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Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet: Universal Jurisdiction and Sovereign Immunity for Jus Cogens Violations

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Abstract

This Comment analyzes the recent House of Lords decision that did not recognize that universal jurisdiction existed over jus cogens crimes before the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture" or "Convention") came into effect, and therefore did not consider Senator Pinochet's acts of torture committed prior to the existence of the Convention. Part I discusses the atrocities committed in Chile, and examines the legal doctrines applicable to prosecuting Senator Pinochet. In this light, Part I discusses the development of universal jurisdiction and its applicability to human rights violations. Part I also traces the development of sovereign immunity and its interaction with human rights violations. Finally, this Part reviews the nature and substance of a jus cogens offense, and analyzes whether a sovereign should be granted immunity for such crimes. Part II focuses upon the Pinochet extradition hearings. This Part first outlines the High Court's ruling and reasoning, and then examines the House of Lords' conclusion that Pinochet would not be tried for acts of torture committed before the enactment of the Convention against Torture. Finally, Part III argues that the jus cogens nature of the crimes alleged against Pinochet subjects him to universal jurisdiction, with or without a convention that explicitly recognizes universal jurisdiction. Pinochet, therefore, can be prosecuted for all of the charges brought against him, including those committed before the adoption of the Convention against Torture.

COMMENT

REGINA v. BARTLE AND THE COMMISSIONER OF POLICE FOR THE METROPOLIS AND OTHERS EX PARTE PINOCHET: UNIVERSAL JURISDICTION AND SOVEREIGN IMMUNITY FOR *JUS COGENS* VIOLATIONS

*Jodi Horowitz**

INTRODUCTION

Beginning in 1973 and lasting seventeen years, Senator Augusto Pinochet Ugarte allegedly committed heinous acts of torture upon the citizens of Chile.[1] Under Pinochet's supervision, military subordinates systematically broke people's bones, and burned or dragged them through bushes from a helicopter.[2] Furthermore, these subordinates applied electric shocks to pregnant women and to men's genitals, and severely beat people.[3] They also trained dogs to rape women, and forced captives to watch a father sodomize his son.[4] Pinochet allegedly ordered the commission of all of these acts in an effort to overthrow the existing government and maintain power in Chile.[5]

Pinochet is currently awaiting extradition to Spain[6] to face

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* J.D. Candidate, May 2000, Fordham University School of Law. This Comment is dedicated to my family for their unconditional love and support.

1. REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 32 (Phillip E. Berryman, trans., 1993) (translation of the official government report, Informe de la Comisión Nacional de Verdad y Reconciliación, also known as the Informe Rettig) [hereinafter Rettig Report]; AMNESTY INTERNATIONAL, *The Inescapable Obligation of the International Community to Bring to Justice Those Responsible for Crimes Against Humanity Committed During the Military Government in Chile* (last modified Oct. 29, 1998) <http://www.amnesty.org/news/1998/22201698.htm> (on file with the *Fordham International Law Journal*); Rebecca Leung, *The Story Behind a Dictator*, (visited Oct. 13, 1999) <http://abcnews.go.com/sections/world/DailyNews/pinochet_profile.html> (on file with the *Fordham International Law Journal*).

2. *Pinochet Hearings Resume, with Change of Tack*, AGENCE FRANCE-PRESSE, Jan. 19, 1999, *available in* 1999 WL 2531079.

3. AMNESTY INTERNATIONAL, *Chilean Gov't Is Making a Mockery of Duties to Citizens*, M2 PRESSWIRE, Jan. 28, 1999, *available in* 1999 WL 7551292.

4. *Id.*

5. Rettig Report, *supra* note 1, at 73.

6. Mara D. Bellaby, *Long-Awaited Decision: London Court Orders Pinochet to Spain* (last modified Oct. 8, 1999) <http://abcnews.go.com/sections/world/DailyNews/pinoche-

prosecution for the acts of torture committed in Chile during his dictatorship.[7] He claims that such acts were sovereign[8] acts and that he deserves protection under the doctrine of sovereign immunity.[9] Following World War II, however, parties to international agreements began recognizing that individual sovereigns can and should be held personally accountable for acts that were previously protected by immunity.[10] Although scholars note that it remains important for states to grant each other immunity so that they maintain good foreign relations, there are certain international norms, such as the prohibition of torture, that override sovereign immunity.[11] When an individual such as Senator Pinochet commits atrocities, he or she should be subject to jurisdiction in any state at any time for all of his or her crimes.

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trule991008.html> (on file with the *Fordham International Law Journal*). On October 8, 1999, London's Deputy Chief Magistrate Ronald Bartle ruled that the charges alleged against Senator Augusto Pinochet Ugarte are extraditable crimes and Pinochet should be extradited to Spain to stand trial. *Id.* Author's note: At the time of publication the U.K. High Court upheld Home Secretary Jack Straw's finding that Pinochet is medically unfit to stand trial and, therefore, cannot be extradited to Spain.

7. *Pinochet Supporters Step Up Campaign*, AGENCE FRANCE-PRESSE, Aug. 13, 1999, *available in* 1999 WL 2654128. Specifically, Spanish Judge Baltasar Garzon alleged that "[b]etween 11 September 1973 and 31 December 1983, within the jurisdiction of the Fifth Central Magistrates' Court of the National Court of Madrid, [Pinochet] did murder Spanish citizens in Chile within the jurisdiction of the Government of Spain." In re Augusto Pinochet Ugarte, 38 I.L.M. 68, 76 (Q.B. 1998).

8. *See* BLACK'S LAW DICTIONARY 1323 (6th ed. 1996) (defining sovereign as "person, body, or state in which independent and supreme authority is vested").

9. *See id.* (explaining that doctrine of sovereign immunity precludes bringing suit against government without consent); Hari M. Osofsky, *Foreign Sovereign Immunity from Severe Human Rights Violations: New Directions for Common Law Based Approaches*, 11 N.Y. INT'L L. REV. 35, 38-39 (1998) (explaining that sovereign immunity originated as absolute exemption from suit but human rights norms caused erosion in privilege).

10. *See, e.g.*, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Charter of the International Tribunal, Aug. 8, 1945, art. 6, 59 Stat. 1544, 1556, 82 U.N.T.S. 279, 288 [hereinafter Nuremberg Charter] (defining crimes within tribunal's jurisdiction for which individuals are held responsible, including crimes against peace, war crimes, and crimes against humanity); Report of the International Law Commission to the General Assembly, [1950] 2 Y.B. INT'L LAW COMM'N 374-78, U.N. Doc. A/CN.4/SER.A/1950 [hereinafter Nuremberg Principles] ("The fact that a person committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.").

11. *See* Mary Ellen Turpel & Philippe Sands, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. J. INT'L L. 364, 365 (1988) ("The guidance of international legal theory toward *jus cogens* or peremptory law has been part of an ongoing struggle to move beyond unrestricted state sovereignty . . . to establish an international rule of law.").

This Comment analyzes the recent House of Lords decision[12] that did not recognize that universal jurisdiction[13] existed over *jus cogens*[14] crimes before the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[15] ("Convention against Torture" or "Convention") came into effect, and therefore did not consider Senator Pinochet's acts of torture committed prior to the existence of the Convention. Part I discusses the atrocities committed in Chile, and examines the legal doctrines applicable to prosecuting Senator Pinochet. In this light, Part I discusses the development of universal jurisdiction and its applicability to human rights violations. Part I also traces the development of sovereign immunity and its interaction with human rights violations. Finally, this Part reviews the nature and substance of a *jus cogens* offense, and analyzes whether a sovereign should be granted immunity for such crimes. Part II focuses upon the Pinochet extradition hearings. This Part first outlines the High Court's[16] ruling and reasoning, and then examines the House of Lords' conclusion that Pinochet would not be tried for acts of torture committed before the enactment of the Convention against Torture. Finally, Part III argues that the *jus cogens* nature of the crimes alleged against Pinochet subjects him to universal jurisdiction, with or without a convention that explicitly recognizes universal jurisdiction. Pinochet, therefore, can be prosecuted for all of the charges brought against him, including those committed before the adoption of the Convention against Torture.

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12. Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet, 38 I.L.M. 581 (H.L. 1999).

13. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 304 (4th ed. 1990) (defining universal jurisdiction as power of domestic court to prosecute non-national offender regardless of connection between offender and prosecuting state because nature of crime is of international concern).

14. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 489 (1992) (defining *jus cogens* as principle whose importance rises to level that is acknowledged to be superior to another principle and thus overrides it).

15. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter Convention against Torture].

16. *See The Judicial Work of the House of Lords* (visited Aug. 3, 1999) <http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldinfo/ld08judg/ld08judg.htm> (on file with the *Fordham International Law Journal*) (explaining that House of Lords hears criminal appeals from Divisional Court of Queen's Bench Division of High Court).

I. *PINOCHET'S REIGN AND INTERNATIONAL LEGAL DOCTRINES APPLICABLE TO ALLEGATIONS OF TORTURE*

Pinochet allegedly committed numerous human rights violations throughout his seventeen years as dictator of Chile.[17] During his reign, Pinochet's government issued Decree Law No. 2191, which Pinochet believed protected him from facing criminal liability for his acts.[18] The doctrine of universal jurisdiction, however, significantly expanded after World War II to subject individuals to the courts of any nation for crimes such as genocide, hostage taking, and torture.[19] The Convention against Torture grants a system of universal jurisdiction, thereby exposing individuals to the courts of foreign nations for acts of torture committed after the adoption of the Convention.[20] Pinochet argues that he is protected by sovereign immunity,[21] a doctrine that originated as an absolute exemption from suit, but scholars note that the protection of the doctrine is diminishing as more individuals face accountability for their actions.[22] The *jus cogens* nature of torture raises further controversy as to whether an individual should be protected by immunity for crimes as atrocious as those committed by Senator Pinochet.[23]

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17. AMNESTY INTERNATIONAL, *supra* note 1; Leung, *supra* note 1.

18. DECREE LAW NO. 2191 (Apr. 18, 1978) (Chile), *published in* DIARIO OFICIAL, No. 30,042 (Apr. 19, 1978) (granting amnesty to individuals who committed criminal acts between September 1973 and March 1978).

19. Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 278 [hereinafter Genocide Convention]; International Convention against the Taking of Hostages, Dec. 12, 1979, G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 99, U.N. Doc. A/34/819, 18 I.L.M. 1456 (1979); Convention against Torture, *supra* note 15.

20. Convention against Torture, *supra* note 15, arts. 5-7.

21. *See* Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet, 38 I.L.M. 581, 609 (H.L. 1999) (noting that case before House of Lords was appeal of decision to quash warrant on grounds that as former head of state of Chile, Pinochet was entitled to immunity from arrest and extradition proceedings in United Kingdom).

22. COVEY T. OLIVER, ET AL., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 580 (4th ed. 1995); *see* Osofsky, *supra* note 9, at 38-40 (recognizing human rights exception to sovereign immunity).

23. *Compare* Ilias Bantekas, *State Responsibility in Private Civil Action—Sovereign Immunity—Immunity for* Jus Cogens *Violations—Belligerent Occupation—Peace Treaties*, 92 AM. J. INT'L L. 765 (1998) (discussing exceptions to immunity where *jus cogens* rules are violated), *with* Andreas Zimmerman, *Sovereign Immunity and Violations of International* Jus Cogens—*Some Critical Remarks*, 16 MICH. J. INT'L L. 433 (1995) (arguing that denying immunity for human rights violations is illegal and politically unwise).

A. *Pinochet's Reign*

Pinochet rose to power in 1973 by leading a military overthrow of the existing government, and maintained power for seventeen years.[24] During his reign, he committed numerous human rights violations in an effort to retain power.[25] When his dictatorship finally ceased, Pinochet instituted several mechanisms to ensure that he could not be prosecuted for the crimes he committed.[26] In 1998, however, a Spanish judge issued a warrant for his arrest while Pinochet was in London receiving medical treatment.[27]

1. Pinochet's Rise to Power

After a narrow victory in 1970,[28] Dr. Salvador Allende Gossens became the first democratically elected Marxist in the Western Hemisphere.[29] In an attempt to reform the capitalist system, Allende developed socialist programs and drastically changed Chile's economic policy.[30] In response, rightist Chileans undertook a program of economic destabilization, involving credit restrictions and causing shortages in materials, goods, and food.[31] By 1973, the conflict in economic ideologies created a bitter division between President Allende's followers and the many Chileans unhappy with the Marxist-Leninist direction of his govern-

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24. Rettig Report, *supra* note 1, at 73; Leung, *supra* note 1.

25. *See* Rettig Report, *supra* note 1, at 62 (recognizing military's goal of eliminating people regarded as ultraleft).

26. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (1980); DECREE LAW NO. 2191, *supra* note 18.

27. *Ex-dictators Are Not Immune*, ECONOMIST, Nov. 28, 1998, at 16.

28. *See The Pinochet Affair: Blackwashing Allende*, ECONOMIST, Jan. 30, 1999, *available in* 1999 WL 7361564 (stating that Dr. Salvador Allende Gossens was elected with only 36.5% of vote in three-way race).

29. *See* Dixie Barlow, *Confronting the Ghosts of the Past*, WASHINGTONPOST.NEWSWEEK INTERACTIVE (last modified Oct. 23, 1998) <http://www.washingtonpost.com/wp-srv/inatl/longterm/pinochet/overview.htm> (on file with the *Fordham International Law Journal*) (noting that Allende had run unsuccessfully for president twice before).

30. *See id.* (stating that government redistributed lands, nationalized banks, and overtook copper mines and other industries).

31. *See* Rettig Report, *supra* note 1, at 51 (discussing role of 1972 economic crisis in bringing about eventual broader crisis in 1973); *see also* 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, 911 (1994) (discussing background of events in Chile leading up to coup).

ment.[32] As the conflict heightened, leftists advocated the use of violence to defend the government while rightists openly called for military intervention.[33] The climate in Chile was comparable to that of a civil war.[34]

On September 11, 1973, Pinochet, then Commander-in-Chief of the Chilean Army and Supreme Commander of the Nation, led a military junta in staging a *coup d'etat.*[35] In less than one week, the entire nation came under military control.[36] The junta continued to rule the State for sixteen years, with Pinochet as President of the Republic.[37]

During the years of Pinochet's presidency, the military undertook economic reforms that were widely admired, and it maintained a significant amount of public support.[38] During this period, however, a secret group of military officers, the National Intelligence Directorate ("DINA"), began its task of eliminating those individuals that it regarded as ultraleft.[39] This program involved gross human rights violations, including disappearances, executions, use of undue force, abuse of power, torture, and terrorist acts.[40]

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32. Elliott Abrams, *Justice for Pinochet?*, COMMENTARY, Mar. 1, 1999, *available in* 1999 WL 3660355.

33. Rettig Report, *supra* note 1, at 50.

34. *See id.* at 50-53 (evaluating factors of Chile's climate before coup, which taken together reflect impossibility of peaceful coexistence).

35. *See* BLACK'S LAW DICTIONARY 1396 (6th ed. 1990) (defining *coup d'etat* as political move to overthrow existing government by force); *see also* Rettig Report, *supra* note 1, at 73 (discussing installation of junta). The U.S. Central Intelligence Agency aided the Chilean military in the coup with training and financing. Barlow, *supra* note 29.

36. *See* Rettig Report, *supra* note 1, at 57 (noting that junta assumed executive, legislative, and constituent powers of state, but not judiciary). Although the judiciary formally retained its independence, most members of the court agreed with the new regime so there was no threat to the takeover from the judiciary. *Id.*

37. Barlow, *supra* note 29.

38. *See* Abrams, *supra* note 32 (noting that at end of regime, 43% of Chileans voted for Pinochet to continue ruling).

39. Rettig Report, *supra* note 1, at 62.

40. *Id.* at 35-39; *see* AMNESTY INTERNATIONAL, *supra* note 3 (reporting specific acts alleged, including: suspending woman from pole in pit, pulling out finger and toe nails, and burning her; systematically breaking man's wrists, pelvis, ribs, and skull and burning him; applying electric shocks to body parts of pregnant woman and putting cigarettes out on stomach); *Pinochet Hearings Resume, supra* note 2 (noting particular acts alleged, including: applying electric currents to man's genitals and repeatedly beating entire body; using dogs trained to rape women; forcing captives to watch father sodomize son; and dragging detainees through thorn bushes from helicopter).

2. Pinochet's Decline in Power

The majority of deaths during Pinochet's dictatorship occurred during the four months following the coup.[41] Repression lessened at the end of the 1970s, with the DINA formally dissolving in 1978.[42] In 1980, Pinochet's government created a new constitution for Chile[43] that kept him in office until 1989, and established a senator for life status for ex-presidents who had served for over six years.[44] It contained provisions for a gradual return to democracy, a restoration of a limited, appointed National Congress in 1990, and a presidential election in 1997.[45] The constitution also incorporated Decree Law No. 2191,[46] a blanket amnesty law covering crimes committed during the coup through 1978 when the junta issued the decree.[47] Under this amnesty law, Pinochet is immune from prosecution in Chile.[48]

In a 1988 plebiscite in which Pinochet questioned the Chilean populace on whether he should remain in power for another eight years, he only received forty-three percent of the vote, thus ending his sixteen-year dictatorship.[49] Pinochet negotiated a deal that would keep him as head of the armed forces until 1998, after which he would become senator for life.[50] In 1990, Chile returned to a democratic government when Patricio Aylwin was elected as the first President of Chile's transition period.[51]

In the years following his reign, Pinochet was careful not to travel to the countries of origin of the torture victims.[52] In Octo-

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41. Rettig Report, *supra* note 1, at 73-80.

42. *See id.* at 88 (explaining dissolution of DINA and creation of National Center for Information ("CNI")).

43. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (1980).

44. Barlow, *supra* note 29; *see* AMNESTY INTERNATIONAL, *supra* note 1 (stating that senators for life have complete immunity under national law).

45. Barlow, *supra* note 29.

46. DECREE LAW NO. 2191, *supra* note 18.

47. *See* Quinn, *supra* note 31 at 905-06 (arguing need to dismantle decree).

48. DECREE LAW NO. 2191, *supra* note 18.

49. *See* Abrams, *supra* note 32 (explaining that democratic government came into office after Chileans voted against Pinochet remaining in power, and that task of new government was to deal with human rights abuses under prior military dictatorship).

50. *See* Barlow, *supra* note 29 (noting that constitution established new senator for life status for ex-presidents who served more than six years).

51. Rettig Report, *supra* note 1, at 767 n.d.

52. *See Foreign Jail Ideal Place for Pinochet's Last Days*, CANBERRA TIMES, Oct. 21, 1998, *available in* 1998 WL 24329142 (providing example that Pinochet did not travel to United States because United States "would like to talk to him about the car bomb that

ber 1998, Pinochet traveled to London for back surgery believing that he would be safe from prosecution.[53] After his surgery, however, the London police barged into his hospital room to deliver a warrant for his arrest.[54] Spanish Judge Baltasar Garzon issued the warrant, alleging that between 1973 and 1990 Pinochet was involved in the violent overthrow of Chile's democratic government and committed numerous human rights violations against Spanish citizens in order to gain and maintain power.[55]

B. *Universal Jurisdiction*

Universal jurisdiction[56] empowers the courts of any nation to prosecute certain crimes regardless of the state in which such crimes are committed.[57] The earliest applications of the principle of universal jurisdiction involved piracy and slave trading.[58] Following World War II, the principle expanded to include war crimes and crimes against humanity, and it continues to evolve to cover certain terrorist acts and other human rights violations.[59]

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his agents planted to kill a former Chilean ambassador to the U.S. and his American aide").

53. *See id.* (noting that Pinochet was major customer of British arms industry, frequently visited Britain, and had tea with former Prime Minister Margaret Thatcher).

54. *Ex-dictators Are Not Immune*, *supra* note 27, at 16.

55. *See* In re Augusto Pinochet Ugarte, 38 I.L.M. 68, 76 (Q.B. 1998) (quoting warrant, which stated that "[b]etween 11 September 1973 and 31 December 1983, within the jurisdiction of the Fifth Central Magistrates' Court of the National Court of Madrid, [Pinochet] did murder Spanish citizens in Chile within the jurisdiction of the Government of Spain").

56. *See* BROWNLIE, *supra* note 13, at 304 (defining universal jurisdiction as power of domestic court to prosecute non-national offender regardless of connection between offender and prosecuting state because nature of crime is of international concern).

57. *See* BASSIOUNI, *supra* note 14, at 512 ("The rationale for universal jurisdiction . . . is that there exist certain offenses, which due to their very nature, affect the interests of all states, even when committed in another state or against another state, victim or interest.").

58. *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 791-800 (1988) (noting that "pirates and slave traders have long been considered enemies of all humanity").

59. *See generally id.* (arguing that universal jurisdiction has expanded to allow any nation to prosecute those charged with offenses that international community widely condemns); *see also* BROWNLIE, *supra* note 13, at 305 (suggesting that hijacking and offenses related to narcotics trafficking are probably subject to universal jurisdiction).

1. Early Applications of Universal Jurisdiction

Piracy is the oldest offense[60] that eliminated the requirement of a nexus between the accused and the prosecuting state, an essential requirement for any of the theories under which states obtain jurisdiction.[61] Pirates often committed heinous acts against numerous states, thus rendering them *hostes humani generis*, or enemies of the human race.[62] Since pirates existed when most commercial activity between nations occurred through maritime operations, their lawless acts were harmful to the world and thus a concern for all nations.[63]

Scholars note that slave trading is also a global offense be-

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60. *See* Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 337 (1925) (noting that pirates were subject to universal jurisdiction at least as early as 17th century). While universal jurisdiction over piracy was originally a matter of customary international law, it eventually became recognized under treaty law. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82. The convention states:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Id. art. 19, 13 U.S.T. at 2317, 450 U.N.T.S. at 92.

61. *See* Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153, 163-65 (1996) (discussing five principles of jurisdiction, including territoriality, where offense occurs within prosecuting state's territory; nationality, where offender is national of prosecuting state; protective, where act outside prosecuting state's territory threatens that state's interests; passive personality, where victim is national of prosecuting state; and universality, where act committed is so universally abhorrent that offender may be prosecuted in any jurisdiction where he is secured); *see also* BASSIOUNI, *supra* note 14, at 511 (noting that all theories except universality require connection between prosecuting state and offender to exercise jurisdiction). For a detailed discussion of the principles of jurisdiction, see BROWNLIE, *supra* note 13, at 300-05. Brownlie further asserts that universality over war crimes is a principle of jurisdiction separate from the universality principle because universality over war crimes punishes breaches of *international law*, not acts that international law permits all states to punish under *national law* even though not declared criminal by international law. *Id.* at 305.

62. *See* BLACK'S LAW DICTIONARY 738 (6th ed. 1990) (defining *hostis humani generis* as enemies of human race); United States v. Brig Malek Adhel, 43 U.S. 210, 232 (1844) ("A pirate is deemed, and properly deemed, hostis humani generis . . . [b]ecause he commits hostilities upon the subjects and property of any or all nations without any regard to right or duty, or any pretence of public authority.").

63. *See* 2 BARRY H. DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY 45 (1980) (suggesting that allowing any state to capture and punish pirates is "a matter of sea-policing").

cause it violates an individual's fundamental right to freedom.[64] Thus, several instruments of international law recognize slave trading as an offense subject to universal jurisdiction.[65] While slave trading does not threaten commerce or navigation between nations in the same way as piracy, its atrocious nature renders it subject to international condemnation.[66] A nexus between the offender and the capturing nation, therefore, is not necessary for a state to invoke jurisdiction over an individual charged with slavery.[67]

2. Modern Expansion of Universal Jurisdiction

Following World War II, universal jurisdiction expanded to grant states the power to punish those who commit war crimes,[68] regardless of a lack of connection between the offender and the prosecuting state.[69] The expansion of universal jurisdiction occurred principally during the Nuremberg trials.[70] The Charter of the International Military Tribunal in Nuremberg[71] ("Nuremberg Charter") and the common articles of the Four Geneva

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64. *See* Randall, *supra* note 58, at 800 (noting that heinous nature of slavery rendered it subject to universal jurisdiction even though slavery is unlike piracy in that it did not threaten interstate commerce and maritime navigation).

65. Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253; Protocol Amending the Slavery Convention, Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51; Supplementary Convention of the Abolition of Slavery, the Slave Trade and Institutions and Practices Similarly to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.

66. *See* Joyner, *supra* 61, at 165 n.49 (suggesting that violation of individuals' fundamental rights to liberty and freedom is offense against all humanity).

67. Randall, *supra* note 58, at 800.

68. For a general discussion of the unlawful nature of war crimes, see Joyner, *supra* note 61, at 155-62.

69. *See* Randall, *supra* note 58, at 800-15 (reasoning that war crimes are particularly reprehensible because they endanger human lives, may adversely affect international commerce and transportation, and may destabilize international legal order); *see also* BROWNLIE, *supra* note 13, at 305 ("It is now generally accepted that breaches of the laws of war . . . may be punished by any state which obtains custody of persons suspected of responsibility.").

70. *See* Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 884-85 (1990) ("Nuremberg was a watershed event that pointed international law towards a more humane and enlightened interpretation and application. It also helped to revive universal jurisdiction . . . .").

71. *See* Nuremberg Charter, *supra* note 10, art. 6, 59 Stat. at 1556, 82 U.N.T.S. at 288 ("The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes against peace . . . (b) War crimes . . . (c) Crimes against humanity . . .").

Conventions of 1949[72] explicitly identify the obligation of states to hold individuals responsible for criminal acts regardless of any nexus to the prosecuting state.[73]

States hold individuals accountable for the commission of war crimes regardless of their lack of nexus to the prosecuting state because war crimes are sufficiently atrocious to compare them with crimes that previously warranted universal jurisdiction.[74] Furthermore, scholars argue that claims to sovereign immunity should be ignored in determining whether universal jurisdiction is applicable to a war criminal because the underlying crimes are often committed beyond the sovereign control of any responsible government.[75] Accordingly, two cases involving crimes committed during World War II applied the theory of universal jurisdiction to try individuals for war crimes.[76]

In 1962 in *Attorney General of Israel v. Eichmann*,[77] the

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72. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV] (collectively "1949 Geneva Conventions"). The 1949 Geneva Conventions articulate grave breaches of international law that states are required to punish, including willful killing, torture, and inhuman treatment. Geneva I, *supra*, art. 50, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Geneva II, *supra*, art. 51, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Geneva III, *supra*, art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238; Geneva IV, *supra*, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

73. *See* identical provisions of the 1949 Geneva Conventions, *supra* note 72, at Geneva I art. 49, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Geneva II art. 50, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Geneva III art. 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 236; Geneva IV art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386 (stating that each party to the Convention "shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches, and shall bring such persons, *regardless of their nationality*, before its own courts") (emphasis added).

74. *See* Joyner, *supra* note 61, at 166-67 (noting that war crimes, like piracy and slave trading, involve violent, abhorrent acts against entire international community, and are committed for private gain, personal revenge, and generic hatred, so no lawful justification can support their plan, purpose, or execution).

75. *See* Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CALIF. L. REV. 177, 194 (1945) (noting that war criminals take advantage of fact that often there is no well-organized police or judicial system where act is committed, and therefore hope to commit their crimes with impunity).

76. Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 5 (Jerusalem Dist. Ct. 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962); Demjanjuk v. Petrovsky, 776 F.2d 561 (6th Cir. 1985).

77. 36 I.L.R. at 5.

Supreme Court of Israel relied upon the doctrine of universal jurisdiction to prosecute Adolph Eichmann for war crimes and crimes against humanity committed while executing the "Final Solution of the Jewish Problem" during the German Nazi regime in 1942-45.[78] Eichmann argued that the court did not have jurisdiction because the State of Israel did not exist at the time of the offenses[79] and because Germany was the only country with the right to punish him under the principle of territorial sovereignty.[80] The court, however, found that the harmful effects of the crimes on the international community as a whole warranted the application of universal jurisdiction.[81]

In 1985, the U.S. Court of Appeals for the Sixth Circuit in *Demjanjuk v. Petrovsky*[82] found that, pursuant to Israel's exercise of universal jurisdiction, the United States could extradite John Demjanjuk to Israel for crimes committed when he was a Nazi concentration camp guard.[83] Demjanjuk raised arguments similar to Eichmann's,[84] but the court nevertheless found that certain crimes exist which subject the offender to the jurisdiction of any nation.[85] It held that the acts the Nazis committed are uni-

78. *See id.* at 298 (defining principle of universality as "the power to try and punish a person for an offence . . . vested in every State regardless of the fact that the offence was committed outside its territory by a person who did not belong to it, provided he is in its custody when brought to trial").

79. *See id.* at 279 (arguing that District Court of Jerusalem acted contrary to international law because only source of jurisdiction over Eichmann was pursuant to Nazi and Nazi Collaborators (Punishment) Law of 1950, and since Israel was not yet state at time of offenses, Law is ex post facto penal legislation). The court rejected Eichmann's argument. *Id.*

80. *See id.* (arguing that territorial sovereignty provides that because offense was committed in Germany and Eichmann "belongs" to Germany, Germany is only country that can try and punish him). The court rejected Eichmann's argument. *Id.*

81. *See id.* at 299-304 (stating that Israel can try Eichmann pursuant to principal of universal jurisdiction, despite fact that State of Israel did not exist at time of commission of offenses, because "[n]ot only do all the crimes attributed to [Eichmann] bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations").

82. 776 F.2d at 571.

83. *Id.* at 584. Demjanjuk was a native of the Ukraine living in the United States when Israel issued a request for his extradition to try him for serving as a guard at the Treblinka concentration camp in Poland during World War II. *Id.* at 575.

84. *See id.* at 582 (arguing that because Demjanjuk is not citizen or resident of Israel, and because crimes alleged were committed in Poland, Israel does not have jurisdiction to try and punish him). The court rejected Demjanjuk's argument. *Id.* Demjanjuk also argued that Israel does not have jurisdiction because the State of Israel did not exist at the time of his offenses; the court rejected this contention as well. *Id.*

85. *See id.* (stating that Israel is not deprived of authority to try Demjanjuk based

versally recognized crimes and therefore are punishable by any member of the international community.[86]

C. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

The U.N. General Assembly adopted the Convention against Torture in 1984 to strengthen existing prohibitions against torture[87] and other cruel, inhuman, or degrading treatment.[88] The Convention obligates states to prevent torture,[89] compensate victims of torture,[90] and enact laws making torture a punishable offense.[91] To fulfill these obligations, the Convention makes it legitimate for a nation to interfere and prosecute individuals when another nation is improperly treating its own citizens.[92]

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on fact that he committed acts charged in Poland because crimes alleged are universally recognized and condemned by community of nations).

86. *See id.* (reasoning that crimes alleged are offenses against law of nations or against humanity and prosecuting nation is acting for all nations). Israel, therefore, may prosecute offenders on behalf of all nations regardless of status of Israel at time offender committed crimes. *Id.*

87. Convention against Torture, *supra* note 15, art. 1, para. 1. The Convention defines torture as:

> any act by which severe pain or suffering, whether physical or mental, 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, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id.

88. *See* J. HERMAN BURGERS & HANS DANELIUS, A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 1 (1988) (clarifying widespread misunderstanding that objective of Convention is to outlaw torture). Torture was outlawed prior to the existence of the Convention so the aim of the Convention was to strengthen existing prohibitions. *Id.*

89. *See* Convention against Torture, *supra* note 15, art. 2, para. 1 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.").

90. *See id.* art. 14, para. 1 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation . . . .").

91. *See id.* art. 4, para. 1 ("Each State Party shall ensure that all acts of torture are offences under its criminal law.").

92. *See* Robert B. Fitzpatrick, *The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, 38 FED. B. NEWS & J. 392, 392 (1991) (noting

Although the Convention against Torture does not explicitly grant universal jurisdiction over torture, scholars note that several of its articles create a penumbra wherein acts of torture are universally prosecutable.[93] All states that are parties to the Convention therefore have the authority and, in fact, the obligation to take action over an alleged torturer found in its territory.[94] It is unclear, however, whether such authority existed before the enactment of the Convention against Torture.[95]

D. *Sovereign Immunity*

Sovereign immunity is a doctrine of international law that precludes domestic courts from exercising jurisdiction over foreign authorities.[96] Sovereign immunity began as an absolute privilege for sovereigns, but commentators note that the privilege has diminished as the nature of relations between nations

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that country's manner of treating its citizens is no longer internal matter because torture violates international human rights).

93. Convention against Torture, *supra* note 15, arts. 5-7; BURGERS & DANELIUS, *supra* note 88, at 3. The handbook on the Convention against Torture suggests that international law prohibited torture before the enactment of the Convention against Torture and states the following:

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

BURGERS & DANELIUS, *supra* note 88, at 1 (emphasis in original).

94. *See* BURGERS & DANELIUS, *supra* note 88, at 3 (explaining that there is no safe-haven for torturers so state parties must submit case to authorities after finding alleged offender in its territory).

95. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (holding that torturers are like pirates and slave traders and therefore are subject to universal jurisdiction); Scott A. Richman, Comment, Siderman de Blake v. Republic of Argentina: *Can the FSIA Grant Immunity for Violations of* Jus Cogens *Norms?*, 19 BROOK. J. INT'L L. 967, 974 (1993) (stating that customary international law recognizes universal jurisdiction over torture and other *jus cogens* violations). *But see* Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet, 38 I.L.M. 581, 627 (H.L. 1999) (holding that universal jurisdiction over torture did not exist until after enactment of Convention against Torture).

96. BLACK'S LAW DICTIONARY 1396 (6th ed. 1990); William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 257 (1997).

has expanded and diversified.[97] Several international agreements concluded following World War II recognize individual responsibility for criminal acts.[98]

1. Development of Sovereign Immunity

One commentator suggests that sovereign immunity enables nations to avoid friction in international relations.[99] The doctrine protects the sovereign's ability to uphold the dignity of his nation, and satisfies the functional need for sovereigns to act in their nation's best interest when travelling to another state without fear of being subject to adjudication.[100] As a matter of international comity,[101] states generally accept the validity of official acts of a foreign state to the extent that they comply with international law.[102]

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97. *See* OLIVER, *supra* note 22, at 580 (recognizing that modern limited view of immunity is more realistic because equality and independence are restricted by institutions such as United Nations or other international organizations).

98. *E.g.,* Nuremberg Charter, *supra* note 10; Nuremberg Principles, *supra* note 10. *See* Princz v. Federal Republic of Germany, 26 F.3d 1166, 1181 (D.C. Cir. 1994) (Wald, J., dissenting) ("The Nuremberg Principles crystallized the pre-existing international condemnation of persecution and enslavement of civilians on the basis of race or religious belief, with the widescale atrocities committed by Hitler's Germany driving home the concept that certain fundamental rights may never be transgressed under international law.").

99. *See* Dorsey, *supra* note 96, at 257 (suggesting that purpose of doctrine is same whether doctrine is based on view that members of international community are bound by customary international law to accord immunity to foreign sovereigns, or based on comity).

100. *See* BROWNLIE, *supra* note 13, at 326 (stating that rationale of immunity rests equally on upholding dignity of nation and remaining unencumbered when visiting foreign state); OLIVER, *supra* note 22, at 579 (explaining additional purpose of sovereign immunity as ensuring that public property of foreign state remains available for public purposes, free from forum's powers of attachment and execution); B.J. George, Jr., *Immunities and Exceptions, in* 2 INTERNATIONAL CRIMINAL LAW: PROCEDURE 107, 107-08 (M. Cherif Bassiouni ed., 2d ed. 1999) (providing three justifications for immunity and arguing that functional necessity is currently most recognized theory).

101. *See* 1 L. OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW § 17 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (defining international comity as rules of politeness, convenience, and goodwill that states observe towards one another). Comity involves "[n]eighbourliness, mutual respect, and the friendly waiver of technicalities." BROWNLIE, *supra* note 13, at 29. While not legally binding, many rules of comity eventually develop into rules of international law. OPPENHEIM, *supra*, at 30.

102. *See* BROWNLIE, *supra* note 13, at 322-23 (suggesting that courts accept validity of acts of foreign states as consequence of equality and independence of states). *But see* OPPENHEIM, *supra* note 101, at 342 (arguing that equality, independence, and dignity of states are not impaired when subjected to ordinary judicial process of foreign states). The acceptance of the validity of governmental acts of a foreign sovereign is known as

Sovereign immunity originated as an absolute exemption from suit in another nation, regardless of the nature of the act.[103] Absolute immunity is based on the concept that all states are equal, and that one state cannot exercise authority over another.[104] As a result of states' increased participation in commercial activity in the nineteenth century, however, the use of absolute immunity shifted to a more limited approach known as restrictive immunity.[105] According to restrictive immunity, courts distinguish between acts of government, *jure imperii*,[106] and acts of a commercial nature, *jure gestionis*,[107] denying immunity in the latter situation.[108] While one scholar notes that the

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the "act of state" doctrine. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (tracing development of doctrine from its root in England in 17th century through 18th and 19th centuries); Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("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.").

103. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 891 (2d ed. 1987). The U.S. Supreme Court explained the theory of absolute sovereign immunity in The Schooner Exchange v. McFaddon:

> One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

11 U.S. (7 Cranch) 116, 137 (1812).

104. HENKIN, *supra* note 103, at 891. Several policy considerations also support sovereign immunity, such as preventing interference with foreign relations upon rendering a negative judgment, protecting foreign nations from frivolous cases or abuse of courts, and preventing interference with governmental action. OLIVER, *supra* note 22, at 580-81.

105. *See* BROWNLIE, *supra* note 13, at 326-27 (defining restrictive immunity as denial of immunity from jurisdiction for acts of commercial nature). The transformation from absolute to restrictive immunity is also a result of the modern reality that the concept underlying absolute immunity, that sovereigns have perfect equality and independence, has become limited due to obligations to international institutions such as the United Nations. *See* OLIVER, *supra* note 22, at 580 ("'Perfect equality' does not exist outside ideal abstraction.").

106. *See* BROWNLIE, *supra* note 13, at 327 (defining *jure imperii* as acts of government).

107. *See id.* (defining *jure gestionis* as acts of commercial nature).

108. *See* Letter from Jack B. Tate, Acting Legal Advisory of the Dep't of State, to the U.S. Department of Justice, May 19, 1952, *reprinted in* 26 DEP'T STATE BULL. 984 (1952) ("Tate Letter") (expressing Department of State's decision to shift from absolute to restrictive immunity because persons engaging in business with sovereigns should be able to have their rights determined in court); Dralle v. Republic of Czecho-

current legal position on sovereign immunity is difficult to determine,[109] the trend in the practice of states leans toward the restrictive approach.[110]

2. Decline of Sovereign Immunity

Historically, individual sovereigns were not criminally responsible for their actions because sovereign immunity developed at a time when the state and its ruler were viewed as one entity.[111] Head of state immunity and state immunity, however, have developed into separate legal doctrines.[112] The state, rather than its ruler, is the primary subject of international law, and is thus protected by immunity.[113] One commentator notes that at one time states might have been able to use discretion in the treatment of their own citizens, but that is not the law today.[114]

Views of national sovereign immunity changed following World War II when international agreements began imposing criminal liability on individuals for human rights violations.[115] In 1945 the Nuremberg Charter asserted that a head of state is

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slovakia, 17 I.L.R. 155, 163 (Supreme Court of Austria 1950) (noting that doctrine of immunity arose at time when all commercial activities of states in other countries were connected with their political activities but that today it is different; states engage in commercial activities and competition with their own nationals and with non-nationals). The *Dralle* court stated that "the classic doctrine of immunity has lost its meaning and . . . can no longer be recognised as a rule of international law." 17 I.L.R. at 163.

109. *See* BROWNLIE, *supra* note 13, at 329 ("It is far from easy to state the current legal position [on sovereign immunity] in terms of customary or general international law.").

110. *See id.* at 327-28 & nn.25-26 & 31 (listing 20 countries that adopted restrictive immunity, 11 that support it in principle, and 16 that still accept absolute immunity); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 cmt. a (1987) [hereinafter RESTATEMENT] (noting that nearly all non-Communist states now accept restrictive theory of immunity).

111. *See* Jerrold L. Mallory, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 170 & n.10 (1986) (explaining that today heads of state are no longer viewed as actual state).

112. *Id.* at 170-71.

113. *Id.* at 170 n.10.

114. *See* Fitzpatrick, *supra* note 92, at 392 ("The way a country treats its own citizens is no longer simply an internal matter, capable of hiding behind domestic jurisdiction or national sovereignty, once the treatment violates internationally established human rights standards."); *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) ("The United Nations Charter . . . makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern.").

115. *See generally* BROWNLIE, *supra* note 13, at 561-80 (discussing individual criminal responsibility and development of international protection of human rights).

not free from responsibility for crimes against humanity[116] by reason of his official position.[117] The Nuremberg Principles also declared a lack of immunity for such crimes.[118] Both the Statute for the International Criminal Tribunal for the Former Yugoslavia[119] ("ICTY Statute") and the Statute for the International Criminal Tribunal for Rwanda[120] ("ICTR Statute") recently reaffirmed this theory of criminal responsibility.[121]

E. *Jus Cogens*

Several crimes violate the customary international law[122] of

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116. *See* Nuremberg Charter, *supra* note 10, art. 6, para. (c), 59 Stat. at 1556, 82 U.N.T.S. at 288. The Charter defines crimes against humanity as:

> namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Id.

117. *See id.* art. 7, 59 Stat. at 1556, 82 U.N.T.S. at 288 ("The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.").

118. *See* Nuremberg Principles, *supra* note 10 ("The fact that a person committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.").

119. Statute for the International Criminal Tribunal for the Former Yugoslavia, adopted at New York, May 25, 1993, S.C. Res. 827, U.N. SCOR 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159 [hereinafter ICTY Statute].

120. Statute for the International Criminal Tribunal for Rwanda, adopted at New York, Nov. 8, 1994, S.C. Res. 955, U.N. SCOR 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 [hereinafter ICTR Statute].

121. *See* identical provisions of ICTY Statute, *supra* note 119, art. 7, para. 2, 32 I.L.M. at 1175, and ICTR Statute, *supra* note 120, art. 6, para. 2, 33 I.L.M. at 1604 ("The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.").

122. *See* RESTATEMENT, *supra* note 110, § 102(2) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."). Customary international law is divided into rules based upon states' consent and rules that are necessary to the good of the international community. *See* David F. Klein, Comment, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 350-53 (1988) (clarifying distinction between *jus cogens* and *jus dispositivum* by suggesting that states can change *jus dispositivum* and urge others states to follow because *jus dispositivum* is based on states' own self-interest, while *jus cogens* is based on values fundamental to international community so cannot be changed on state's own volition). The first class, *jus dispositivum*, is only applicable to states that continue to comply with the rules and can be modified by

human rights.[123] Not all acts that violate customary human rights, however, are considered *jus cogens*,[124] or peremptory norms[125] fundamental to the entire international community.[126] Although commentators differ as to what constitutes *jus cogens*,[127] international law recognizes that torture has achieved such status.[128] Nevertheless, commentators disagree as to whether an individual can claim sovereign immunity for a *jus cogens* violation.[129]

1. Definition of *Jus Cogens*

Jus cogens, or compelling law, refers to fundamental legal

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treaty, while the second class, *jus cogens*, is binding on all states and can only be changed by a subsequent rule of the same nature. Richman, *supra* note 95, at 974.

123. *See* RESTATEMENT, *supra* note 110, § 702 (listing acts that violate customary international law if practiced, encouraged, or condoned as state policy, including genocide, slavery or slave trade, murder or disappearance, torture, detention, systematic racial discrimination, and consistent pattern of gross violations of international human rights).

124. *See* M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 63, 67 (1996) (defining *jus cogens* as peremptory norm, or compelling law that holds highest hierarchical position among other international norms and principles, but noting difficulty and scholarly disagreement in defining peremptory norm).

125. *See* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, U.N. Doc. A/Conf. 39/27, 1155 U.N.T.S. 332 [hereinafter Vienna Convention] (defining peremptory norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").

126. RESTATEMENT, *supra* note 110, § 702 cmt. n.

127. *See* Anthony D'Amato, *It's a Bird, It's a Plane, It's* Jus Cogens!, 6 CONN. J. INT'L L. 1, 6 (1990) (questioning unanswered elementary issues respecting *jus cogens* norms, including its utility, how it arises, and how it abolishes or changes). *But see* Bassiouni, *supra* note 124, at 70 (observing that it is clear that crime becomes *jus cogens* when there is wide recognition among nations of *jus cogens* nature of crime).

128. *See* Siderman de Blake v. The Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992) ("[T]he right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*."); RESTATEMENT, *supra* note 110, § 702 cmt. n (stating that torture is *jus cogens* peremptory norm); BURGERS & DANELIUS, *supra* note 88, at 12 (stating that prohibition of torture "can be considered a peremptory norm as defined in article 53 of the Vienna Convention"). For a thorough discussion of torture as an international crime, see M. Cherif Bassiouni & Daniel Derby, *The Crime of Torture, in* 1 INTERNATIONAL CRIMINAL LAW: CRIMES 363 (M. Cherif Bassiouni ed., 1986).

129. *Compare* Bantekas, *supra* note 23, at 766 (discussing exceptions to immunity where *jus cogens* rules are violated), *with* Zimmerman, *supra* note 23, at 433 (arguing that denying immunity for human rights violations is illegal and politically unwise).

norms comprising the highest[130] rules of international law.[131] International crimes that have acquired the status of *jus cogens* contain non-derogable binding obligations, regardless of whether such obligations are explicitly stated in a convention or as a customary rule of international law.[132] While these basic aspects of *jus cogens* are widely acknowledged,[133] the determination of how a norm becomes *jus cogens* is not as clear.[134]

In 1988 in *Committee of U.S. Citizens Living in Nicaragua v. Reagan*,[135] the D.C. Circuit Court of Appeals addressed the criteria required for a rule to become a peremptory norm of interna-

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130. *See* BASSIOUNI, *supra* note 14, at 489 (explaining that hierarchical position of *jus cogens* norms preempts all other principles, norms, and rules of both international and national law).

131. *See* Vienna Convention, *supra* note 125, art. 53, 1155 U.N.T.S at 344 (referring to *jus cogens* as peremptory norm of general international law, and explaining that treaty is void if conflicts with peremptory norm of general international law). The Restatement also defines *jus cogens*:

> Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.

RESTATEMENT, *supra* note 110, § 102 cmt. k. For a discussion on the difficulty in defining *jus cogens*, and the various definitions it has been given, see Karen Parker & Lyn Beth Neylon, Jus Cogens: *Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 414-16 (1989).

132. *See* M. CHERIF BASSIOUNI, *Characteristics of International Criminal Law Conventions*, *in* 1 INTERNATIONAL CRIMINAL LAW: CRIMES 1, 7 (M. Cherif Bassiouni ed., 1986) (explaining that duty to prosecute or extradite international criminals is *jus cogens* principle, or binding international obligation); Parker & Neylon, *supra* note 131, at 418 ("Once an international norm becomes *jus cogens*, it is absolutely binding on all states, whether they have persistently objected or not.").

133. *E.g.*, BASSIOUNI, *supra* note 14, at 489; BROWNLIE, *supra* note 13, at 513; Bassiouni, *supra* note 124, at 67; Parker & Neylon, *supra* note 131, at 418; Richman, *supra* note 95, at 972-74.

134. *See* BROWNLIE, *supra* note 13, at 514-15 (recognizing that "more authority exists for the category of *jus cogens* than exists for its particular content"); D'Amato, *supra* note 127, at 6 (questioning unanswered elementary issues respecting *jus cogens* norms, including its utility, how it arises, and how it abolishes or changes). D'Amato analogizes *jus cogens* to Superman, arguing that the sheer ephemerality of *jus cogens* seems to give any writer the magical power to essentially create a new *jus cogens* norm by merely suggesting that a norm has attained the requisite status. D'Amato, *supra* note 127, at 1-2. *But see* BASSIOUNI, *supra* note 132, at 8 (arguing need for consistent re-affirmation of particular duty in conventional international law for duty to constitute *jus cogens*); Bassiouni, *supra* note 124, at 70 (considering necessity of wide recognition before crime becomes *jus cogens*). Bassiouni argues that the problems surrounding *jus cogens* would be prevented by a comprehensive international codification. Bassiouni, *supra* note 124, at 74.

135. 859 F.2d 929 (D.C. Cir. 1988).

tional law.[136] The D.C. Circuit found that to become a peremptory norm, a rule must first become a rule of customary law, which occurs when the extensive and uniform practice of individual nations reveals their willingness for the rule to become law.[137] A customary norm evolves into a peremptory norm when the international community as a whole recognizes that the norm is one that permits no derogation.[138]

One scholar attempted to further clarify the determination of how a crime reaches the status of *jus cogens* by suggesting a two-part doctrinal method.[139] The first element requires a threat to the peace and security of humankind, and the second requires a shock to the conscience of humanity.[140] The presence of both elements is not required for a crime to be *jus cogens*,[141] but if they do coexist, the crime has necessarily attained *jus cogens* status.[142] Furthermore, three other factors must be taken into consideration.[143] These factors include the number of legal instruments that condemn and prohibit the crime, the number of state legal systems that recognize such prohibitions, and the number of prosecutions for the particular crime, both nationally and internationally.[144]

Several international crimes are recognized as *jus cogens*.[145] Torture is included among those crimes.[146] In 1992, the Ninth

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136. *Id.* at 940.

137. *Id.* (quoting Meijers, *How Is International Law Made?*, 9 NETHERLANDS Y.B. INT'L L. 3, 5 (1978); The North Sea Continental Shelf Case (Judgment), 1969 I.C.J. 12, 43).

138. *Id.* (quoting Vienna Convention, *supra* note 125, art. 53); *see* BROWNLIE, *supra* note 13, at 514 (defining derogation as "agreement . . . to contract out of general international law").

139. *See* Bassiouni, *supra* note 124, at 69 (suggesting crime is *jus cogens* if it threatens peace and security of mankind and shocks conscience of humanity).

140. *See id.* (noting that implicit in first element, and sometimes in second, is that questionable act "is the product of state-action or state-favoring policy"). For a tabular analysis of elements of various crimes, see BASSIOUNI, *supra* note 132, at 11-13.

141. *See* Bassiouni, *supra* note 124, at 70 (recognizing that genocide, for example, may not threaten world peace and security, but is widely accepted as *jus cogens*).

142. *See id.* at 69 ("If both elements are present in a given crime, it can be concluded that it is part of *jus cogens*.").

143. *Id.* at 70-71.

144. *See id.* (explaining that large amount of one factor weighs in favor of crime reaching *jus cogens* status).

145. *See* RESTATEMENT, *supra* note 110, § 702 cmt. n (recognizing *jus cogens* status of genocide, slavery or slave trade, murder or disappearance, torture, detention, and systematic racial discrimination).

146. Siderman de Blake v. The Republic of Argentina, 965 F.2d 699, 717 (9th Cir.

Circuit in *Siderman de Blake v. The Republic of Argentina*[147] explicitly reaffirmed the status of torture as *jus cogens*.[148] Commentators further note that the generally accepted view among international lawyers is that the prohibition of torture is a peremptory norm of international law.[149]

2. Sovereign Immunity for *Jus Cogens* Violations

Scholars recognize that *jus cogens* principles can curtail various privileges.[150] The principles can limit the privilege of state sovereignty, for example, because a peremptory rule of international law overrides the actions of individual states.[151] Commentators suggest that a rule of international law based on the fundamental values of the international community must apply to sovereign acts against individuals just as it does to such acts among nations.[152]

Greek courts recognize several justifications for denying immunity for *jus cogens* violations.[153] In 1997 in *Prefecture of Voiotia v. Federal Republic of Germany*,[154] for example, the Court of First Instance of Leivadia, Greece, held that courts should deny immunity for *jus cogens* violations because a sovereign cannot reasonably expect to receive immunity for grave violations of international law and, therefore, he or she constructively waives the privilege by committing a *jus cogens* act.[155] The court further

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1992); RESTATEMENT, *supra* note 110, § 702 cmt. n; BURGERS & DANELIUS, *supra* note 88, at 12 (stating that prohibition of torture "can be considered a peremptory norm as defined in article 53 of the Vienna Convention").

147. 965 F.2d at 699.

148. *See id.* at 717 ("[T]he right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*.").

149. BURGERS & DANELIUS, *supra* note 88, at 12.

150. *See* BROWNLIE, *supra* note 13, at 514 (providing example that "an aggressor would not benefit from the rule that belligerents are not responsible for damage caused to subjects of neutral states by military operations").

151. *See* Turpel & Sands, *supra* note 11, at 365 ("The guidance of international legal theory toward *jus cogens* or peremptory law has been part of an ongoing struggle to move beyond unrestricted state sovereignty . . . to establish an international rule of law."). *But see* Mark W. Janis, *The Nature of* Jus Cogens, 3 CONN. J. INT'L L. 359, 362 (1988) (noting that state sovereignty is principle protected by *jus cogens* rules).

152. Klein, *supra* note 122, at 351.

153. Prefecture of Voiotia v. Federal Republic of Germany, Case No. 137/1997 (Court of First Instance of Leivadia, Greece, 1997).

154. Case No. 137/1997 (Court of First Instance of Leivadia, Greece, 1997).

155. *Id.* at 13.

found that a sovereign is not acting within his or her authority when he or she commits an act prohibited by *jus cogens*.[156] Thus, the action does not contain the requisite character of being a sovereign act warranting immunity.[157] Additionally, an act violating a peremptory norm is by definition null and void and cannot be a source of legal rights and privileges, such as a claim to immunity.[158] National courts should also not grant immunity for acts prohibited by *jus cogens* because doing so would serve to collaborate in the violation.[159] Finally, a sovereign abuses his or her right to immunity by invoking it for protection against claims that he or she committed a *jus cogens* violation.[160] Thus, the court in *Prefecture of Voiotia* concluded that a sovereign loses the right to claim sovereign immunity when he or she violates a *jus cogens* norm.[161]

While some authority exists supporting a denial of immunity for *jus cogens* violations, one scholar notes that the practice of states appears to stray from this view.[162] In *Siderman*, for example, the Ninth Circuit found that torture is a *jus cogens* violation, but still granted immunity for acts of torture pursuant to the Foreign Sovereign Immunities Act ("FSIA").[163] The court followed the Supreme Court's narrow interpretation of the FSIA in *Argentine Republic v. Amerada Hess Shipping Corporation*,[164] which held that immunity is only denied where Congress has specifically stated an exception.[165] The FSIA does not explicitly state an exception to immunity for *jus cogens* violations, so the Ninth Circuit concluded that Congress did not confer jurisdiction over sovereigns for such offenses.[166]

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156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*; Richman, *supra* note 95, at 980-81 (stating that by granting immunity "the court can be considered to be sanctioning and promoting an act that is condemned by the international community").

160. *Prefecture of Voiotia*, Case No. 137/1997 at 13.

161. *Id.* at 12.

162. *See* Bassiouni, *supra* note 124, at 66 ("The practice of the states evidences that, more often than not, impunity has been allowed for *jus cogens* crimes . . . .").

163. The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (1976) [hereinafter FSIA]; Siderman de Blake v. The Republic of Argentina, 965 F.2d 699, 714-19 (9th Cir. 1992).

164. 488 U.S. 428 (1989).

165. *Siderman*, 965 F.2d at 719 (quoting Argentine Republic v. Amerada Hess Shipping Corporation, 488 U.S. 428, 436 (1989)).

166. *See id.* at 719 ("The fact that there has been a violation of *jus cogens* does not

Scholars suggest several other reasons for upholding sovereign immunity even where basic human rights are violated.[167] One rationale is that the prohibition of acts such as torture and the principle of sovereign immunity are both *jus cogens* principles, so one rule cannot override the other.[168] Additionally, a precise limitation on immunity for *jus cogens* offenses creates a risk that states will deny immunity for a myriad of reasons other than for *jus cogens* violations.[169] Furthermore, even if states only deny immunity for *jus cogens* violations, the ambiguous nature of *jus cogens* creates a risk that states will decide that certain offenses are *jus cogens* and strip a sovereign of his immunity, regardless of whether the offense is internationally recognized as *jus cogens*.[170] Finally, denying immunity could disrupt relations between states because equality and independence of states, which serves as the basis of sovereign immunity, is a fundamental principle of international law.[171]

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confer jurisdiction under the FSIA."). The court found that Argentina did not have immunity because immunity was implicitly waived under the Implied Waiver Exception of the FSIA when Argentina availed itself of the U.S. courts to persecute Siderman. *Id.* at 722. For a criticism of the *Siderman* decision, see Richman, *supra* note 95, at 1000-07. The *Siderman* decision was reaffirmed by the D.C. Circuit in Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994). For a criticism of the *Princz* decision, see Jack Alan Levy, Note, *As Between Princz and King: Reassessing the Law of Foreign Sovereign Immunity as Applied to* Jus Cogens *Violators*, 86 GEO. L.J. 2703 (1998).

167. *See generally* Zimmerman, *supra* note 23, at 433 (arguing that it would be illegal under public international law and politically unwise to deny sovereign immunity for international human rights violations). For a thorough critique of *jus cogens*, see A. Mark Weisburd, *The Emptiness of the Concept of* Jus Cogens, *as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 24-40 (1995).

168. *See* Zimmerman, *supra* note 23, at 438 ("[W]hile it seems to be beyond doubt that the prohibition of torture nowadays forms part of international *jus cogens*, it cannot be argued that this prohibition necessarily encompasses the further *jus cogens* rule—thus overriding the general principle of state immunity . . . .") (footnote omitted). Zimmerman argues that human rights law and sovereign immunity are two distinct sets of rules that do not interact with one another, and therefore one set of rules cannot encompass the other. *Id.*

169. *See id.* (arguing that countries create exceptions from immunity for human rights violations that are not *jus cogens* violations).

170. *See id.* (opining that broadness of *jus cogens* will permit states to determine that offenses are *jus cogens* even if not internationally recognized as such).

171. *See id.* (suggesting that courts of one sovereign should not be able to sit in judgment on acts of another sovereign).

II. REGINA v. BARTLE AND THE COMMISSIONER OF POLICE FOR THE METROPOLIS AND OTHERS EX PARTE PINOCHET

On October 16, 1998, Senator Pinochet was arrested pursuant to two international warrants from Madrid alleging that he ordered the murder of Spanish citizens during his dictatorship in Chile.[172] Pinochet was travelling with a diplomatic passport[173] that the Chilean foreign ministry insisted gave him immunity.[174] The British courts, therefore, needed to determine whether an ex-dictator could be questioned or prosecuted for crimes committed outside U.K. borders.[175] The High Court first found that Pinochet was entitled to sovereign immunity,[176] but the House of Lords reversed the decision.[177] Although the House of Lords' decision was set aside due to a potential bias of one of the Lords,[178] a new panel of the House of Lords also reversed the High Court decision.[179]

A. *Decision of the High Court*

In a challenge to the validity of Spain's arrest warrants, the U.K. High Court ruled that Pinochet was entitled to immunity in the English courts.[180] Pinochet, therefore, would not be extra-

172. *See Ex-Dictator Arrested in Britain for Alleged Murders in Chile*, AGENCE FRANCE-PRESSE, Oct. 17, 1998, *available in* 1998 WL 16620607 (specifying that Spanish magistrates charged that Spanish nationals were among more than 3000 people killed and 1198 unaccounted for during Pinochet's reign).

173. *See* 22 C.F.R. § 51.3 (1999) ("A diplomatic passport is issued to a Foreign Service Officer, a person in the diplomatic service or to a person having diplomatic status either because of the nature of his or her foreign mission or by reason of the office he or she holds.").

174. *Ex-Dictator Arrested, supra* note 172.

175. *Id.*

176. In re Augusto Pinochet Ugarte, 38 I.L.M. 68 (Q.B. 1998).

177. Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet, 37 I.L.M. 1302 (H.L. 1998) [hereinafter Pinochet I].

178. *See* In re Pinochet, 38 I.L.M. 430 (H.L. 1999) (holding that Lord Hoffmann was disqualified from hearing case against Pinochet because Amnesty International, which is organization aimed at securing observance of Universal Declaration of Human Rights throughout world, intervened in appeal against Pinochet and Lord Hoffman was involved with Amnesty International Charity Limited, company controlled by Amnesty International, and did not disclose involvement prior to hearing).

179. Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet, 38 I.L.M. 581 (H.L. 1999) [hereinafter Pinochet II].

180. *In re Augusto Pinochet Ugarte*, 38 I.L.M. at 85.

dited to Spain.[181] The court analyzed the two warrants separately.[182]

The court found that the first warrant,[183] charging that Pinochet murdered Spanish citizens in Chile, was invalid pursuant to the U.K. Extradition Act[184] ("Act"). The court held that under the Act, the alleged conduct does not constitute an extradition crime[185] because extradition crimes are extra-territorial offenses that are illegal if committed in the United Kingdom.[186] Under British law, British courts only have jurisdiction where the defendant commits a crime outside the United Kingdom if he is a British citizen, regardless of the nationality of the victim.[187] Spain based its claim to jurisdiction on the nationality of the victims, and not on that of the offender, Senator Pinochet, a citizen of Chile.[188] The court, therefore, held the warrant invalid.[189]

The court ruled the second warrant, alleging five offenses arising out of official acts of a head of state,[190] invalid pursuant to the State Immunity Act[191] and the Diplomatic Privileges

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181. *Id.* at 71. The court defined extradition as:

> [A] process whereby one sovereign state, 'the requesting state', asks another sovereign state, 'the requested state', to return to the requesting state someone present in the requested state, 'the subject of the request', in order that the subject of the request may be brought to trial on criminal charges in the requesting state.

Id.

182. *Id.* at 77-79.

183. *Id.* at 76. The warrant stated that "[b]etween 11 September 1973 and 31 December 1983, within the jurisdiction of the Fifth Central Magistrates' Court of the National Court of Madrid, [Pinochet] did murder Spanish citizens in Chile within the jurisdiction of the Government of Spain." *Id.*

184. Extradition Act 1989, ch. 33 (Eng.).

185. *See id.* § 2(1)(a) (defining extradition crime as "[c]onduct in the territory of a foreign state . . . which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, . . . is so punishable under that law").

186. *In re Augusto Pinochet Ugarte*, 38 I.L.M. at 77.

187. *See* Extradition Act, *supra* note 184, § 2(3)(a) (stating that jurisdiction can be based on nationality of offender).

188. *In re Augusto Pinochet Ugarte*, 38 I.L.M. at 77.

189. *Id.*

190. *See In re Augusto Pinochet Ugarte*, 38 I.L.M. at 77 (stating that offenses include intentional infliction of severe pain and suffering and conspiracy to commit such crime, detention of hostages and conspiracy to commit such crime, and conspiracy to commit murder).

191. State Immunity Act, 17 I.L.M. 1123 (1978).

Act.[192] Consistent with these acts, the court held that Pinochet was entitled to immunity from the English courts as a former sovereign.[193] The attorney representing the Government of Spain argued that immunity is limited to official functions as head of state, and that crimes so repugnant as to constitute crimes against humanity can never be categorized as such a function.[194] The court, however, declined to distinguish among official acts, and stated that all criminal acts performed while exercising public functions are protected.[195]

The court recognized the concern that a head of state could escape punishment for crimes against humanity.[196] It distinguished, however, the current situation from the Nuremberg Charter,[197] the ICTY Statute,[198] and the ICTR Statute,[199] all of which state that an individual's official position will not relieve him or her of criminal responsibility.[200] It found that since the Nuremberg Charter, the ICTY Statute, and the ICTR Statute are all international agreements, they do not violate the principle that one sovereign state will not judge another in relation to its sovereign acts.[201] The court concluded that Pinochet was entitled to immunity from process in the British courts.[202]

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192. Diplomatic Privileges Act 1964, 12 & 13 Eliz. 2, ch. 81.

193. *In re Augusto Pinochet Ugarte*, 38 I.L.M. at 85.

194. *Id.* at 83.

195. *See id.* ("If the former sovereign is immune from process in respect of some crimes, where does one draw the line?").

196. *Id.* at 84.

197. *See* Nuremberg Charter, *supra* note 10, art. 7, 59 Stat. at 1556, 82 U.N.T.S. at 288 ("The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.").

198. *See* ICTY Statute, *supra* note 119, art. 7, para. 2, 32 I.L.M. at 1175 ("The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.").

199. *See* ICTR Statute, *supra* note 120, art. 6, para. 2, 33 I.L.M. at 1604 ("The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.").

200. *In re Augusto Pinochet Ugarte*, 38 I.L.M. at 84.

201. *Id.*

202. *See id.* at 85 ("[T]he applicant is entitled to immunity as a former sovereign from the criminal and civil process of the English courts.").

B. *High Court's Decision Overturned by House of Lords*

On appeal from the High Court, the House of Lords reversed the High Court's decision.[203] The Law Lords held that Pinochet did not have immunity as a former Head of State for internationally recognized crimes.[204] In its decision, the court analyzed state immunity, the common law act of state doctrine,[205] personal immunity, and residual immunity.[206]

The court found state immunity inapplicable because the cases previously relied on under the State Immunity Act[207] only applied where the action concerned civil proceedings against the state.[208] The court rejected the act of state doctrine, finding that Parliament did not intend it to apply to legislation criminalizing torture and hostage taking.[209] The court found that Pinochet likewise did not have personal or residual immunity because such immunity extended to internationally recognized functions of a head of state, regardless of domestic constitutions, and to hold that torture was such a function would make a mock-

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203. Pinochet I, 37 I.L.M. at 1330 (stating that certified question was "the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state").

204. *Id.* at 1334.

205. *See id.* at 1331 (reviewing several definitions given to principle but stating that modern view is that domestic courts recognize that certain questions of foreign affairs are non-justiciable). The court ultimately concluded that the definition accorded the doctrine is irrelevant because Parliament did not intend it to apply in this case. *Id.* at 1332.

206. *See id.* at 1331 (defining residual immunity as broad principle of customary international law that grants former public officials degree of personal immunity against prosecutions in other states).

207. State Immunity Act, *supra* note 191, §§ 1(1), 14(1)(a), 17 I.L.M. at 1124-27. The relevant portions of the State Immunity Act ("Act") are § 1, which provides that "[a] State is immune from the jurisdiction of the courts of the United Kingdom" subject to several exceptions, and § 14(1)(a), which provides that references to a State include "the sovereign or other head of that State in his public capacity." *Id.* Read together, the words "in his public capacity" refer to the capacity in which a head of state is sued, and not that in which he performed the alleged act. Pinochet I, 37 I.L.M. at 1331. Furthermore, the Part of the Act that includes these sections does not apply to criminal proceedings. State Immunity Act, *supra*, § 16(4).

208. *See* Pinochet I, 37 I.L.M. at 1331 (citing Al-Adsani v. Government of Kuwait, 107 I.L.R. 536 (1996), Argentine Republic v. Amerada Hess Shipping Corporation, 488 U.S. 421 (1989), Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992)).

209. *See id.* at 1332 (finding that doctrine cannot apply to justiciable issue in English courts and definition of torture in Criminal Justice Act 1988 requires investigation into conduct of officials acting in official capacity so issue is justiciable).

ery of international law.[210] The court further noted that international law recognized torture as an international crime long before 1973 and as an unacceptable act by anyone, including a head of state.[211] The court concluded that torture and hostage taking are offenses under U.K. law, and held that Pinochet was not immune from criminal prosecution because of his status as a former head of state.[212]

C. *The House of Lords' Final Decision*

In an unprecedented decision, the House of Lords granted Pinochet's petition to set aside the first House of Lords decision due to a potential bias of one of the judges based on that judge's involvement with Amnesty International.[213] Upon rehearing the case, a majority of the new panel of Law Lords decided that Pinochet could face prosecution for the crimes he committed after the Convention against Torture became binding upon Spain, the United Kingdom, and Chile in 1988.[214] The court's analysis

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210. *See id.* at 1333 (noting that history made clear that immunity extends to internationally recognized functions of head of state regardless of domestic constitutions, and torture is not such function, long before Pinochet rose to power in 1973).

211. *See id.* (referring to Nuremberg Charter and Nuremberg Principles).

212. *Id.* at 1334.

213. In re Pinochet, 38 I.L.M. 430 (H.L. 1999). Amnesty International ("AI") is an unincorporated, non-profit organization aimed at securing the observance of the Universal Declaration of Human Rights throughout the world. *Id.* at 435. Lord Hoffmann is not a member of AI, but is a Director of Amnesty International Charity Limited ("AICL"), a company wholly controlled by AI that carries on much of AI's work. *Id.* at 439. The problem arose because AI intervened in the appeal against Pinochet to the House of Lords and became a party to the matter. *Id.* at 433. While Pinochet claimed that neither he nor his legal advisors were aware of the connection until after the judgment was given, AI claimed that Lord Hoffmann's involvement was a matter of public record. AMNESTY INTERNATIONAL, *Amnesty International's Position on the Decision by the House of Lords To Open a New Hearing on the Pinochet Case* (last modified Dec. 17, 1998) <http://www.amnesty.org/news/1998/44503598.htm> (on file with the *Fordham International Law Journal*). Relying on the principle that a man may not be a judge in his own cause, the court found that Lord Hoffmann was automatically disqualified from hearing the case, even though he may not actually be guilty of any bias. *In re Pinochet*, 38 I.L.M. at 439. Pursuant to this principle, once it is shown that a judge has an interest in the case, there does not need to be an investigation into any likelihood or suspicion of bias. *See id.* at 437-39 (finding pecuniary interest not necessary in criminal litigation). Lord Hoffmann's interest alone was sufficient to disqualify him since he did not disclose it prior to the hearing. *Id.* at 437. His disqualification rendered it necessary to have a re-hearing of the appeal before a different committee because the decision had a majority of three to two finding against Pinochet. *Id.* at 433, 440. Without Lord Hoffmann, there is not a majority for a judgment. *Id.*

214. Regina v. Bartle and the Commissioner of Police for the Metropolis and

rested on the consideration of two issues.[215] The first issue concerned whether the charges alleged against Pinochet were extradition crimes under U.K. law.[216] The court held that crimes committed before the adoption of the Convention against Torture were not extradition crimes because the United Kingdom did not have universal jurisdiction over acts of torture until after the Convention was adopted.[217] The second issue concerned whether Pinochet had immunity for crimes that were extraditable.[218] The court held that Pinochet was not entitled to immunity for acts of torture after the Convention against Torture became binding upon Spain, the United Kingdom, and Chile.[219]

1. Torture as an Extradition Crime

The court determined whether the offenses alleged were extradition crimes by examining the U.K. Extradition Act.[220] To fall within the definition of an extradition crime, the conduct must constitute a crime under U.K. law and Spanish law at the time the conduct took place.[221] It is not sufficient to show that the conduct would be an offense if committed now.[222]

Torture was not considered an extra-territorial crime under U.K. law at the time Pinochet allegedly committed most of the

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others Ex Parte Pinochet, 38 I.L.M. 581 (H.L. 1999) [hereinafter Pinochet II]. The only dissenting judge was Lord Goff, who decided that neither international law nor the Convention against Torture deprived Pinochet of immunity as a former head of state. *Id.* at 609. The remaining six Lords each wrote his own opinion, but each opinion expressed the same proposition as the other opinions in the majority. *Id.* at 595, 627, 641, 643, 652, 663.

215. *Id.* at 613-27.

216. *Id.* at 613.

217. *See id.* at 619 (explaining that torture was not extra-territorial offense until after Convention against Torture so, consistent with U.K. law, Pinochet could only be extradited to Spain if offense occurred in Spain and offense would be crime if occurred in United Kingdom).

218. *Id.* at 623.

219. *Id.* at 623-27.

220. *Id.* at 613. The Act defines an extradition crime as "[c]onduct in the territory of a foreign state . . . which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, . . . is so punishable under that law." Extradition Act, *supra* note 184, § 2(1)(a).

221. Pinochet II, 38 I.L.M. at 582, 588. This ruling is consistent with the principle of double criminality, which requires that the conduct constitute a crime under the law of both the requesting and requested states. *Id.*

222. *Id.* at 613.

crimes charged against him.[223] The court reached this conclusion by analyzing the Convention against Torture in conjunction with the laws of the United Kingdom.[224] Section 134 of the U.K. Criminal Justice Act[225] effectuated the Convention against Torture, thus making it a crime under U.K. law for a public official to commit acts of torture.[226] Furthermore, the Criminal Justice Act made such acts an extra-territorial offense regardless of where they were committed or the nationality of the offender.[227] Although acts of torture were illegal under English common law prior to the enactment of the Criminal Justice Act, such acts were not extra-territorial offenses until after the act's enactment, and the act was not applied retroactively.[228] The court therefore found that Pinochet could not be extradited for acts of torture that occurred before 1988 unless they were committed in Spain or the United Kingdom.[229]

The court found that Pinochet could be extradited for acts of torture committed after 1988 when Section 134 of the Criminal Justice Act rendered torture an extra-territorial offense.[230] Almost all of the nearly 4000 alleged offenses, however, were committed during 1973 and 1974, leaving merely 130 offenses between 1977 and 1990, of which only three have been identified in the extradition request as having occurred after 1988.[231] These three isolated charges, therefore, are the only ones that are relevant to the question of whether Pinochet can claim immunity from criminal prosecution.[232]

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223. *Id.* at 589.

224. *Id.* at 617-18.

225. Criminal Justice Act 1988, ch. 33 (Eng.).

226. Pinochet II, 38 I.L.M. at 618.

227. *Id.*

228. *Id.* at 619.

229. *See id.* ("Senator Pinochet could only be extradited to Spain for such offences under reference to section 2(1)(a) of the Act of 1989 if he was accused of conduct in Spain which, if it occurred in the United Kingdom, would constitute an offence which would be punishable in this country.").

230. *Id.*

231. *Id.* at 620. The three crimes identified in the extradition request as having occurred after 1988 included one act of official torture in Chile on June 24, 1989, and two charges of conspiracy to commit torture extending from 1972 through 1990. *See id.* (noting that first conspiracy charge did not allege any acts in furtherance of conspiracy, but second conspiracy charge alleged acts of murder following torture in various countries, including Spain).

232. *Id.* at 621. The court noted that Chile is the only country that can put Pinochet on trial for all of the charges alleged against him. *Id.*

2. Immunity for Extradition Crimes

The court considered the question of immunity granted to a former head of state pursuant to the U.K. State Immunity Act of 1978.[233] It found that immunity was not limited with respect to acts performed in the exercise of official functions as head of state, whether performed inside or outside the state from which the sovereign claims immunity.[234] To determine whether the crimes alleged were considered official acts, it was necessary to decide whether they constituted private acts committed for Pinochet's own gratification, or governmental acts executed to promote the interests of the state.[235] If the acts were official functions of the government performed on behalf of the state, then the head of state would be protected from prosecution, with two exceptions.[236] The first exception applied to criminal acts committed pursuant to head of state authority which, ostensibly, were committed for the sovereign's own pleasure. The second exception related to crimes that violate *jus cogens*.[237] The court, however, found that even in the case of *jus cogens* violations, customary international law did not yet recognize that heads of state lose immunity from the jurisdiction of international courts.[238] A provision of an international convention must explicitly clarify a loss of immunity.[239]

A head of state can only waive immunity with an express waiver,[240] and the Convention against Torture does not contain

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233. *Id.*

234. *See id.* (distinguishing immunity that continues after official function ceases, or immunity *ratione materiae*, from immunity only enjoyed while still serving as head of state, or immunity *ratione personae*).

235. *Id.* at 622 (citing United States v. Noriega, 746 F. Supp. 1506, 1519-21 (S.D. Fla. 1990)).

236. *Id.*

237. *See id.* (explaining that *jus cogens* "compels all states to refrain from such conduct under any circumstances and imposes an obligation *erga omnes* to punish such conduct").

238. *Id.* at 623.

239. *Id.* at 622-23. The court based this conclusion on the analysis of Lord Slynn of Hadley in Pinochet I. 37 I.L.M. at 1313-14. Slynn stated that a provision of a convention clearly asserting that immunity is not granted is necessary, and such convention must be given the force of law in the United Kingdom through domestic legislation. *Id.*

240. Pinochet II, 38 I.L.M. at 623. The court based its conclusion that a waiver must be express upon the following analysis:

> Article 32.2 of the Vienna Convention, which forms part of the provisions in the Diplomatic Privileges Act 1964 which are extended to heads of state by section 20(1) of the Sovereign Immunity Act 1978, subject to "any necessary

a provision that expressly concerns denying immunity from allegations of torture.[241] The court nevertheless continued to consider whether the Convention denies immunity to a head of state facing charges of torture.[242] It recognized that Pinochet did not expressly waive his immunity, and that the Convention against Torture did not imply that former heads of state would be deprived of their immunity with regard to acts of official torture.[243] The court concluded, however, that by the time the Convention came into effect, customary international law had developed sufficiently so that individuals were held responsible for international criminal conduct.[244] Furthermore, because the Convention against Torture applies to state officials, a head of state cannot claim immunity for acts in violation of the Convention.[245] The court therefore held that Senator Pinochet does not have immunity for the isolated acts of torture committed after 1988.[246]

III. *THE* JUS COGENS *STATUS OF TORTURE RENDERS IT A CRIME SUBJECT TO UNIVERSAL JURISDICTION BEFORE THE UNITED KINGDOM'S ADOPTION OF THE CONVENTION AGAINST TORTURE*

The House of Lords properly held that Senator Pinochet did not have sovereign immunity for acts of torture he allegedly committed in Chile. The precedent of rejecting sovereign immunity for human rights violators,[247] coupled with the *jus cogens* nature of acts of torture,[248] indicate that there was no interna-

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modifications", states that waiver of the immunity accorded to diplomats "must always be express".

Id.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 626.

245. *Id.*

246. *See id.* at 595, 627, 641, 643, 663. Although the six Law Lords in the majority found that Pinochet has no immunity for certain alleged offenses, they each urged the Home Secretary to reconsider proceeding with the extradition because of the limited number of crimes subject to prosecution. *See id.* at 595, 627, 641, 643, 652, 663.

247. *See supra* notes 111-21 (discussing individual criminal responsibility for human rights violations).

248. *See supra* note 128 (specifying case law and scholarly analysis that recognize that torture is violation of *jus cogens*).

tional sovereign immunity for such acts. The House of Lords, however, improperly found that the Convention against Torture was the only means of granting universal jurisdiction. Senator Pinochet should be extradited to Spain to be prosecuted for all acts of torture committed between 1973 and 1990, and not merely for those acts committed after the United Kingdom's adoption of the Convention in 1988, because Spain does have universal jurisdiction over Pinochet.

A. *Sovereign Immunity Should Not Be Granted for* Jus Cogens *Violations*

The House of Lords properly recognized the *jus cogens* status of torture under international law, but erred in finding that an international convention must explicitly deny sovereign immunity when a sovereign violates a *jus cogens* principle. Sovereigns must be held accountable when they violate fundamental values of the international community. A *jus cogens* violation strips a sovereign of his or her immunity, regardless of the existence of a convention that explicitly denies immunity.[249] While commentators suggested various reasons for granting immunity even where *jus cogens* violations occur, none justify allowing individuals to be unaccountable for acts such as torture.

1. Denial of Sovereign Immunity for *Jus Cogens* Violations

A *jus cogens* violation strips a sovereign of his or her immunity because a sovereign constructively waives the privilege of immunity by committing such a violation. Dictators such as Pinochet cannot expect to commit atrocious crimes without being held accountable for their acts. The Nuremberg trials after World War II made the international community aware of individual criminal accountability.[250] The jurisdiction of post World War II trials was based on the inhumane nature of the acts committed.[251] Pinochet waived his immunity by committing violent

249. *See supra* notes 153-61 and accompanying text (listing justifications for denying immunity for *jus cogens* violations).

250. *See supra* note 98 and accompanying text (noting that Nuremberg crystallized international condemnation of persecution of civilians).

251. *See supra* note 81 and accompanying text (noting that jurisdiction in Eichmann's case was based on harmful effects of crimes on international community as whole).

acts of torture because he was aware of individual criminal responsibility for *jus cogens* violations prior to his acts of torture.

Additionally, a *jus cogens* violation is not a sovereign act worthy of protection from prosecution. Since sovereign status does not shield a head of state when torture is committed, Pinochet cannot be said to be acting within his sovereign authority. Because a *jus cogens* violation is theoretically illegal under the laws of every nation,[252] it is inconsistent for any domestic court to grant sovereign immunity to an individual facing such charges. Granting immunity was not intended to enable a sovereign to escape punishment. It is a significant legal right that states grant one another so that the sovereign may responsibly pursue his or her nation's mission without fear of adjudication.[253] An individual deserves the protection of immunity only in situations where he or she must be protected from prosecution in order to serve his or her country's needs. International law condemns the acts Pinochet committed. Thus, he cannot expect to be granted the rights that international law provides.

Finally, a court that grants immunity for a *jus cogens* violation essentially collaborates in the alleged offense. By granting Pinochet immunity for the crimes he committed before the United Kingdom's adoption of the Convention against Torture, the House of Lords sent a clear message to violators from nations that are not parties to the Convention, and to those that committed human rights violations before the adoption of the Convention, that the international community is turning a blind eye to continued and future impunity. The United Kingdom should have adhered to the law of *jus cogens* and treated Pinochet's atrocious acts of torture as an implicit waiver of sovereign immunity. Whether Chile, the United Kingdom, or Spain were a party to the Convention at the time of the alleged acts is irrelevant because torture constituted a *jus cogens* violation before the adoption of the Convention.

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252. *See supra* notes 130-32 and accompanying text (recognizing that *jus cogens* principles are highest rules of international law).

253. *See supra* notes 99-100 (stating that purpose of sovereign immunity is to allow sovereigns to act in nation's best interest without fear of being subject to adjudication).

2. No Proposition Justifies Granting Immunity for *Jus Cogens* Violations

While several reasons have been proposed for granting immunity even where *jus cogens* violations occur,[254] they do not justify waiving individual unaccountability for crimes such as torture. First, scholars suggest that sovereign immunity and the prohibition of torture are both *jus cogens* principles and therefore one cannot take precedence over the other.[255] This analysis is flawed, however, because while torture is an established violation of *jus cogens*,[256] sovereign immunity is granted to foreign sovereigns merely as a matter of grace and comity.[257] The prohibition of torture, therefore, trumps claims of sovereign immunity.

Additionally, commentators are concerned that limiting immunity for *jus cogens* violations, coupled with the ambiguous nature of *jus cogens* norms, creates a risk that courts will deny immunity for offenses that have not reached the requisite high status of a peremptory norm.[258] This risk is minimal, however, because a rule does not become *jus cogens* until the international community as a whole recognizes it as a rule that permits no derogation.[259] It would not be possible, therefore, for a state to label a violation as *jus cogens* at its own discretion in order to avoid immunity and prosecute an individual that has not violated an established peremptory norm.

Finally, scholars express concern that international relations will be disrupted if immunity is denied to sovereigns who commit *jus cogens* violations.[260] They note that a basic principle of

254. *See supra* notes 163-71 and accompanying text (noting reasons for granting sovereign immunity for *jus cogens* violations).

255. *Supra* note 168 and accompanying text.

256. *See supra* note 148 and accompanying text (discussing case law explicitly reaffirming torture as violation *jus cogens*).

257. *See supra* notes 101-02 and accompanying text (defining international comity as rules of politeness or convenience that states observe towards one another that are not legally binding, and recognizing that courts accept validity of acts of foreign states as matter of comity).

258. *See supra* notes 169-70 and accompanying text (discussing risk of denying immunity for *jus cogens* violations).

259. *See supra* notes 135-44 and accompanying text (stating that rule becomes peremptory norm of international law after becoming rule of customary law, which occurs when extensive and uniform practice of individual nations reveals willingness for rule to become law; customary norm becomes peremptory norm when international community as whole recognizes that norm permits no derogation).

260. *Supra* note 171 and accompanying text.

international law is equality among states, and that one sovereign does not have authority over another sovereign. This argument, however, fails to recognize the fundamental violation of international legal principles caused by the commission of crimes such as torture. A sovereign is stripped of his immunity when he or she commits a crime that affects the international community as a whole. Such crimes do not deserve the protection of sovereign immunity. Claims of immunity by *jus cogens* violators such as Senator Pinochet, therefore, should be denied.

B. *Universal Jurisdiction over Torture Existed Before the Adoption of the Convention against Torture*

The House of Lords improperly found that Pinochet can only be extradited for the crimes he committed after the United Kingdom's adoption of the Convention against Torture in 1988. Universal jurisdiction over acts of torture existed before the adoption of the Convention. Case law following World War II indicates that international crimes such as torture are subject to the jurisdiction of any nation, regardless of a lack of a nexus between the offender and the prosecuting state.[261] Additionally, other international conventions that encourage universal jurisdiction overwhelmingly involve *jus cogens* violations.[262] Customary international law recognizes universal jurisdiction for offenses involving *jus cogens* violations.[263] Thus, because torture is a *jus cogens* violation,[264] acts of torture are subject to universal jurisdiction, with or without the Convention against Torture.

Furthermore, and perhaps the most compelling argument that universal jursidiction existed before the enactment of the Convention against Torture, is that the aim of the Convention is not to outlaw torture, but rather to strengthen the already ex-

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261. *See supra* notes 68-86 and accompanying text (discussing application of universal jurisdiction over war crimes).

262. *E.g.*, Genocide Convention, *supra* note 19, art. VI, 102 Stat. at 3045, 78 U.N.T.S. at 278; International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted Nov. 30, 1973 (entered into force July 18, 1976), 1015 U.N.T.S. 245, arts. V, VI, *reprinted in* 13 I.L.M. 50 (1974).

263. *See supra* note 95 and accompanying text (recognizing universal jurisdiction over *jus cogens* violations).

264. *See supra* notes 146-49 and accompanying text (discussing case law and scholarly analyses recognizing status of torture as *jus cogens* violation).

isting anti-torture controls.[265] Torture was an international crime long before 1988 when the United Kingdom adopted the Convention and, as an international crime, individuals were subject to the jurisdiction of any national court.[266] Pinochet's acts between 1973 and 1988, therefore, should be treated identically to those committed after the Convention became binding in the United Kingdom.

CONCLUSION

The House of Lords erred in finding that the bulk of the crimes Pinochet committed during his seventeen-year dictatorship cannot be considered for extradition. Although the decision alerted the international community that individuals can and will be held responsible for violations of international law, the court was reluctant to do so itself. It should have subjected Pinochet to prosecution in Spain for all alleged offenses.

It is possible that the court was pressured by political considerations in reaching its decision. By denying sovereign immunity and at the same time urging the U.K. Home Secretary not to extradite Pinochet, Pinochet's critics and supporters both achieve positive outcomes. International human rights groups gain a precedent-setting case holding that individuals cannot circumvent punishment by claiming immunity, and Pinochet and his supporters benefit from the Law Lords' decision urging the Home Secretary not to extradite Pinochet. The House of Lords might also have been under pressure to reach a similar conclusion as the first panel of Law Lords so that the judicial system of the United Kingdom would not be internationally discredited as a result of inconsistent decisions.

Regardless of the motivation of the Law Lords, they decided the portion of the case regarding universal jurisdiction improperly. While the Lords were correct in denying immunity for the crimes allegedly committed after the adoption of the Convention against Torture, torture was widely recognized as a *jus cogens* violation and was condemned by the international community long before the existence of the Convention, and thus should be

265. *See supra* note 93 and accompanying text (explaining that international law prohibited torture prior to the enactment of the Convention against Torture).

266. *See supra* notes 56-86 and accompanying text (discussing generally universal jurisdiction).

prosecuted anytime and anywhere by any national court. No individual should be able to skirt punishment for committing atrocious acts like those committed during Senator Pinochet's regime.