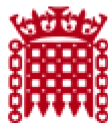

House of Lords

Judgment - Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division)

HOUSE OF LORDS

Lord Browne-Wilkinson Lord Goff of Chieveley Lord Hope of Craighead Lord Hutton Lord Saville of Newdigate Lord Millett Lord Phillips of Worth Matravers

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

REGINA

v.

BARTLE AND THE COMMISSIONER OF POLICE FOR THE METROPOLIS AND OTHERS
(APPELLANTS)
EX PARTE PINOCHET
(RESPONDENT)

REGINA

v.

EVANS AND ANOTHER AND THE COMMISSIONER OF POLICE FOR THE

METROPOLIS AND OTHERS
(APPELLANTS)
EX PARTE PINOCHET
(RESPONDENT)
(ON APPEAL FROM A DIVISIONAL COURT OF THE QUEEN'S BENCH DIVISION)

ON 24 March 1999

LORD BROWNE-WILKINSON

My Lords,

As is well known, this case concerns an attempt by the Government of Spain to extradite Senator Pinochet from this country to stand trial in Spain for crimes committed (primarily in Chile) during the period when Senator Pinochet was head of state in Chile. The interaction between the various legal issues which arise is complex. I will therefore seek, first, to give a short account of the legal principles which are in play in order that my exposition of the facts will be more intelligible.

Outline of the law

In general, a state only exercises criminal jurisdiction over offences which occur within its geographical boundaries. If a person who is alleged to have committed a crime in Spain is found in the United Kingdom, Spain can apply to the United Kingdom to extradite him to Spain. The power to extradite from the United Kingdom for an "extradition crime" is now contained in the Extradition Act 1989. That Act defines what constitutes an "extradition crime". For the purposes of the present case, the most important requirement is that the conduct complained of must constitute a crime under the law both of Spain and of the United Kingdom. This is known as the double criminality rule.

Since the Nazi atrocities and the Nuremberg trials, international law has recognised a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states. The most important of such international crimes for present purposes is torture which is regulated by the International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. The obligations placed on the United Kingdom by that Convention (and on the other 110 or more signatory states who have adopted the Convention) were incorporated into the law of the United Kingdom by section 134 of the Criminal Justice Act 1988. That Act came into force on 29 September 1988. Section 134 created a new crime under United Kingdom law, the crime of torture. As required by the Torture Convention "all" torture wherever committed world-wide was made criminal under United Kingdom law and triable in the United Kingdom. No one has suggested that before section 134 came into effect torture committed outside the United Kingdom was a crime under United Kingdom law. Nor is it suggested that section 134 was retrospective so as to make torture committed outside the United Kingdom before 29 September 1988 a United Kingdom crime. Since torture outside the United Kingdom was not a crime under U.K. law until 29 September 1988, the principle of double criminality which requires an Act to be a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before that date if the principle of double criminality requires the conduct to be criminal under United Kingdom law *at the date it was*

committed. If, on the other hand, the double criminality rule only requires the conduct to be criminal under U.K. law *at the date of extradition* the rule was satisfied in relation to all torture alleged against Senator Pinochet whether it took place before or after 1988. The Spanish courts have held that they have jurisdiction over all the crimes alleged.

In these circumstances, the first question that has to be answered is whether or not the definition of an "extradition crime" in the Act of 1989 requires the conduct to be criminal under U.K. law at the date of commission or only at the date of extradition.

This question, although raised, was not decided in the Divisional Court. At the first hearing in this House it was apparently conceded that all the matters charged against Senator Pinochet were extradition crimes. It was only during the hearing before your Lordships that the importance of the point became fully apparent. As will appear, in my view only a limited number of the charges relied upon to extradite Senator Pinochet constitute extradition crimes since most of the conduct relied upon occurred long before 1988. In particular, I do not consider that torture committed outside the United Kingdom before 29 September 1988 was a crime under U.K. law. It follows that the main question discussed at the earlier stages of this case--is a former head of state entitled to sovereign immunity from arrest or prosecution in the U.K. for acts of torture--applies to far fewer charges. But the question of state immunity remains a point of crucial importance since, in my view, there is certain conduct of Senator Pinochet (albeit a small amount) which does constitute an extradition crime and would enable the Home Secretary (if he thought fit) to extradite Senator Pinochet to Spain unless he is entitled to state immunity. Accordingly, having identified which of the crimes alleged is an extradition crime, I will then go on to consider whether Senator Pinochet is entitled to immunity in respect of those crimes. But first I must state shortly the relevant facts.

The facts

On 11 September 1973 a right-wing coup evicted the left-wing regime of President Allende. The coup was led by a military junta, of whom Senator (then General) Pinochet was the leader. At some stage he became head of state. The Pinochet regime remained in power until 11 March 1990 when Senator Pinochet resigned.

There is no real dispute that during the period of the Senator Pinochet regime appalling acts of barbarism were committed in Chile and elsewhere in the world: torture, murder and the unexplained disappearance of individuals, all on a large scale. Although it is not alleged that Senator Pinochet himself committed any of those acts, it is alleged that they were done in pursuance of a conspiracy to which he was a party, at his instigation and with his knowledge. He denies these allegations. None of the conduct alleged was committed by or against citizens of the United Kingdom or in the United Kingdom.

In 1998 Senator Pinochet came to the United Kingdom for medical treatment. The judicial authorities in Spain sought to extradite him in order to stand trial in Spain on a large number of charges. Some of those charges had links with Spain. But most of the charges had no connection with Spain. The background to the case is that to those of left-wing political convictions Senator Pinochet is seen as an arch-devil: to those of right-wing persuasions he is seen as the saviour of Chile. It may well be thought that the trial of Senator Pinochet in Spain for offences all of which related to the state of Chile and most of which occurred in Chile is not calculated to achieve the best justice. But I cannot emphasise too strongly that that is no concern of your Lordships. Although others perceive our task as being to choose between the

two sides on the grounds of personal preference or political inclination, that is an entire misconception. Our job is to decide two questions of law: are there any extradition crimes and, if so, is Senator Pinochet immune from trial for committing those crimes. If, as a matter of law, there are no extradition crimes or he is entitled to immunity in relation to whichever crimes there are, then there is no legal right to extradite Senator Pinochet to Spain or, indeed, to stand in the way of his return to Chile. If, on the other hand, there are extradition crimes in relation to which Senator Pinochet is not entitled to state immunity then it will be open to the Home Secretary to extradite him. The task of this House is only to decide those points of law.

On 16 October 1998 an international warrant for the arrest of Senator Pinochet was issued in Spain. On the same day, a magistrate in London issued a provisional warrant ("the first warrant") under section 8 of the Extradition Act 1989. He was arrested in a London hospital on 17 October 1998. On 18 October the Spanish authorities issued a second international warrant. A further provisional warrant ("the second warrant") was issued by the magistrate at Bow Street Magistrates Court on 22 October 1998 accusing Senator Pinochet of:

> "(1) Between 1 January 1988 and December 1992 being a public official intentionally inflicted severe pain or suffering on another in the performance or purported performance of his official duties;
>
> (2) Between the first day of January 1988 and 31 December 1992 being a public official, conspired with persons unknown to intentionally inflict severe pain or suffering on another in the performance or purported performance of his official duties;
>
> (3) Between the first day of January 1982 and 31 January 1992 he detained other persons (the hostages) and in order to compel such persons to do or to abstain from doing any act threatened to kill, injure or continue to detain the hostages;
>
> (4) Between the first day of January 1982 and 31 January 1992 conspired with persons unknown to detain other persons (the hostages) and in order to compel such persons to do or to abstain from doing any act, threatened to kill, injure or continue to detain the hostages;
>
> (5) Between January 1976 and December 1992 conspired together with persons unknown to commit murder in a Convention country."

Senator Pinochet started proceedings for habeas corpus and for leave to move for judicial review of both the first and the second provisional warrants. Those proceedings came before the Divisional Court (Lord Bingham of Cornhill C.J., Collins and Richards JJ.) which on 28 October 1998 quashed both warrants. Nothing turns on the first warrant which was quashed since no appeal was brought to this House. The grounds on which the Divisional Court quashed the second warrant were that Senator Pinochet (as former head of state) was entitled to state immunity in respect of the acts with which he was charged. However, it had also been argued before the Divisional Court that certain of the crimes alleged in the second warrant were not "extradition crimes" within the meaning of the Act of 1989 because they were not crimes under U.K. law at the date they were committed. Whilst not determining this point directly, the Lord Chief Justice held that, in order to be an extradition crime, it was not necessary that the conduct should be criminal at the date of the conduct relied upon but only at the date of request for extradition.

The Crown Prosecution Service (acting on behalf of the Government of Spain) appealed to this House with the leave of the Divisional Court. The Divisional Court certified the point of law of general importance as being "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." Before the appeal came on for hearing in this House for the first time, on 4 November 1998 the Government of Spain submitted a formal Request for Extradition which greatly expanded the list of crimes alleged in the second provisional warrant so as to allege a widespread conspiracy to take over the Government of Chile by a coup and thereafter to reduce the country to submission by committing genocide, murder, torture and the taking of hostages, such conduct taking place primarily in Chile but also elsewhere.

The appeal first came on for hearing before this House between 4 and 12 November 1998. The Committee heard submissions by counsel for the Crown Prosecution Service as appellants (on behalf of the Government of Spain), Senator Pinochet, Amnesty International as interveners and an independent amicus curiae. Written submissions were also entertained from Human Rights Watch. That Committee entertained argument based on the extended scope of the case as put forward in the Request for Extradition. It is not entirely clear to what extent the Committee heard submissions as to whether all or some of those charges constituted "extradition crimes". There is some suggestion in the judgments that the point was conceded. Certainly, if the matter was argued at all it played a very minor role in that first hearing. Judgment was given on 25 November 1998 (see [1998] 3 W.L.R. 1456). The appeal was allowed by a majority (Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann, Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) on the grounds that Senator Pinochet was not entitled to immunity in relation to crimes under international law. On 15 January 1999 that judgment of the House was set aside on the grounds that the Committee was not properly constituted: see [1999] 2 W.L.R. 272. The appeal came on again for rehearing on 18 January 1999 before your Lordships. In the meantime the position had changed yet again. First, the Home Secretary had issued to the magistrate authority to proceed under section 7 of the Act of 1989. In deciding to permit the extradition to Spain to go ahead he relied in part on the decision of this House at the first hearing that Senator Pinochet was not entitled to immunity. He did not authorise the extradition proceedings to go ahead on the charge of genocide: accordingly no further arguments were addressed to us on the charge of genocide which has dropped out of the case.

Secondly, the Republic of Chile applied to intervene as a party. Up to this point Chile had been urging that immunity should be afforded to Senator Pinochet, but it now wished to be joined as a party. Any immunity precluding criminal charges against Senator Pinochet is the immunity not of Senator Pinochet but of the Republic of Chile. Leave to intervene was therefore given to the Republic of Chile. The same amicus, Mr. Lloyd Jones, was heard as at the first hearing as were counsel for Amnesty International. Written representations were again put in on behalf of Human Rights Watch.

Thirdly, the ambit of the charges against Senator Pinochet had widened yet again. Chile had put in further particulars of the charges which they wished to advance. In order to try to bring some order to the proceedings, Mr. Alun Jones Q.C., for the Crown Prosecution Service, prepared a schedule of the 32 U.K. criminal charges which correspond to the allegations made against Senator Pinochet under Spanish law, save that the genocide charges are omitted. The charges in that schedule are fully analysed and considered in the speech of my noble and learned friend, Lord Hope of Craighead who summarises the charges as follows:

Charges 1, 2 and 5: conspiracy to torture between 1 January 1972 and 20 September 1973 and between 1 August 1973 and 1 January 1990;

Charge 3: conspiracy to take hostages between 1 August 1973 and 1 January 1990;

Charge 4: conspiracy to torture in furtherance of which murder was committed in various countries including Italy, France, Spain and Portugal, between 1 January 1972 and 1 January 1990.

Charges 6 and 8: torture between 1 August 1973 and 8 August 1973 and on 11 September 1973.

Charges 9 and 12: conspiracy to murder in Spain between 1 January 1975 and 31 December 1976 and in Italy on 6 October 1975.

Charges 10 and 11: attempted murder in Italy on 6 October 1975.

Charges 13-29; and 31-32: torture on various occasions between 11 September 1973 and May 1977.

Charge 30: torture on 24 June 1989.

I turn then to consider which of those charges are extradition crimes.

Extradition Crimes

As I understand the position, at the first hearing in the House of Lords the Crown Prosecution Service did not seek to rely on any conduct of Senator Pinochet occurring before 11 September 1973 (the date on which the coup occurred) or after 11 March 1990 (the date when Senator Pinochet retired as head of state). Accordingly, as the case was then presented, if Senator Pinochet was entitled to immunity such immunity covered the whole period of the alleged crimes. At the second hearing before your Lordships, however, the Crown Prosecution Service extended the period during which the crimes were said to have been committed: for example, see charges 1 and 4 where the conspiracies are said to have started on 1 January 1972, i.e. at a time before Senator Pinochet was head of state and therefore could be entitled to immunity. In consequence at the second hearing counsel for Senator Pinochet revived the submission that certain of the charges, in particular those relating to torture and conspiracy to torture, were not "extradition crimes" because *at the time the acts were done* the acts were not criminal under the law of the United Kingdom. Once raised, this point could not be confined simply to the period (if any) before Senator Pinochet became head of state. If the double criminality rule requires it to be shown that at the date of the conduct such conduct would have been criminal under the law of the United Kingdom, any charge based on torture or conspiracy to torture occurring before 29 September 1988 (when section 134 of the Criminal Justice Act came into force) could not be an "extradition crime" and therefore could not in any event found an extradition order against Senator Pinochet.

Under section 1(1) of the Act of 1989 a person who is accused of an "extradition crime" may be arrested and returned to the state which has requested extradition. Section 2 defines "extradition crime" so far as relevant as follows:

> "(1) In this Act, except in Schedule 1, 'extradition crime' means -
>
> > (a) conduct in the territory of a foreign state, a designated Commonwealth country or a colony 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, Commonwealth country or colony, is so punishable under that law;
> >
> > (b) an extra-territorial offence against the law of a foreign state, designated Commonwealth country or colony which is punishable under that law with imprisonment for a term of 12 months, or any greater punishment, and which satisfies -
> >
> > (i) the condition specified in subsection (2) below; or
> >
> > (ii) all the conditions specified in subsection (3) below.
>
> "(2) The condition mentioned in subsection (1)(b)(i) above is that in corresponding circumstances equivalent conduct would constitute an extra-territorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.
>
> "(3) The conditions mentioned in subsection (1)(b)(ii) above are -
>
> > (a) that the foreign state, Commonwealth country or colony bases its jurisdiction on the nationality of the offender;
> >
> > (b) that the conduct constituting the offence occurred outside the United Kingdom; and
> >
> > (c) that, if it occurred in the United Kingdom, it would constitute an offence under the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment."

The question is whether the references to conduct "which, if it occurred in the United Kingdom, would constitute an offence" in section 2(1)(a) and (3)(c) refer to a hypothetical occurrence which took place at the date of the request for extradition ("the request date") or the date of the actual conduct ("the conduct date"). In the Divisional Court, the Lord Chief Justice (at p. 20 of the Transcript) held that the words required the acts to be criminal only at the request date. He said:

> "I would however add on the retrospectivity point that the conduct alleged against the subject of the request need not in my judgment have been criminal here at the time the alleged crime was committed abroad. There is nothing in section 2 which so provides. What is necessary is that at the time of the extradition request the offence should be a criminal offence here and that it should then be punishable with 12 months imprisonment or more. Otherwise section 2(1)(a) would have referred to conduct which would at the relevant time 'have constituted' an offence and section 2(3)(c) would have said 'would have constituted'. I therefore reject this argument."

Lord Lloyd (who was the only member of the Committee to express a view on this point at the first hearing) took the same view. He said at p. 1481:

> "But I agree with the Divisional Court that this argument is bad. It involves a misunderstanding of section 2 of the Extradition Act 1989. Section 2(1)(a) refers to conduct which *would* constitute an offence in the United Kingdom *now*. It does not refer to conduct which *would* have constituted an offence *then*."

My Lords, if the words of section 2 are construed in isolation there is room for two possible views. I agree with the Lord Chief Justice and Lord Lloyd that, if read in isolation, the words "if it occurred . . . would constitute" read more easily as a reference to a hypothetical event happening now, i.e. at the request date, than to a past hypothetical event, i.e. at the conduct date. But in my judgment the right construction is not clear. The word "it" in the phrase "if it occurred . . ." is a reference back to the actual conduct of the individual abroad which, by definition, is a past event. The question then would be "would that past event (including the date of its occurrence) constitute an offence under the law of the United Kingdom." The answer to that question would depend upon the United Kingdom law at that date.

But of course it is not correct to construe these words in isolation and your Lordships had the advantage of submissions which strongly indicate that the relevant date is the conduct date. The starting point is that the Act of 1989 regulates at least three types of extradition.

First, extradition to a Commonwealth country, to a colony or to a foreign country which is not a party to the European Convention on Extradition. In this class of case (which is not the present one) the procedure under Part III of the Act of 1989 requires the extradition request to be accompanied by evidence sufficient to justify arrest under the Act: section 7(2)(b). The Secretary of State then issues his authority to proceed which has to specify the offences under U.K. law which "would be constituted by equivalent conduct in the United Kingdom": section 7(5). Under section 8 the magistrate is given power to issue a warrant of arrest if he is supplied with such evidence "as would in his opinion justify the issue of a warrant for the arrest of a person accused": section 8(3). The committal court then has to consider, amongst other things, whether "the evidence would be sufficient to warrant his trial if the extradition crime *had* taken place within jurisdiction of the court" (emphasis added): section 9(8). In my judgment these provisions clearly indicate that the conduct must be criminal under the law of the United Kingdom at the conduct date and not only at the request date. The whole process of arrest and committal leads to a position where under section 9(8) the magistrate has to be satisfied that, under the law of the United Kingdom, if the conduct "*had* occurred" the evidence was sufficient to warrant his trial. This is a clear reference to the position at the date when the conduct in fact occurred. Moreover, it is in my judgment compelling that the evidence which the magistrate has to consider has to be sufficient "to warrant his trial". Here what is under consideration is not an abstract concept whether a hypothetical case is criminal but of a hard practical matter--would this case in relation to this defendant be properly committed for trial if the conduct in question had happened in the United Kingdom? The answer to that question must be "no" unless at that date the conduct was criminal under the law of the United Kingdom.

The second class of case dealt with by the Act of 1989 is where extradition is sought by a foreign state which, like Spain, is a party to the European Extradition Convention. The requirements applicable in such a case are the same as those I have dealt with above in relation to the first class of case save that the requesting state does not have to present

evidence to provide the basis on which the magistrate can make his order to commit. The requesting state merely supplies the information. But this provides no ground for distinguishing Convention cases from the first class of case. The double criminality requirement must be the same in both classes of case.

Finally, the third class of case consists of those cases where there is an Order in Council in force under the Extradition Act 1870. In such cases, the procedure is not regulated by Part III of the Act of 1989 but by Schedule I to the Act of 1989: see section 1(3). Schedule I contains, in effect, the relevant provisions of the Act of 1870, which subject to substantial amendments had been in force down to the passing of the Act of 1989. The scheme of the Act of 1870 was to define "extradition crime" as meaning "a crime which, if committed in England . . . would be one of the crimes described in the first schedule to this Act": section 26. The first schedule to the Act of 1870 contains a list of crimes and is headed:

> "The following list of crimes is to be construed according to the law existing in England . . . *at the date of the alleged crime*, whether by common law or by statute made before or after the passing of this Act." (emphasis added)

It is therefore quite clear from the words I have emphasised that under the Act of 1870 the double criminality rule required the conduct to be criminal under English law at the conduct date not at the request date. Paragraph 20 of Schedule 1 to the Act of 1989 provides:

> "'extradition crime', in relation to any foreign state, is to be construed by reference to the Order in Council under section 2 of the Extradition Act 1870 applying to that state as it had effect immediately before the coming into force of this Act and to any amendments thereafter made to that Order;"

Therefore in this class of case regulated by Schedule 1 to the Act of 1989 the same position applies as it formerly did under the Act of 1870, i.e. the conduct has to be a crime under English law at the conduct date. It would be extraordinary if the same Act required criminality under English law to be shown at one date for one form of extradition and at another date for another. But the case is stronger than that. We were taken through a trawl of the travaux preparatoires relating to the Extradition Convention and the departmental papers leading to the Act of 1989. They were singularly silent as to the relevant date. But they did disclose that there was no discussion as to changing the date on which the criminality under English law was to be demonstrated. It seems to me impossible that the legislature can have intended to change that date from the one which had applied for over a hundred years under the Act of 1870 (i.e. the conduct date) by a side wind and without investigation.

The charges which allege extradition crimes

The consequences of requiring torture to be a crime under U.K. law at the date the torture was committed are considered in Lord Hope's speech. As he demonstrates, the charges of torture and conspiracy to torture relating to conduct before 29 September 1988 (the date on which section 134 came into effect) are not extraditable, i.e. only those parts of the conspiracy to torture alleged in charge 2 and of torture and conspiracy to torture alleged in charge 4 which relate to the period after that date and the single act of torture alleged in charge 30 are extradition crimes relating to torture.

Lord Hope also considers, and I agree, that the only charge relating to hostage-taking (charge

3) does not disclose any offence under the Taking of Hostages Act 1982. The statutory offence consists of taking and detaining a person (the hostage), so as to compel someone who is not the hostage to do or abstain from doing some act: section 1. But the only conduct relating to hostages which is charged alleges that the person detained (the so-called hostage) was to be forced to do something by reason of threats to injure other non-hostages which is the exact converse of the offence. The hostage charges therefore are bad and do not constitute extradition crimes.

Finally, Lord Hope's analysis shows that the charge of conspiracy in Spain to murder in Spain (charge 9) and such conspiracies in Spain to commit murder in Spain, and such conspiracies in Spain prior to 29 September 1988 to commit acts of torture in Spain, as can be shown to form part of the allegations in charge 4 are extradition crimes.

I must therefore consider whether, in relation to these two surviving categories of charge, Senator Pinochet enjoys sovereign immunity. But first it is necessary to consider the modern law of torture.

Torture

Apart from the law of piracy, the concept of personal liability under international law for international crimes is of comparatively modern growth. The traditional subjects of international law are states not human beings. But consequent upon the war crime trials after the 1939-45 World War, the international community came to recognise that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity. Although there may be legitimate doubts as to the legality of the Charter of the Nuremberg Tribunal, in my judgment those doubts were stilled by the Affirmation of the Principles of International Law recognised by the Charter of Nuremberg Tribunal adopted by the United Nations General Assembly on 11 December 1946. That Affirmation affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal and directed the Committee on the codification of international law to treat as a matter of primary importance plans for the formulation of the principles recognised in the Charter of the Nuremberg Tribunal. At least from that date onwards the concept of personal liability for a crime in international law must have been part of international law. In the early years state torture was one of the elements of a war crime. In consequence torture, and various other crimes against humanity, were linked to war or at least to hostilities of some kind. But in the course of time this linkage with war fell away and torture, divorced from war or hostilities, became an international crime on its own: see *Oppenheim's International Law* (Jennings and Watts edition) vol. 1, 996; note 6 to Article 18 of the *I.L.C. Draft Code of Crimes Against Peace*; *Prosecutor v. Furundzija* Tribunal for Former Yugoslavia, Case No. 17-95-17/1-T. Ever since 1945, torture on a large scale has featured as one of the crimes against humanity: see, for example, U.N. General Assembly Resolutions 3059, 3452 and 3453 passed in 1973 and 1975; Statutes of the International Criminal Tribunals for former Yugoslavia (Article 5) and Rwanda (Article 3).

Moreover, the Republic of Chile accepted before your Lordships that the international law prohibiting torture has the character of jus cogens or a peremptory norm, i.e. one of those rules of international law which have a particular status. In *Furundzija (supra)* at para. 153, the Tribunal said:

> "Because of the importance of the values it protects, [the prohibition of torture] has

> evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force. . . . Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate." (See also the cases cited in Note 170 to the *Furundzija* case.)

The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished by any state because the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution": *Demjanjuk v. Petrovsky* (1985) 603 F. Supp. 1468; 776 F. 2d. 571.

It was suggested by Miss Montgomery, for Senator Pinochet, that although torture was contrary to international law it was not strictly an international crime in the highest sense. In the light of the authorities to which I have referred (and there are many others) I have no doubt that long before the Torture Convention of 1984 state torture was an international crime in the highest sense.

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