses of human rights wherever they may occur.⁷

These conventions and commissions were put to the test before the Law Lords of England when they were asked to decide whether Spain could extradite former Chile Head of State, Augusto Pinochet Ugarte from England. Pinochet was arrested in London on October 17, 1998 when Baltazar Garzon Real, a judge sitting on the Spanish National High Court, filed a formal request to question him, called a commission rogatoire.⁸ Within weeks the Spanish National Court ruled that Spain had the right to seek the extradition of Pinochet, and a formal request for extradition was filed.⁹ The Spanish warrant accused General Pinochet of using the power of the State to commit thousands of violations of human rights.¹⁰ On October 28, 1998, England's High Court declared Pinochet's detention to be unlawful, holding that under the act of state doctrine, he was entitled to sovereign immunity as a former head of state.¹¹ A quick

5. *Id.* This was also the first time that military, political and financial leaders of a country were held criminally liable for violations of international law. Benney, *supra* note 4, at 275.

6. Marlise Simons, *Judges in Spain Assert Pinochet Can Face Trial*, THE NEW YORK TIMES, Oct. 31, 1998, at A6. This comment focuses on the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the International Convention Against the Taking of Hostages. It is important to be aware that conventions address practices that are already recognized as being outlawed by the international community and serve only to strengthen the international commitment to preventing such acts. In addition, the conventions are directed at such acts insofar as they are committed by persons who hold some sort of official responsibility or capacity. J. HERMAN BURGERS AND HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE 1 (1988). See *infra* notes 82-88 and accompanying text for more information regarding the United Nations Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the Convention Against the Taking of Hostages.

7. Both Spain and England are parties to these conventions. *Id.*

8. *Pinochet Decision - The Birth of a New Era for Human Rights*, M2 Presswire (Amnesty International), Dec. 10, 1998.

9. Simons, *supra* note 3, at A6. The Spanish National Court is Spain's second highest tribunal, but no appeal was possible in this case.

10. Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, *ex parte* Pinochet Ugarte, 3 W.L.R. 1456 (H.L. 1998) [hereinafter *ex parte Pinochet* 1998].

11. *Id.* at 1457.

appeal followed resulting in the reversal of the High Court's ruling.¹² In a decision hailed as "the birth of a new era for human rights," England's House of Lords held that Pinochet was not entitled to sovereign immunity as a former head of state.¹³

This new era was eclipsed when little more than a month later the House of Lords, in an unprecedented decision, set aside the ruling of the Law Lords and scheduled a rehearing of Pinochet's case.¹⁴ This landmark reversal occurred after it was revealed that one of the Law Lords, Leonard Hoffman, who voted against sovereign immunity, and his wife had close links to Amnesty International, one of the intervening parties.¹⁵

On March 24, 1999, the House of Lords rendered a decision that, although still a victory for human rights, cut back on the previous, more general denial of immunity to General Pinochet.¹⁶ Rather than focusing on whether Pinochet was entitled to immunity, the new decision focused on when, if at all, such immunity applied.¹⁷ The Law Lords examined the dates the alleged violations occurred in conjunction with the dates of the passage of English statutes which would permit prosecution for such actions.¹⁸ In the end, the Law Lords determined that Pinochet could only be denied immunity for the acts of torture that were committed after the passage of the Criminal Justice Act of 1988, and after England's ratification of the Torture Convention on December 8, 1988.¹⁹

III. INTERNATIONAL RESPONSES TO HUMAN RIGHTS VIOLATIONS

A. *The Classic Paradigm for Responding to Human Rights Violations*

The Nuremberg Trials held after the fall of Adolf Hitler's Nazi regime established the classic response to violations of human rights - the criminal prosecution.²⁰ Criminal prosecution serves the dual purpose of

12. *Pinochet Decision - The Birth of a New Era for Human Rights*, *supra* note 8.

13. *Id.* See also *ex parte Pinochet* 1998, *supra* note 10.

14. Kevin Cullen, *British Court Reverses Itself, Gives Pinochet a New Chance - One Jurist Faulted on Potential Conflict*, THE BOSTON GLOBE, Dec. 18, 1998, at A26.

15. *Id.*

16. *ex parte Pinochet* 1999, *supra* note 1.

17. See *id.* See also *ex parte Pinochet* 1998, *supra* note 10 (arguing that violations of human rights are never valid acts of a head of state that would give rise to sovereign immunity).

18. See *ex parte Pinochet* 1999, *supra* note 1.

19. See *id.*

20. Stephan Landsman, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Alternative Responses to Serious Human Rights Abuses: of Prosecution and Truth Conventions*, 59 LAW & CONTEMP. PROB. 81, 81 (Au-

punishing human rights violators and preserving for posterity a documentation of the atrocities that were committed.²¹ Holding human rights violators liable through prosecution sends a clear message that respect for, and adherence to, the rule of law is imperative.²² It also serves to inform and educate the populace as to the true extent of the acts that have been committed.²³ The record produced by the criminal process also provides a basis for compensation of victims and their families because it reveals the names of victims, the crimes that were committed against them, and the persons responsible.²⁴ In addition, the punishment meted out satisfies the public's need for retribution and the victim's need for vengeance.²⁵ The criminal process also deters future violations and may contribute to the healing of social wounds caused by human rights violations.²⁶

Although there are other alternatives to criminal prosecution for human rights violations, the criminal trial has served as the model response ever since the Nuremberg trials of the 1940s.²⁷ In the face of serious human rights violations, the international community should question the decision of any nation not to prosecute.²⁸ Certain violations of human rights have been advanced as always requiring criminal prosecution.²⁹ Among such violations are acts of genocide and those committed against citizens of foreign states.³⁰

B. *Truth Conventions—A Practical Alternative*

When criminal prosecution is not a feasible option, truth conventions are frequently utilized to respond to human rights violations.³¹ In-

tumn 1996).

21. *Id.* Criminal trials that prosecute and memorialize at the same time have proven to be an attractive response by the international community to human rights violations. Most recently, the United Nations utilized criminal prosecution in addressing the atrocities committed in Bosnia and Rwanda. *Id.* at 81-82.

22. *Id.* at 83.

23. *Id.*

24. *Id.* at 84.

25. *Id.*

26. *Id.*

27. *Id.* at 87. It has also been argued that the Nuremberg Trials are considered to be an unusual case because of the total defeat and surrender of the Nazi's, the need for the reconstruction of German society, and the history of show trials or allegiance to trial format that existed in several of the victors' nations. These factors cast doubt on the "universality of the Nuremberg paradigm." *Id.*

28. *Id.* at 89.

29. *Id.* at 90.

30. *Id.* Certain treaties create the obligation to prosecute these violations. *Id.*

31. *Id.* at 82. The truth convention has been used over twenty times over the past twenty-five years. Most notably are the truth conventions of Uruguay, Germany, Chad,

stead of prosecuting, the truth convention investigates the incidents and publishes the circumstances that surrounded what actually occurred, who was responsible, and what the motives were behind the violations.³² Possible goals of a truth commission include: reconciliation of different factions, closure of an oppressive past to move the country beyond it, vindication of victims through official acknowledgment of their stories, forgiveness by victims, confession by perpetrators, and some of the aims of criminal prosecution such as retribution and deterrence.³³ One universal goal is to memorialize for future generations the atrocities that were committed in an effort to prevent any further violations.³⁴

Truth conventions are a better response to human rights violations committed by a prior regime when prosecution may endanger the stability of a newly formed democratic government.³⁵ The threat of unfair trials may also render prosecution impracticable, especially when military rule has infiltrated the judicial system creating a disillusion with it by the public.³⁶ Truth conventions offer speedy results in contrast with long drawn out trials that may last for several years.³⁷ The possible backlash that may be created by unpopular court decisions are also avoided by truth conventions. This can be extremely important to a new, weak, democratic government whose existence may depend upon the compliance of

and South America. *Id.*

32. *Id.* Truth commissions conducted in various countries have varied significantly with respect to the extent of investigative authority, modes of conducting hearings, and the publication of the final report. The Argentinean *Nunca Mas* became a best seller. The Chilean report was sent to each named victim's family. In contrast, Brazil's full report saw limited circulation while a summary of the report was given mass distribution. Germany took an entirely different approach to truth telling. East Germany's secret police files were opened so that victims of abuse could discover the identity of their informers. Henry Steiner, *Introduction* to HARVARD LAW SCHOOL HUMAN RIGHTS PROGRAM, INTERDISCIPLINARY DISCUSSION, TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT 8-9 (1997) [hereinafter TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT].

33. *Id.* at 11.

34. Milan Kundera addressed the problem of international amnesia in *The Book of Laughter and Forgetting*:

The bloody massacre in Bangladesh quickly covered over the memory of the Russian invasion of Czechoslovakia, the assassination of Allende drowned out the groans of Bangladesh, the war in the Sinai Desert made people forget about Allende, the Cambodian massacre made people forget about Sinai. And so on and so forth, until ultimately everyone lets everything be forgotten.

TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT, *supra* note 32, at 14 (quoting MILAN KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* 7 (Michael and Henry Heim trans., New York, Knopf, 1980).

35. Landsman, *supra* note 20, at 84.

36. *Id.* at 85.

37. *Id.*

the military.³⁸

One drawback of the truth commission is that it does not satisfy the policy goals that punishment does, such as retribution and vengeance.³⁹ In contrast with the goals of the criminal procedure, truth commissions do not seek punishment and often trade immunity to violators in exchange for information.⁴⁰ Before a truth commission is implemented as an alternative to a criminal proceeding certain criterion must be satisfied.⁴¹ The public must support its use, it must be capable of conducting a thorough and effective investigation into the violations, and it must also provide a system to identify and provide compensation to victims.⁴² The legitimacy of a truth commission depends upon the satisfaction of these criterion and on its independence from political pressure.⁴³

C. *The Chilean Truth Commission*

In 1989, Patricio Aylwin became the first democratically elected President of Chile since Pinochet's military junta overthrew President Allende's administration in 1973.⁴⁴ One of President Aylwin's first official acts was to create the National Commission on Truth and Reconciliation to investigate the acts of the prior regime in an effort to establish the State's acknowledgment of the violations committed.⁴⁵ Aylwin's decree states its purpose to be the clarification of the truth about the human rights violations committed in Chile and abroad by the Chilean government.⁴⁶ The decree emphasized that the commission was created to bring

38. *Id.*

39. *Id.* at 88.

40. *Id.* at 89. It has also been argued that truth commissions may achieve punishment like results if the violators are ostracized as a result of the report. *Id.*

41. *Id.*

42. *Id.* at 89-90. It is argued that the truth commission alternative should be rejected if: "(1) the commission is not structured to make a thorough inquiry or exacerbates delay; (2) compensation is not paid to victims; (3) the commission is not the product of democratic decision-making; (4) the commission does not yield at least four of the six benefits of prosecution . . . ; and (5) exigent social, economic, or political factors make more complete compliance impossible." *Id.* at 90.

43. *Id.* at 89.

44. Edward C. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973-1995*, 2 TULSA J. COMP. & INT'L. 253 (1995).

45. Robert J. Quinn, *Note: Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 FORDHAM L. REV. 905, 954 (1994). The Presidential decree was necessary because Aylwin did not have the requisite votes in Congress to approve the creation of the truth commission. TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT, *supra* note 32, at 51.

46. REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 6 (Phillip E. Berryman trans., University of Notre Dame Press, 1993) [hereinafter RE-

the country together through an official recognition of the truth, and not for the purpose of bringing about any legal proceedings related to any offenses.⁴⁷ In addition, the commission was not to interfere in any cases pending or to reach any legal conclusions as to responsibility for any human rights violations.⁴⁸ The Commission conducted a year long investigation before releasing a report that was critical both of the Allende regime and Pinochet's junta.⁴⁹

In Chile, the truth commission was a better alternative to a criminal proceeding for several reasons. First, the military was still an imposing force despite the election of Aylwin as President.⁵⁰ It was unlikely that the military influence exerted over the judiciary would permit a fair trial of the perpetrators in Chile.⁵¹ Secondly, an unpopular decision was capable of threatening the stability of the newly elected democratic administration of President Aylwin.⁵² Most importantly, the Amnesty Laws passed by Pinochet provided a barricade which prevented criminal proceedings against most of the persons involved in the human rights violations.⁵³ The military had effectively shielded itself from any liability for the acts that were committed.

IV. THE CASE AGAINST PINOCHET

The Spanish warrant issued by Judge Baltasar Garzon Real accused Pinochet of masterminding a plan to eliminate Chilean, Argentinian and Spanish citizens who fled Chile after the coup that brought Pinochet into

PORT]. Rather than criticizing or trying to lay blame for the situation which led to the violation of human rights, the Chilean commission focused on the facts. The commission attempted to show that the polarization of political life in Chile resulted in the dehumanization of opponents, opening the door to the denial of human rights. TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT, *supra* note 32, at 21.

47. *Id.*

48. *Id.* at 7.

49. Snyder, *supra* note 44, at *28. Pinochet publicly attacked the report, warning that "the Army of Chile solemnly declares that it will not accept being placed as if on trial before the citizenry for having saved the freedom and sovereignty of the homeland at the insistence of the civilian population." *Id.* at *28-*29.

50. General Pinochet has threatened the rule of law on several different occasions. Snyder, *supra* note 44, at *35-*36.

51. Pinochet appointed ten out of the seventeen judges who are currently sitting on Chile's Supreme Court. *Id.* at *31.

52. Pinochet has stood by any and all acts of his soldiers and has threatened the stability of the government if any of his soldiers are held accountable for their actions. *Id.* at *36.

53. See *infra* notes 67-71 and accompanying text.

power in 1973.⁵⁴ The Spanish court ruling that Pinochet could be extradited was based on Spanish and international law that has developed since the Nuremberg Charter, including the United Nations conventions against torture and hostage-taking.⁵⁵ Garzon has charged Pinochet with crimes against humanity that were committed during his seventeen year reign, including the murder of almost 4,300 people and the imprisonment and torture of many thousands of others.⁵⁶

A. *The Violent Overthrow of the Government and the Creation of the DINA*

On September 11, 1973, the Chilean Armed Forces, led by General Pinochet, overthrew the democratically elected government of Salvatore Allende.⁵⁷ For the ensuing seventeen years Pinochet's military junta ruled Chile with an iron fist, suppressing the rule of law through the passage of a series of decrees.⁵⁸ Some of the early acts of the junta included several decrees which appointed Pinochet as the President, stated that the military overthrew the democratic government in order to restore the rule of law that had been suppressed under Allende, declared a state of siege which allowed the military to exercise jurisdiction over civilians, expanded the use of the death penalty and declared a state of emergency.⁵⁹ Decree No.521 established the Directorate of National Intelligence [hereinafter DINA] in June 1974 to eliminate all political parties and any opposition to the military junta.⁶⁰

The military government supported the existence of the DINA through its contention that Chile was at war with "an insidious, subver-

54. Clifford Krauss, *For the Bereft in Chile, a Cause for Tears: Pinochet Could Slip Spain's Grasp*, THE NEW YORK TIMES, Oct. 30, 1998, at A6. Pinochet's plan to eliminate the citizens who fled the country was called Operation Condor, the mostly closely kept secret of Pinochet's administration. In 1991, the secret operation was disclosed by a Chilean commission that documented the disappearance of over 3,000 Chileans but did not name the officers responsible. *Id.*

55. *ex parte Pinochet* 1998, *supra* note 10, at 1500.

56. *Id.*

57. Quinn, *supra* note 45, at 905.

58. *Id.* A decree law is a norm dictated by a de facto government which was not constitutionally established and assumed the power of the legislative branch. REPORT, *supra* note 46, at 74 note j.

59. Snyder, *supra* note 44, at *6. All of the state powers were consolidated in General Pinochet who first held the office of Commander in Chief of the Army and Supreme Commander of the Nation, and then President of the Republic. Quinn, *supra* note 45, at 912.

60. Snyder, *supra* note 44, at *8.

sive enemy.”⁶¹ The REPORT rejects this contention, finding that with the exception of a few uprisings occurring almost contemporaneously with the coup d’etat, the military government effectively exercised control over the government.⁶² Articles 9, 10, and 11 of the decree law that created DINA were not made public.⁶³ Only later was the public made aware that these articles allowed the DINA to utilize the armed forces intelligence agencies and to conduct raids and arrests.⁶⁴ In furtherance of its goals, the DINA seized and held citizens without warrants for long periods of time, during which citizens were subject to interrogation, torture, summary executions and forced exile.⁶⁵ During the first four months of the military regime, the DINA was responsible for the murders of at least 1213 people and another 599 between January 1974 and August 1977.⁶⁶

B. *Torture Techniques Utilized by the DINA*

The Spanish warrant explains several of the techniques used by the DINA. The most frequently used technique was called “the grill.”⁶⁷ The grill entailed a victim being laid naked on a metal table with electric shocks being applied to the lips, genitals, wounds or metal prosthesis.⁶⁸ Another method of torture alleged in the warrant involves two friends or relatives being placed in metal drawers one on top of the other, so that while the one above was being tortured, the other person would experience the psychological impact.⁶⁹ Other methods included hanging persons by their wrists and/or knees while electric currents were applied or beatings administered, placing a bag over a person’s head until the victim

61. Jose Zalaquett, *Introduction* to REPORT, *supra* note 46, at xxv.

62. *Id.* During the 1980’s a small number of groups formed in opposition to the military government. These groups resorted to violent acts against the government but met with little success. As a result of such groups, the government felt the newly organized DINA, then called the CNI, was justified in its goal of fighting subversive enemies. A new onslaught of human rights violations were committed as the government pressured the CNI to “get results” through repression. *Id.* at 71.

63. *Id.* at 82.

64. *Id.*

65. Snyder, *supra* note 44, at *8-*9. When the DINA gained unfavorable attention from the United States it was deconstructed and a new agency, called the National Center of Information, took its place. This new version of the DINA engaged in more subtle means of accomplishing its goals. Whereas the DINA would seize people in broad daylight, the National Center of Information adopted more subversive tactics. *See also* Quinn, *supra* note 45, at 912-13.

66. Quinn, *supra* note 45, at 916.

67. *Id.*

68. *Id.*

69. *Id.*

was close to suffocation, administering drugs, and throwing boiling water on others.⁷⁰ The agents of the DINA were specially trained in the torture techniques that were applied to victims in the secret torture chambers that existed in Chile, where hooded doctors were present to ensure that victims did not die before the DINA wanted them to.⁷¹

The warrant accused Pinochet of using his power as the head of the State to commit such atrocities.⁷² It is also alleged that the killings and disappearances took place abroad, as well as in Chile.⁷³ The warrant did not allege that General Pinochet personally participated in the kidnapping, hostage-taking, or torture of anyone.⁷⁴ Rather, it has been alleged that the agency charged with these atrocities was directly answerable to Pinochet and that it was Pinochet who ordered the human rights violations committed by the DINA.⁷⁵

C. *The Amnesty Law*

There has been virtually no redress for the victims of Pinochet's military junta due to the Amnesty Decree passed in 1978.⁷⁶ This was accomplished through Decree Law No. 2191, which was allegedly issued in furtherance of "the ethical imperative to make all efforts conducive to strengthening the bonds uniting the Chilean nation, leaving behind hatreds that are meaningless today, and encouraging all those initiatives that might solidify the reunification of Chileans".⁷⁷ Amnesty was thus guaranteed to anyone who had committed criminal acts, been accomplices to, or helped to cover up such acts while the state of siege was in effect, from September 11, 1973 until March 10, 1978.⁷⁸ In further frustration of attempts to seek redress for the human rights violations committed by Pinochet's regime, the Chilean courts interpreted the amnesty law to prohibit investigations involving the events covered by the decree.⁷⁹ This left

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *ex parte Pinochet* 1998, *supra* note 10, at 1503.

75. *Id.* at 1503-1504.

76. *Reprinted in* Diario Oficial on April 19, 1978. For the definition of amnesty, see BLACK'S LAW DICTIONARY 83 (6th ed. 1990); "Included in the concept of pardon is amnesty, which is similar in all respects to a full pardon, insofar as when it is granted both the crime and the punishment are abrogated; however, unlike pardons, an amnesty usually refers to a class of individual situations."

77. REPORT, *supra* note 46, at 89.

78. *Id.* Amnesty was not extended to anyone involved with the murder of Orlando Letelier and Ronnie Moffit that occurred in Washington D.C. *Id.*

79. *Id.* at 125. The courts chose to completely disregard Article 413 of the Code of

many questions that the courts had begun to deal with involving the circumstances surrounding alleged violations of human rights, as well as the guilt or innocence of victims and perpetrators, unanswered.⁸⁰ As a result, offenses that would be protected by the Amnesty Decree are being challenged in international law.⁸¹

D. *The Violation of International Agreements*

Even though domestic criminal proceedings seemed an unpractical response to the atrocities committed by Pinochet's military regime, the international community still had the option of prosecuting such acts because they violated several international agreements which Chile had entered into.

1. *United Nations Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*

The United Nations Convention for the Prevention of Torture and inhuman or degrading treatment or punishment was adopted by the General Assembly on December 10, 1984.⁸² Subsequently, the Consultative Assembly of the Council of Europe adopted a recommendation similar to the U.N.'s convention with the addition of a proposed optional protocol which was not included in the final draft adopted by the U.N.⁸³ The European Convention was adopted on June 26, 1987, and it was opened for signature by the member states on November 26, 1987.⁸⁴

The Convention, which came into force in 1987, contains the most expansive jurisdictional provision for human rights violations.⁸⁵ Four jurisdictional bases are permitted under the treaty: (1) jurisdiction based on wrongs occurring within the territory of the forum state, (2) jurisdiction

Criminal Procedure that exists in Chile. This article orders that "a definitive halting of procedures cannot be rendered until the investigation that seeks to determine the facts of the case and the identity of perpetrator has been exhausted". *Id.*

80. *Id.* The REPORT also points out that several troops who were unjustly accused of committing human rights violations have not been able to clear their names. *Id.* at 125-126.

81. Robert J. Quinn, *supra* note 46, at 907.

82. COUNCIL OF EUROPE: EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, Nov. 26, 1987, 27 I.L.M. 1152 (1988).

83. *Id.* Costa Rica had submitted a draft optional protocol to the U.N which contained preventive measures similar to the one adopted by the Council of Europe. These were not included in the U.N. final draft. *Id.*

84. *Id.* This note focuses on the ratification of the Convention by the United Kingdom on June 24, 1988. *Id.*

85. Hari M. Osofsky, Note, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L.J. 191, 197 (1997).

based upon the offender being a national of the forum state, (3) jurisdiction based upon the victim being a national of the forum state, and (4) jurisdiction based upon the offender's presence in the forum state in the absence of extradition.⁸⁶

2. *International Convention Against the Taking of Hostages*

Recognizing the taking of hostages as a "grave concern of the international community", the United Nations International Convention against the taking of hostages established hostage taking as a form of international terrorism and advanced the proposition that any person who commits such an act should be prosecuted or extradited.⁸⁷ The Convention holds accountable anyone who commits such an act or any accomplice of one who commits or attempts to commit an act of hostage taking.⁸⁸

3. *Applicable United Kingdom Statutes State Immunity Act of 1978*

The United Kingdom's State Immunity Act of 1978 was enacted by Parliament to modify and apply art. 39(2) of the Vienna Convention to the United Kingdom.⁸⁹ This modification permits a former head of state to invoke sovereign immunity to avoid criminal prosecution in the United Kingdom for acts performed in the his functions as the head of state.⁹⁰ Thus, under English law, a former head of state is immune from criminal prosecution so long as the acts being called into question were performed

86. *Id.*

87. UNITED NATIONS: INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES, G.A. Res. 34/146, U.N. GAOR 6th Comm., 34th Sess., U.N. Doc. A/C.6/34/L.23 (1979). This note uses the definition of hostage taking established by the Convention: Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence (sic) of taking of hostages ("hostage-taking") within the meaning of this Convention. *Id.* at art.1.

88. *Id.* at art. 1 § 2.

89. *ex parte Pinochet* 1998, *supra* note 10, at 1499. Art. 39(2) of the Vienna Convention: When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in the case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission immunity shall continue to subsist. *Id.* at 1499.

90. *Id.* § 20 of the State Immunity Act replaces the words "as a member of the mission" in the Vienna Convention with "as head of state". *Id.*

in his function as the head of state.⁹¹

4. *The Taking of Hostages Act of 1982*

Parliament enacted the Taking of Hostages Act of 1982 to implement the International Convention Against the Taking of Hostages of 1979.⁹² The Act does not define hostage-taking as a crime which can only be committed by a public official, but neither does it preclude such an application.⁹³ The definition of hostage-taking under §1 applies the offense to;

“A person, whatever his nationality, who, in the United Kingdom or elsewhere, - (a) detains any other person (“the hostage”), and (b) in order to compel a State, international governmental organisation [sic] or person to do or abstain from doing any act, threatens to kill, injure, or continues to detain the hostage.”⁹⁴

5. *Criminal Justice Act of 1988*

The United Nations Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was implemented by Parliament in § 134 of the Criminal Justice Act of 1988.⁹⁵ This section establishes that;

“A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance of his official duties.”⁹⁶

The Act permits the same expansive jurisdictional bases that are permitted by the Torture Convention.⁹⁷

Section 134 of the Criminal Justice Act was invoked for the first time in 1994 when Scotland Yard investigated torture claims against Pinochet.⁹⁸ Evidence of the alleged torture was submitted by Amnesty In-

91. *Id.*

92. *Id.* at 1498. *See supra* notes 78-79 and accompanying text.

93. *See id.*

94. *Id.* at 1496.

95. *See id.* at 1502.

96. *Id.* at 1496.

97. *See id.* at 1502. *See supra* notes 76-77 and accompanying text.

98. *Scotland Yard Investigating Pinochet Torture Claims*, THE GUARDIAN, Jun. 15, 1994, at 8.

ternational to the Yard while Pinochet was in England during an arms-buying mission.⁹⁹ The investigation could not be completed because Pinochet left England and therefore, was no longer within the jurisdiction of section 134.¹⁰⁰

V. *EX PARTE PINOCHET* - THE LAW LORDS' STRUGGLE

A. *The Decision of the Law Lords*

On November 25, 1998, the British House of Lords held that Augusto Pinochet Ugarte was not immune from criminal prosecution in England under the doctrine of sovereign immunity.¹⁰¹ A month earlier the Divisional Court had quashed a Spanish warrant which was issued pursuant to § 8(b)(i) of the Extradition Act of 1989 for the extradition of Pinochet on the grounds that the allegations made in the warrant were acts committed by Pinochet as the Head of the State of Chile, therefore entitling him to sovereign immunity.¹⁰² According to Lord Chief Justice Thomas Bingham, "[a] former head of state is clearly entitled to immunity for criminal acts committed in the course of exercising public functions".¹⁰³ In acknowledgment of the public and international importance of the issue, the lower court granted British prosecutors leave to appeal to the House of Lords.¹⁰⁴

The House of Lords held that Pinochet was not entitled to sovereign immunity as a former head of state from the criminal processes of the United Kingdom, of which extradition is a part.¹⁰⁵ First, the court found the case to be justiciable in the United Kingdom.¹⁰⁶ Although the early common law act of state doctrine rendered acts of sovereigns non-justiciable, the Law Lords found a clear intent on the part of Parliament that the courts of England should hear and decide cases involving human rights violations.¹⁰⁷ Second, the court held that §20 of the State Immunity Act of 1978¹⁰⁸ extends immunity to acts of heads of state performed in

99. The Criminal Justice Act allows for prosecution of torture occurring in the United Kingdom or elsewhere, as long as the accused is in Britain. Pinochet could have faced life imprisonment under the statute. *Id.*

100. *Id.*

101. *Pinochet Isn't Saved*, THE NEW YORK TIMES, Oct. 30, 1998, at 8.

102. *ex parte Pinochet* 1998, *supra* note 10, at 1496.

103. *Pinochet Wins First Round of British Court Battle*, CNN Interactive, Oct. 28, 1998.

104. *Id.*

105. *ex parte Pinochet* 1998, *supra* note 10, at 1502.

106. *Id.* at 1498.

107. *Id.*

108. *Id.* at 1499. § 20 of the State Immunity Act reads, in pertinent part:

the exercise of functions of the state which are recognized by international law.¹⁰⁹ Since kidnapping, hostage-taking, and torture are not functions of a head of state recognized by international law, immunity cannot be extended to cover such acts.¹¹⁰ And third, the court held that although a type of residual immunity can be applied to acts of former heads of state performed while he was still the head of state, Pinochet cannot claim such immunity.¹¹¹

The Law Lords held that kidnapping, torture, and hostage-taking could never be considered as functions of a head of state that would give rise to sovereign immunity.¹¹² Sovereign immunity was designed to protect actions taken by heads of state which could be considered wrongful or illegal by the laws of his own state or those of other states.¹¹³ But hostage-taking, kidnapping, and torture are not acceptable forms of conduct on the part of anyone, especially heads of states and any holding to the contrary would make a mockery of modern international law.¹¹⁴ In addition, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹¹⁵ and the Convention Against the Taking of Hostages¹¹⁶ expressly give states the right, in fact makes it a duty, for states to prosecute such crimes against humanity whenever they occur.¹¹⁷

(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to - (a) a sovereign or other head of state; (b) members of his family forming part of his household; and (c) his private servants, as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants . . . (5) This section applies to the sovereign or other head of any state on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of state in his public capacity.

Id. at 1492 (quoting the State Immunity Act of 1978, 10 Halsbury's Statutes, 4th Edition, 1997 reissue, 757).

109. *See id.* at 1500.

110. *Id.*

111. *Id.* at 1501.

112. *Id.* at 1500. Lord Steyn's opinion established a two part test to determine when the statutory immunity could be applied. The act being questioned must be such "(1) that the defendant is a former head of state . . . and (2) that he is charged with official acts performed in the exercise of his functions as a head of state . . .". Pinochet fails to meet the second prong of this test because the acts that he is accused of do not fall within the functions of a head of state. *Id.* at 1502-1503.

113. *Id.*

114. *Id.* at 1500.

115. *See supra* text accompanying notes 73-77.

116. *See supra* text accompanying notes 78-79.

117. *ex parte Pinochet* 1998, *supra* note 10, at 1500.

A new twist was added to the controversy when it was discovered that one of the Law Lords had close ties to one of the intervening groups, Amnesty International.¹¹⁸ A panel of five Law Lords reversed itself on the grounds that Lord Hoffman's failure to reveal his association with Amnesty International gave an appearance of a conflict of interest.¹¹⁹ In an effort to avoid further embarrassment and to add legitimacy to the rehearing, the Law Lords increased the number of judges who are to hear the case from five to seven.¹²⁰

VI. THE LEGAL HISTORY EARLY DEVELOPMENT OF THE ACT OF STATE DOCTRINE

As pointed out in Lord Nichols' opinion in *Ex parte Pinochet*, the act of state doctrine developed as a common law principle in the nineteenth century.¹²¹ One of the most widely cited cases to this effect is *Underhill v. Hernandez*.¹²² Chief Justice Fuller defined the act of state immunity in *Underhill* as a rule of international law under which "every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory".¹²³ This dicta from *Underhill* suggested that the act of state immunity was a rule of international law.¹²⁴

Another early nineteenth century case that has been widely cited in support of the act of state doctrine is *The Schooner Exchange v. Mac Faddon*.¹²⁵ This U.S. Supreme Court case established the act of state doctrine as a rule of absolute immunity.¹²⁶ It was held that when a foreign

118. Cullen, *supra* note 14.

119. *Id.* The Law Lords did not consider the option of simply removing Lord Hoffman's vote. This would have made the decision 2-2 and Pinochet would have won as a result of the draw. Only the option of reversal and thus a possible rehearing was considered. Joanna Bale, *Law Lord's Link With Amnesty 'Led to Bias Risk'*, THE TIMES (London), Dec. 16, 1998.

120. John Mason, *Law Lords to Boost Numbers for Pinochet Hearing*, FINANCIAL TIMES (London), Jan. 13, 1999, at 5.

121. *See ex parte Pinochet* 1998, *supra* note 10, at 1498.

122. 168 U.S. 250 (1897).

123. *Id.* at 253 (dictum).

124. *See id.* *See also ex parte Pinochet* 1998, *supra* note 10, at 1498.

125. 11 U.S. 116 (1812).

126. *Id.* It has been argued that a careful reading of the case does not support this assertion. This alternative argument is that the decision holds that a sovereign has exclusive jurisdiction over his state unless this right is waived either implicitly or explicitly for the benefit of a foreign state. Andrea Bianchi, *Overcoming the Hurdle of State Immunity*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 405, 409 (Benedetto

sovereign enters a state with the express or implied consent of the state, it is universally understood that he is not subject to the jurisdiction of that state.¹²⁷ To do so would be incompatible with his dignity as a foreign sovereign and the dignity of his nation.¹²⁸

A. *Modern Development of the Act of State Doctrine*

The more recent cases concerning the act of state doctrine reveal that it has evolved into a domestic rule of law, rather than an international rule of law.¹²⁹ There is now recognition that certain questions pertaining to acts of states are not justiciable and that judicial intervention may reach beyond the authority of the judiciary into the realm of executive or legislative authority regarding foreign affairs.¹³⁰ Courts began in the 1980s to move away from the absolute rule of sovereign immunity to a more restrictive view.¹³¹

B. *The Theory that Acts of State are Non-Justiciable*

The U.S. Supreme Court held in *Banco Nacional de Cuba v. Sabbatino*,¹³² that the judiciary would not inquire into the taking of property within its own jurisdiction by a foreign sovereign, in the absence of a treaty or other agreement regarding controlling legal principles, even if there is a violation of international law.¹³³ In *Banco*, the court held that the act of state doctrine prohibited an inquiry into the validity of a Cuban expropriation decree because to do so would allow the United States to sit in judgment upon the validity of an act of Cuba done within its own territory.¹³⁴ Relying on earlier caselaw, the Supreme Court found that the act of state doctrine is applicable even in situations where there has been a violation of a customary rule of international law.¹³⁵ A holding to the

Conforti and Francesco Francioni eds., 1997).

127. *McFaddon*, 11 U.S. at 139.

128. *Id.* at 139.

129. See e.g. *Buttes Gas and Oil Co. v. Hammer and Others* (No 3), [1980] 3 All ER 475, [1981] QB 223 *Occidental Petroleum Corporation v. Buttes Gas and Oil Co. and Others* (No 2), [1980] 3 All ER 475, [1981] QB 223; *Hesperides Hotels Ltd v. Muf-tizade*, [1978] 2 All ER 1168, [1979] AC 508; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

130. *ex parte Pinochet* 1998, *supra* note 10, at 1498.

131. See generally, *Argentine Republic v. Amerada Hess*, 488 U.S. 428 (1989); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).

132. 376 U.S. 398 (1964).

133. *Id.* at 428.

134. *Id.* at 424.

135. *Id.* at 431. See also; *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Oetjan v.*

contrary was found to allow for possible embarrassing situations in which a conflict could exist between the will of the Executive branch and a decision of the Judicial branch.¹³⁶

The House of Lords rejected an application of the act of state doctrine in *Buttes Gas and Oil Co. v. Hammer*.¹³⁷ The controversy in *Buttes* arose out of a territorial dispute between Sharjah and Umm al Qaiwain over the territorial rights to a certain body of water.¹³⁸ Both of the adjacent sovereign states had their foreign relations conducted by the United Kingdom under treaty.¹³⁹ Problems developed when both states granted oil concessions to two different American oil companies, *Buttes* and *Occidental*, over the same strip of water.¹⁴⁰ Both of the concessions were approved by the United Kingdom.¹⁴¹ When *Occidental* discovered oil the two companies each claimed exclusive right to the area below the water, relying on their respective concessions.¹⁴² The ruler of Sharjah, in support of *Buttes*' claim, produced a decree that was published in 1970 that he claimed to have issued in 1969, which stated that the water was within Sharjah's jurisdiction.¹⁴³ A representative of *Occidental* then publicly alleged that Sharjah and *Buttes* had conspired to backdate the decree.¹⁴⁴ *Buttes* then filed a suit for defamation claiming that they had been slandered and *Occidental* counterclaimed for damages resulting from fraudulent conspiracy and sought certain documents from Sharjah during discovery.¹⁴⁵

The House of Lords would not permit the discovery, finding that to

Central Leather Co., 246 U.S. 297 (1918); *Ricaud v. American metal Co.*, 246 U.S. 304 (1918); *Shapleigh v. Mier*, 299 U.S. 468 (1937).

136. *Banco*, 376 U.S. at 432-433.

137. *Buttes Gas and Oil Co.*, 3 All ER at *10.

138. The dispute arose over the island of Abu Musa. Sharjah claimed to have territory over the water extending 12 miles around the island. Umm al Qaiwain claimed that Sharjah's territory was limited to 3 miles around Abu Musa. *Id.* at *10.

139. *Id.*

140. Umm al Qaiwain granted an oil concession to *Occidental* which included Umm al Qaiwain's territorial waters as extending up to 3 miles around Abu Musa. Sharjah granted an oil concession to *Buttes* over its territorial waters, which Sharjah believed to include 12 miles around the island of Abu Musa. *Id.* at *2.

141. The United Kingdom believed that Sharjah had sovereignty over the island of Abu Musa and up to 3 miles around it. But the agreement between Sharjah and *Buttes* did not explicitly say this. It only said that *Buttes* would have access to the island and its territorial waters. There was no definition of what the territorial waters included. *Id.*

142. *Id.*

143. The significance of the decree is that if it was in fact issued in 1969, it predated *Occidental's* concession agreement with Umm al Qaiwain. *Id.*

144. *Id.*

145. *Id.*

do so "would be contrary to the comity of nations".¹⁴⁶ Lord Denning found the charge of conspiracy to require a judicial inquiry into the legislative capacity of the ruler of Sharjah.¹⁴⁷ It was emphasized that the court was dealing with a sovereign, and not an ordinary citizen who could be joined as a necessary and proper party to the action.¹⁴⁸ The ruler was held to be entitled to claim sovereign immunity because his conduct in the realm of international relations and his legislative capacity had been called into question.¹⁴⁹ Finally, Lord Denning articulated a theory of judicial restraint for situations where, as in the *Buttes* case, the dispute is so intertwined with "the comity on which sovereign immunity is founded" such that the controversy is "politically sensitive".¹⁵⁰ Judicial self-restraint was relied on by the court rather than the traditional act of state doctrine.¹⁵¹

C. *The Restrictive v. Absolute Theory of Sovereign Immunity*

In 1989, the United States Supreme Court addressed the restrictive theory of sovereign immunity when it held in *Argentine Republic v. Amerada Hess Shipping Corp.*¹⁵² that sovereign immunity would automatically apply to acts of state unless there was an exception to such immunity laid out in the Foreign Sovereign Immunities Act [hereinafter FSIA].¹⁵³ The court notes that the FSIA was enacted as a codification of the new restrictive theory of sovereign immunity that had become widely

146. *Id.* at *3.

147. *Id.* at *9.

148. *Id.*

149. *Id.* at *10.

150. *Id.* The court also noted that Occidental had begun hundreds of suits against *Buttes* in the United States as a result of the facts stated in this case. All of these actions were stayed because the United States courts would not hear them. *Id.* at *9.

151. *Id.* at *10. Lord Denning relied on a statement made by the legal advisor to the Department of State in Washington urging rejection of the act of state doctrine and that the courts refrain from deciding any case between *Buttes* and Occidental arising from the concession agreements. He said: We do not believe that this judicial self-restraint should turn on such analytical questions as whether the so-called Act of State doctrine which is traditionally limited to governmental actions within the territory of the respective state can apply to an exercise of disputed territorial jurisdiction. It rather follows from the general notion that national courts should not assume the function of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties. *Id.*

152. 488 U.S. 428 (1989).

153. § 1604 of the FSIA states that "subject to existing international agreements to which the United States [was] a party at the time of the enactment of this Act[,] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter". *Id.* at 434.

accepted in international law.¹⁵⁴ The restrictive theory allows foreign states to be brought up on civil charges for their commercial acts but not for their public acts.¹⁵⁵

The Supreme Court again reaffirmed the restrictive theory when it held that the recruitment and hiring of a United States citizen did not fall within the meaning of commercial activity under the FSIA.¹⁵⁶ In *Saudi Arabia v. Nelson*, it was alleged that the plaintiff Nelson was recruited to work at a hospital in Saudi Arabia.¹⁵⁷ After taking the job, Nelson alleges that he was arrested and tortured for reporting safety defects that existed in the hospital.¹⁵⁸ The Supreme Court refused to hear the case, granting immunity to Saudi Arabia because the acts alleged were *jure imperii* (public acts) rather than *jure gestionis* (private or commercial acts).¹⁵⁹ The restrictive theory was explained as creating an exception for immunity for private acts of the government that are the kinds of activities that could be carried on by private individuals.¹⁶⁰ The Supreme Court emphasized that the conduct called into question by Nelson was the exercise of the police power of Saudi Arabia.¹⁶¹ The police power of a sovereign as applied to the restrictive theory of immunity, has always been viewed as particularly sovereign in nature, even when there has been an abuse of such power.¹⁶²

VII. ANALYSIS

The early act of state doctrine was virtually a rule of absolute immunity.¹⁶³ Such a strict application of the doctrine could allow the immunity to be invoked even for a state's violations of international law.¹⁶⁴ This would create quite a paradox, because the doctrine of state immunity exists in international law to prevent abuses against states. To allow a rule of absolute immunity would then permit violations of international law to go unpunished, to a large extent defeating the original purpose of

154. *Id.* at FN1; see *Siderman de Blake v. The Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).

155. *Id.*

156. *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

157. *Id.* at 352.

158. *Id.*

159. *Id.* at 359-360.

160. *Id.* at 360.

161. *Id.* at 361.

162. *Id.*

163. Andrea Bianchi, *supra* note 126, at 410.

164. *Id.*

the doctrine to prevent abuses.¹⁶⁵ Instead of protecting states from abuses, a rule of absolute immunity would allow states to violate human rights with no threat of being held responsible for such violations.

This does not mean to say that the act of state doctrine should be abolished altogether. Any discussion concerning state sovereignty must first recognize that its legitimate continued existence is not changed by the new dynamics of the world community.¹⁶⁶ Since Chief Justice Marshall defined the principle of absolute sovereign immunity in *Schooner Exchange v. McFaddon*¹⁶⁷, it has been an essential principle of international law.¹⁶⁸ Although legitimate, the act of state doctrine should be modified when its application would permit serious human rights violations. There are several ways that have been, or should be, utilized to prevent sovereign immunity from having the effect of permitting abuses of human rights.

A. *The Trend Towards Applying the Act of State Doctrine to International Agreements*

The House of Lords in *Ex parte Pinochet*, held any discussion of the act of state doctrine to be irrelevant to its decision due to the clear intention of Parliament that human rights violations should be justiciable in the courts of the United Kingdom.¹⁶⁹ Parliament had enacted the Criminal Justice Act of 1988¹⁷⁰ and the Taking of Hostages Act of 1982¹⁷¹, both of which allow an investigation by the United Kingdom into official acts of foreign countries that relate to torture and hostage taking.¹⁷² All of the early caselaw concerning the act of state doctrine was held to be superseded by international agreements and statutes, showing a contrary intent of Parliament.¹⁷³

In addition, *ex parte Pinochet* was distinguished from the previous caselaw of the United Kingdom and the United States because it is a criminal proceeding, rather than a civil proceeding.¹⁷⁴ Thus, even though the weight of authority seemed to allow the grant of immunity to Pi-

165. *Id.*

166. John A. Perkins, Essay: The Changing Foundations of International Law: From State Consent to State Responsibility, 15 B.U. Int'l L.J. 433, 452 (Fall 1997).

167. See *supra* notes 125-128 and accompanying text.

168. Perkins, *supra* note 166, at 452.

169. *ex parte Pinochet* 1998, *supra* note 10, at 1498.

170. See *supra* notes 86-88 and accompanying text.

171. See *supra* notes 83-85 and accompanying text.

172. *ex parte Pinochet* 1998, *supra* note 10, at 1498.

173. *Id.*

174. *Id.*

nochet, these cases correctly were not followed by the House of Lords because all involved civil proceedings against the state.¹⁷⁵

The Law Lords' decision is consistent with the current trend in the world community of construing treaties and statutes to overcome immunity for violations of international law.¹⁷⁶ The treaty exception has most notably been adopted by the United States, which subjects claims to immunity to treaties and international agreements to which it is a party.¹⁷⁷ The theory behind the exception is that immunity should not be permitted when the forum jurisdiction is a party to an international agreement containing a provision that would conflict with a grant of immunity.¹⁷⁸

B. *The Need for Criminal Prosecution*

Since the post-World War II era the international community has recognized crimes against peace, war crimes, crimes against humanity, and genocide as international crimes.¹⁷⁹ Unfortunately, early treaties and international agreements did not include expansive national jurisdiction over these crimes.¹⁸⁰ In *ex parte Pinochet*, the House of Lords relied on the Convention Against Torture, which mandates a much more expansive bases for jurisdiction than did earlier treaties.¹⁸¹ Beyond the Convention Against Torture, international law currently recognizes universal jurisdiction over several abuses.¹⁸²

In light of the current trend towards applying treaties and statutes to overcome immunity for violations of international law, criminal prosecution should be pursued by the international community whenever human

175. *Id.* See generally, *Argentina v. Amerasia Hess*, 488 U.S. 428 (1989); *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992); *Al Adsani v. Kuwait*, 107 ILR 536 (1996).

176. *Bianchi*, *supra* note 166, at 421. Statutory construction has traditionally dictated that a domestic statute be construed in a manner which does not conflict with international law. This rule of construction has allowed courts to overcome immunity, especially when it can be determined that international law does not require immunity to be extended for human rights violations. *Id.*

177. *Id.* at 424.

178. *Id.* at 425.

179. *Hari Osofsky*, *supra* note 76, at 195. These crimes were established by the Charter of the Military Tribunal, Aug 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 and the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. *Id.*

180. *Id.*

181. *Id.*

182. *Hari Osofsky*, *supra* note 85, at 198. It should be noted, however, that clear consensus as to which abuses should invoke universal jurisdiction, exists only in regard to a few abuses, most of which are mandated by treaty.

rights violations occur.¹⁸³ It is important to note that the international community is constrained by the treaties and international agreements which define when human rights have been violated. But when such violations occur, international leaders are in a better position to effectively bring about the prosecution of human rights violators than national leaders in a transitional state.¹⁸⁴

The benefits of a criminal proceeding cannot be achieved through the creation of a truth commission.¹⁸⁵ While truth commissions offer a more practical response in weak states that are subject to pressures from a prior military regime, they do not satisfy the public's needs for punishment and retribution.¹⁸⁶ When serious violations of human rights are committed, such as those committed by General Pinochet's military regime, the need for punishment is greatly felt. In such situations, prosecution must be sought by the international community as a response.¹⁸⁷

C. *The International Community Should Expand the Treaty Exception and Utilize Political Pressure to Advance the Prosecution of Human Rights Violations*

The traditional strict construction of the act of state doctrine has, in the past, effectively blocked the prosecution of human rights violations.¹⁸⁸ The United States Supreme Court stated in *Banco Nacional de Cuba v. Sabbatino*,¹⁸⁹ that "the act of state doctrine is applicable even if international law has been violated".¹⁹⁰ Through international agreement and political leverage, the international community should take a more active approach to human rights violations.

The United States Court of Appeals for the Ninth Circuit has called into question the Supreme Court's ruling in *Amerada Hess*¹⁹¹ that interprets the treaty exception of the FSIA in a narrow light.¹⁹² The Court of

183. See *supra* note 149 and accompanying text.

184. Douglass Cassel, *infra* note 199, at 202.

185. See *supra* notes 30-31 and accompanying text. *But see* TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT, *supra* note 32, at 36 (1997) (arguing that criminal prosecution may not be the preferred solution because cross-examination of a victim may not be in the victim's best interest. A truth convention may better provide the victim with the restoration of his human and civil dignity because truth conventions focus on the victim, whereas criminal proceedings focus on the perpetrator).

186. See *supra*, notes 24-31 and accompanying text.

187. Steven Landsman, *supra* note 13, at 89.

188. See *supra* note 121 and accompanying text.

189. See *supra* notes 123-137 and accompanying text.

190. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431 (1964).

191. See *supra* notes 138-141 and accompanying text.

192. See Bianchi, *supra* note 166, at 428.

Appeals grudgingly followed the Supreme Court's ruling in *Siderman de Blake v. The Republic of Argentina*.¹⁹³ As established by *Amerada Hess*, a treaty exception would only apply when the treaty *expressly* conflicts with the FSIA.¹⁹⁴ The Court of Appeals treats this interpretation as the creation of "a serious obstacle to claims that, by subscribing to a treaty or other international agreement, a defendant loses its immunity under the FSIA."¹⁹⁵

One clear distinction between *Amerada Hess* and *Siderman* is the conduct complained of. In *Amerada Hess*, the plaintiff's were suing for damages from the destruction of a ship.¹⁹⁶ In stark contrast the 81 year-old plaintiff in *Siderman* was suing for damages resulting from his abduction by ten masked men working for the Argentine military who beat him and tortured him with a caddle prod for seven days, while shouting racial epithets at him.¹⁹⁷ The treaty exception should be expanded in the face of such brutal violations of human rights.

A state in Chile's situation is virtually incapable of prosecuting its own human rights violations.¹⁹⁸ As was discussed earlier, pressure from Pinochet and the military combined with the amnesty law have prevented redress for the atrocities committed by the military junta.¹⁹⁹ Pinochet effectively prevented President Aylwin from touching "a single hair of a single soldier" under the threat of the complete disintegration of the democratic process.²⁰⁰ A threat by Pinochet, while carrying much weight in Chile, would be ineffective against a UN Secretary-General or a U.S. President.²⁰¹ Thus the international community is in a better position to recognize and prosecute human rights violations than a weak state in a transitional situation.²⁰²

This point is exacerbated when there is an amnesty law in effect.²⁰³ Such amnesty laws should be rejected by the international community. In the face of such amnesty laws, nations should seek to insist on prosecu-

193. 965 F.2d 699 (9th Cir. 1992).

194. *Argentina v. Amerada Hess*, 488 U.S. 428, 442 (1989) (emphasis added).

195. *Siderman*, 965 F.2d at 719.

196. 488 U.S. at 432.

197. 965 F.2d at 703.

198. Douglass Cassel, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Lessons from the Americas: Guidelines for International response to Amnesties for Atrocities*, 59 *LAW & CONTEMP. PROB.* 197, 202 (1996).

199. *See supra* notes 67-72 and accompanying text.

200. Douglas Cassel, *supra* note 199, at 202.

201. *Id.*

202. *Id.*

203. *Id.* at 203.

tion whenever possible.²⁰⁴ The United States, for example, has threatened to withhold aid to Chile, El Salvador, and Guatemala to bring about prosecutions of human rights violations.²⁰⁵

VIII. CONCLUSION

The reversal of the Law Lords decision that Pinochet was not entitled to sovereign immunity gives the general another chance at escaping prosecution.²⁰⁶ It also highlights the emergence of a new era for human rights. Although parties to several international agreements have long held the right to prosecute crimes committed against humanity, this right has seldom been invoked.²⁰⁷ Prompted by the issuance of the Spanish warrant for Pinochet's arrest, several other nations have taken steps towards issuing their own arrest warrants, including France, Sweden, and Switzerland.²⁰⁸ Regardless of whether Pinochet ever stands trial for the crimes he has committed, the international outcry for the extradition and prosecution of Pinochet indicates a new allegiance to the protection of human rights.²⁰⁹

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204. The U.S. pressured Chile into prosecuting the murder of Orlando Letelier by threatening to withhold U.S. aid. As a result, the murder was exempted from Chile's amnesty law. *Id.* at n.54.

205. *Id.*

206. Kevin Cullen, *supra* note 14.

207. Marlise Simmons, *supra* note 6.

208. France Seeks Arrest of Chile's Pinochet, CNN Interactive, Nov. 3, 1998 (visited Nov. 3, 1998) <http://cnn.com/world/europe/9811/03/pinochet.france.neut/>. See also Jonathan D. Tepperman, *Politics, Not Legality, Troubles Britain Most on Pinochet*, INTERNATIONAL HERALD TRIBUNE, Oct. 31, 1998, at 6. It is worth noting that even Switzerland, a country known for its neutrality, has joined the effort to hold Pinochet accountable for his abuse of human rights. *Id.*

209. Even if Pinochet is convicted in Spain he will not be incarcerated because Spanish law forbids the incarceration of persons over 75 years old, and Pinochet is 83. Kevin Cullen, *supra* note 14.

