Augusto Pinochet and the pursuit of justice for violations of human rights – implications for international law and Hong Kong

Saturday, 24 April 1999
9:30 a.m. -- 12 noon
Jury Assembly Room
High Court
38 Queensway
HONG KONG

a panel discussion jointly organised by the

International Law Association (HK Chapter)

and the

Centre for Comparative and Public Law

Faculty of Law, The University of Hong Kong

Programme

Chair: The Hon Mr Justice Godfrey JA, President of the Hong Kong Chapter of the International Law Association

Panelists:

- Professor Roda Mushkat, Faculty of Law, The University of Hong Kong
- Mr Gnanapragasam Devadass, Regional Development Coordinator, Amnesty International Asia-Pacific Regional Office
- Mr Christopher Newall, international lawyer, expert in extradition and mutual legal assistance issues
- Associate Professor Andrew Byrnes, Faculty of Law, The University of Hong Kong

International Law Association
(Hong Kong Chapter)

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Further details about the Association can be obtained from the ILA's website: http://www.ila-hq.org.

Further information about the Hong Kong Chapter of the ILA can be obtained from Andrew Byrnes, Hon. Secretary, on tel 2859 2942, (fax) 25593543, or (email) abyrnes@hkusua.hku.hk.

A membership application form appears overleaf.

International Law Association
(Hong Kong Chapter)

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Please return this form, together with a cheque for HK$500 (the membership fee for 1999-2000), to: Andrew Byrnes, Hon. Secretary, International Law (Hong Kong Chapter) Faculty of Law, University of Hong Kong, Hong Kong; fax (852) 2559 3543, email: abyrnes@hkusua.hku.hk. Cheques should be made payable to "International Law Association (Hong Kong Chapter)".

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AUGUSTO PINOCHET AND THE PURSUIT OF JUSTICE FOR VIOLATIONS OF HUMAN RIGHTS - IMPLICATIONS FOR INTERNATIONAL LAW AND HONG KONG

A Panel Discussion
Jointly organised by the
International Law Association (HK Chapter) and
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24 April 1999

Presentation by Professor Roda Mushkat,
Faculty of Law, University of Hong Kong

An Outline

I. **A brief critical overview of the House of Lords' ruling of 24 March 1999.**

II. **Pinochet Case: the Broader Picture**

"Globalisation" of justice

The responsibility for bringing heads of state to account for gross human rights violations

- **An international legal duty**
- **Implementation**
- **The appropriate forum**
  - **The courts of the apprehending state?**
  - **The courts of the home state?**
  - **An international criminal tribunal?**

A "new dawn" for international law?

III. **Implications for Hong Kong**

FYI see handouts:

The Pinochet Case: Legal Chronicles
The Pinochet Case: Key Issues in the English Courts

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THE PINOCHET CASE: LEGAL CHRONICLES

22 October 1998	**Pinochet arrested (while in UK receiving medical treatment) on the execution of two provisional warrants (dated 16 & 22 October 1998) issued by Bow Street Metropolitan Magistrate, pursuant to international warrants issued by Spanish judicial authorities.**
28 October 1998	**Order of certiorari by the Queen's Bench Divisional Court** (Lord Bingham of Cornhill CJ, Collins and Richards JJ) **to quash the above warrnts on the ground of no jurisdiction by reason of immunity; the quashing of warrant of 23 October is stayed - to enable an appeal to be taken to the House of Lords on a point of law of general public importance, formulated as follows:** ***the proper interpretation and scope of the immunity enjoyed by a former head of state for arrest and extradition proceedings in the UK in respect of acts committed while he was head of State.***
	Pinochet is released from custody on bail.
25 November 1998	**House of Lords ruling by three to two** (Lord Nicholls of Birkenhead, Lord Steyn, Lord Hoffmann concurring with Lords Nicholls and Steyn, with Lord Slynn of Hedley and Lord Lloyd of Berwick dissenting) **that a former head of state had no immunity in respect of acts of torture made crimes by Section 134(1) of the Criminal Justice Act 1988 or acts of hostage-taking made criminal in the UK by the Taking of Hostages Act 1982.**
10 December 1998	**Home Secretary's authority to go ahead with extradition proceedings at the request of the Spanish government under Section 7(4) of the Extradition Act 1989; [Reasons: UK had jurisdiction for offences equivalent to those set out in the Spanish request; the House of Lords decision that there was no immunity; the offences charged were not of a political character; Also taken into account – passage of time; humanitarian considerations ("it would not be unjust or oppressive for him to stand trial"); stability of Chile; pending proceedings in Chile]**

17 December 1998	**House of Lords decision** (Lords Goff of Chieveley, Nolan, Hope of Craighead and Hutton with Lord Browne-Wilkinson presiding) **to allow an application on behalf of Pinochet to set aside the House of Lords Order of 25 November 1998, for reasons that the links between a member of the Appellate Committee, Lord Hoffmann and Amnesty International (which was joined as an intervenor and appeared by counsel before the Appellate Committee) were such as to give the appearance that he might have been biased against Pinochet.**
24 March 1999	**Appeal by the Commissioner of Police and the Government of Spain from the decision of the Queen's Bench Divisional Court allowed in part by the House of Lords** (Lords Browne-Wilkinson, Goff of Chieveley, Hope of Craighead, Hutton, Saville of Newdigate, Millet, Phillips of Worth Matravers). **Held** (Lords Goff and Millet dissenting in part): **A former head of state of a country which ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 had no immunity from extradition from the UK to a third country for acts of torture committed in his own country while he was head of State after the date when the Convention came into effect in all these countries.** **For an offence to be extraditable under section 2 of the Extradition Act 1989, it must have been criminal offence punishable under English law at the time it was allegedly committed.** **As acts of torture committed extra-territorially did not become punishable under English law until section 134 of the Criminal Justice 1988, acts of torture committed outside the requesting State prior to that date were not extraditable.**
15 April 1999	**Home Secretary's decision to allow extradition proceedings against Pinochet to go ahead (in respect of offences of torture and conspiracy to torture which are alleged to have taken place after 8 December 1988).**

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THE PINOCHET CASE:
KEY ISSUES IN THE ENGLISH COURTS

Immunity from jurisdiction enjoyed by a former Head of State

- **Sovereign/State immunity**
- **Immunity *ratione personae*; immunity *ratione materiae***
- **The extent of immunity enjoyed by former head of state**

Extradition Crimes

- **The "double criminality rule"**
- **Whether "extradition crime" in Extradition Act 1989 requires the conduct to be criminal under UK law at the *date of commission* or only a the *date of extradition***

Universal Jurisdiction

THE LORDS' OPINIONS
[Judgment of 24 March 1999]

Sovereign/State immunity:

[per Lord Browne-Wilkinson]

"It was a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state was entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability... The head of state is entitled to the same immunity as the state itself... immunity enjoyed by a head of state in power...is a complete immunity attaching to the person of the head of state...rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted *ratione personae*."

A former head of state continues to enjoy immunity *ratione materiae* in respect of acts committed in the exercise of his functions as head of State.

[This is based on the interpretation of section 20 of the State Immunity Act 1978 and Article 39(2) of the Vienna Convention on Diplomatic Relations 1961 incorporated therein; section 20(1) provides:
"Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to – (a) a sovereign or other head of state... as it applies to a head of a diplomatic mission..."
Article 39(2) provides:
"(2) When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."]

The extent of the continuing immunity of a former head of state

[per majority]

Immunity extended to functions which the head of state performed outside the state from whose jurisdiction he claims immunity.

No immunity could extend *ratione materiae* in respect of torture, which is considered an international crime under the Torture Convention

[per Lord Goff - dissenting]

State immunity *ratione materiae* has not been excluded under the Torture Convention.

The relevance of the 1988 date to the question of immunity

Immunity enjoyed by the former head of state was lost on the day the Torture Convention was ratified (by the three concerned countries), since

> "not until there was some form of universal jurisdiction for punishment of the crime of torture could it really be talked about as a fully constituted international crime." [per Lord Browne-Wilkinson]

> "Once the machinery which the Torture Convention provided was put in place to enable jurisdiction over such crimes to be exercised in the courts of a foreign state, it was no longer open to any state which was a signatory to the Convention to invoke the immunity ratione materiae in the event of allegations of systematic or widespread torture committed after that date being made in the courts of that state against its officials or any other person acting in an official capacity." [per Lord Hope]

But per Lord Millet:

> "the systematic use of torture on a large scale and as instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984...it had done so by 1973... The Convention against Torture (1984) did not create a new international crime. But it redefined it..."

Extradition Crimes

The "double criminality" rule

"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.*" [per Lord Browne-Wilkinson]

Criminal under UK law at the "request date" or "conduct date"?

"The expression "extradition crime" in section 2 of the Act of 1989 requires the conduct which is referred to in section 2(1)(a) to have been an offence which was punishable in the United Kingdom *when that conduct took place.* [per Lord Hope agreeing with reasons given by Lord Browne-Wilkinson for such a construction]

Consequently,

"the only charges which allege extradition crimes for which senator Pinochet could be extradited to Spain if he has no immunity are: (a) those charges of torture and conspiracy to torture which irrespective of where the conduct occurred, became extra-territorial offences as from September 29, 1988 under section 134 of the 1988 Act and under the common law as to extra-territorial conspiracies; (b) the alleged conspiracies in Spain to commit murder in Spain and conspiracies in Spain prior to September 29, 1988 to commit acts of torture in Spain. So far as the law of the United Kingdom is concerned, the only country where Senator Pinochet could be put on trial for the full range of the offences which have been alleged against him by the Spanish judicial authorities was Chile." [per Lord Hope]

Universal jurisdiction

[All Lords agreed that]

> "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'." [Lord Browne-Wilkinson]

Yet,

Statutory authority is required before English courts can exercise extra-territorial criminal jurisdiction even in respect of crimes of universal jurisdiction.

[Lord Millet disagreed]

"Every state has jurisdiction under customary international law to exercise extra-territorial jurisdiction in respect of international crimes which satisfy the relevant criteria [First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order]. Whether its courts have extra-territorial jurisdiction under its internal domestic law depends, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts. The jurisdiction of the English criminal courts is usually statutory, but it is supplemented by the common law. Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extra-territorial jurisdiction in respect of crimes of universal jurisdiction under customary international law.
For my own part. I would hold that [in 1973] the courts of this country already possessed extra-territorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it."

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Augusto Pinochet and the pursuit of justice for violations of human rights – implications for international law and Hong Kong

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"IF SENATOR PINOCHET HAD COME TO TOWN ..."

Presentation by Andrew Byrnes,
Faculty of Law, The University of Hong Kong

OUTLINE

Consider the hypothetical case of a request for the extradition of Senator Pinochet made by Spain to the Hong Kong SAR government in relation to alleged systematic torture occurring in Chile in the years 1973-1990.

The different dimensions of an extradition request

- International law obligation
- Hong Kong law complied with
- Political and other discretionary dimensions of a decision to extradite

International law

A. Existence of a binding treaty or other obligation to extradite in respect of the torture alleged

1. The UN Convention against Torture

Only relevant obligation would arise under the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984: ratified by Spain on 21 October 1987, by Chile on 30 September 1988, by China on 4 October 1988 and extended to Hong Kong by the United Kingdom with effect from 9 December 1992.

Article 4 requires States Parties to make torture, wherever it occurs, a criminal offence under their domestic law, while Article 5 requires a State Party to ensure that it can exercise jurisdiction over extraterritorial offences if an alleged offender is not extradited to another State Party. Article 8 requires, rather elliptically, States Parties to take steps to ensure that an alleged torturer can be extradited to State Party requesting his/her return, and provides that the Convention may provide the basis for such an obligation if that is required. See attachment A. (Not clear which paragraph of Article 8 covers Hong Kong's case – is/was extradition from Hong Kong conditional on the existence of a treaty? What is the status of "arrangements under the Fugitive Offenders Ordinance?)

2. Allegations of torture and associated offences for which the fugitive would bear individual criminal responsibility under international law

"Torture" is defined in article 1 of the Convention, and the Convention requires criminalisation of related offences (attempt, complicity, etc). It would be necessary to allege facts which showed that the fugitive had himself perpetrated torture, or instigated it, or bore some other form of accessory liability for torture carried out by others (see *Prosecutor v Anto Furundzija*, IT-95-17/1-T 10, ICTY, Trial Chamber, Judgment of 10 December 1998, (1999) 38 ILM 317, especially at paras. 250-257)

3. Temporal application of the Torture Convention

Does the Torture Convention require a State Party to grant extradition in respect of alleged offences of torture which took place prior to the entry into force of the Convention between the requesting State (Spain) and the requested State (Hong Kong), namely 9 December 1992?

Probably not: see *O.R., M.M., and M.S. v Argentina*, UN Committee against Torture, Comms. Nos. 1/1988, 2/1988, and 3/1988, A/45/44, Annex V, 108 at 112, para. 9 (1990); 11 *HRLJ* 134 (1990), holding that the Committee had not jurisdiction to consider complaints relating to acts or omissions which took place before the entry into force of the Convention for Argentina. Compare Article 28 of the Vienna Convention on the Law of Treaties (provisions of a treaty do not normally bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party).

4. Upshot

Probably no international obligation to extradite in respect of alleged offences occurring between 1973 and 1990. But if this conclusion is wrong ...

B. Absence of immunity from criminal process as a former head of state

Does a former head of state enjoy immunity *ratione materiae* in respect of torture for which he bears individual criminal responsibility performed as part of his functions as head of state?

No, according to the House of Lords. Various reasons given: never any such immunity; any preexisting immunity has been overtaken by prohibition of torture as peremptory

norm (*ius cogens*); inconsistent with the express words and evident purpose of the Torture Convention to grant such immunity in case of former heads of state.

No, according to the UN Committee against Torture in its discussion of the case in the context of reviewing the UK's third report under the Torture Convention.

Does this apply only to systematic torture that rises to the level of a crime against humanity, or does it also apply to individual or isolated acts of torture within the meaning of the Torture Convention?

C. The relevance of de iure or de facto amnesty under Chilean law

Does the fact that amnesty has been granted for many of the alleged offences under Chilean law (a law held constitutional by the Supreme Court) affect the obligation to extradite or prosecute?

Hong Kong law

A. Applicable arrangements between Spain and Hong Kong?

B. Double criminality under the Fugitive Offenders Ordinance and the arrangements

Torture as a "relevant [extraditable] offence"

Temporal questions – does the Fugitive Offenders Ordinance permit extradition for offences that were offences under the law of Hong Kong only at the time of the request or must they have been offences under Hong Kong Law at the time when the acts were committed in the foreign State?

C. Immunity from criminal process as a former head of state or on some other basis under the law of the HKSAR

D. Political and other factors relevant to the decision of the Chief Executive (not) to surrender a fugitive

- Foreign affairs implications: the giving of directions to the Chief Executive under s 24 of the Fugitive Offenders Ordinance

Hong Kong's implementation of the Torture Convention in relation to extraterritorial torture

Is the offence of torture created by the Crimes Torture Ordinance in relation to torture which occurs outside Hong Kong fully consistent with the requirements of the Convention to criminalise torture as defined in Article 1 of the Convention? See attachment B.

If a former head of state were alleged to have committed torture after January 1993 and Hong Kong did not extradite him, but sought to prosecute him, would the effect of the section be that the person would be able to plead lawful authority or an amnesty under the law of the country where the torture occurred?

The cases and other source material on the Pinochet proceedings

England

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 1) [1998] 3 WLR 1457, [1998] 4 All ER 897, 37 ILM 1302 (HL), on appeal from the judgment of the Court of Appeal (1999) 38 ILM 68

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2) [1999] 2 WLR 272, [1999] 1 All ER 577, 38 ILM 430 (HL) (bias judgment)

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No3) [1999] 2 WLR 827, [1999] 2 All ER 97 (rehearing by House of Lords)

The House of Lords judgments are also available on the web at:

http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldjudgmt/ldjudgmt.htm

Spain

For details of the Spanish proceedings, including the decisions of the Spanish courts and many other documents in English and Spanish, see the Derechos site:

http://www.derechos.org/nizkor/chile/juicio

Other websites

http://news.bbc.co.uk/hi/english/special_report/1998/10/98/the_pinochet_file/newsid_302000/302381.stm [BBC]

http://www.igc.org/hrw/campaigns/chile98/index.htm [Human Rights Watch]

http://www.sig.egss.ulg.ac.be/fchd/CAPRI_AffairePinochetIndex.html [Université de Liège] (material in French and Spanish]

APPENDIX 1

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

Adopted by the United Nations General Assembly on 10 December 1984 (resolution 39/46)

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

PART I

Article 1

1. For the purposes of this Convention, the term "torture" means 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.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(*a*) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(*b*) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with

any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

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, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular,

BLIS ON [redacted]

B

Section of Enactment

Chapter:	427	Title:	CRIMES (TORTURE) ORDINANCE	Gazette Number:	
Section:	**3**	Heading:	**Torture**	Version Date:	30/06/1997

(1) A public official or person acting in an official capacity, whatever his nationality or citizenship, commits the offence of torture if in Hong Kong or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.
(2) A person not falling within subsection (1), whatever his nationality or citizenship, commits the offence of torture if-
(a) in Hong Kong or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence of-
(i) a public official; or
(ii) any other person acting in an official capacity; and
(b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.
(3) For the purposes of this Ordinance, it is immaterial whether pain or suffering is physical or mental and whether it is caused by an act or an omission.
(4) It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.
(5) For the purposes of this section "lawful authority, justification or excuse" (□□□□□□□□□□) means-
(a) in relation to pain or suffering inflicted in Hong Kong, lawful authority, justification or excuse under the law of Hong Kong;
(b) in relation to pain or suffering inflicted outside Hong Kong-
(i) if it was inflicted by a public official acting under the law of Hong Kong or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law;
(ii) in any other case an authority, justification or excuse which is lawful under the law of the place where it is inflicted.
(6) A person who commits the offence of torture shall be liable on conviction on indictment to imprisonment for life.

(Enacted 1993)

8

"The History and Development of the Hague Conference and its Relevance to Mainland China and the Hong Kong SAR"

(provisional title)

Mr Hans van Loon, Secretary-General of the Hague Conference on Private International Law

Wednesday, 28 April 1999
4:30 - 5:45 p.m.
Room 306, 3/F, KK Leung Building
The University of Hong Kong

organised by the Centre for Comparative and Public Law and the International Law Association (Hong Kong Chapter), with the assistance of the Department of Justice

Some background on the Hague Conference and its relevance to Hong Kong appears on the other side of this notice. Please let us know, by fax or email, if you would like to attend (form below).

****

REGISTRATION FORM[*]

FAX TO: Andrew Byrnes, Hon Secretary, ILA (HK Chapter)
2559 3543
EMAIL TO: abyrnes@hkusua.hku.hk

_____ I would like to attend the seminar by Mr Van Loon on Wednesday, 28 April 1999

NAME:
AFFILIATION:

FAX:
EMAIL:

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[*] We may use the information collected in this form to send you other information about seminars and other activities of the Centre for Comparative and Public Law and the Faculty of Law, the International Law Association (HK Chapter) or relating to the issues dealt with in this seminar. If you prefer not to receive this information, please send us a message to that effect or indicate your wish on this form:
____ I do not wish the information provided in this form to be used to send me information about other activities of the Centre or the Faculty, the ILA or information about related activities.

BACKGROUND TO THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The Hague Conference on Private is an intergovernmental organization, the purpose of which is "to work for the progressive unification of the rules of private international law". The principal method used to achieve this purpose consists in the negotiation and drafting of multilateral treaties (conventions) in the different fields of private international law (e.g. international judicial and administrative co-operation; conflict of laws for contracts, torts, maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts; and jurisdiction and enforcement of foreign judgments).

A number of Hague Conventions apply to the Hong Kong SAR and have been implemented in Hong Kong legislation. They include conventions relating to the form of wills, legalisation of foreign public documents, service of process abroad, child abduction, on recognition of trusts and the law applicable to them, and recognition of foreign marriages and divorces. Currently in the works is a convention on the recognition and enforcement of foreign judgments.

Hong Kong courts have on various occasions had to interpret and apply legislation implementing one of these conventions in the light of the convention and the practice of other courts: see, for a recent example, N v O (Child Retention) [1998] 4 HKC 574 (CFI, Hartmann J). A number of the conventions are of particular practical importance (for example, service, abolition of requirement of legalisation of foreign public documents, etc).

Further detailed information about the Hague Conference and the various conventions can be found on the website of the Conference: http://www.hcch.net. A list of the conventions applicable to Hong Kong can be found on the website of the International Law Division of the Department of Justice:

http://www.justice.gov.hk/interlaw.htm

Detailed information about the conventions applicable to Hong Kong can be found on the Treaty Project website of the Centre for Comparative and Public Law:

http://www.hku.hk/ccpl/mt-subject-order_1Page15.html#Hague

ILA NEWSLETTER
ADI - ACTUALITES

International Law Association/ Association de droit international

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Telephone: +44 171 323 2978; Telefax: +44 171 323 3580; E-mail: secretariat@ila-hq.org

January 1999 No 11

EDITORIAL

First of all I would like to take this opportunity to farewell Mrs Barbara Osorio who will retire as Executive Secretary of the International Law Association after 19 years of service, since 1994 in the capacity of Executive Secretary. I had the great privilege of attending the dinner held at The Athenaeum in London on 20 November last at which Mrs Osorio was officially farewelled, although she will continue to be in the office until January 1999. It was a wonderful evening at which the Chairman, Lord Slynn, and several other members of the Executive Council thanked her for the outstanding work she had done over those many years for the Association. The next day the Executive Council conferred on her honorary life membership and it is to be hoped that she will make active use of it so we can meet up with her again.

It is trite, but true, to say that the office of the Association will never be the same again. Since the office bearers and the members of the Executive Council all have their own professional responsibilities, she has been the vital link to keep the organisation rolling over the years. From a personal point of view, I am grateful for the assistance she has given to the publication of the Newsletter, including the present issue.

Barbara Osorio will be succeeded by Juliet Fussell, who will be combining her existing employment as Secretary to the Society for Advanced Legal Studies equally with that of the Secretariat of the Association. In her work with the Society for Advanced Legal Studies, she has gained valuable experience in running the day to day operation of a respected legal institution, including managing the membership data base, promoting the Society and its membership and arranging series of lectures. She also holds the more arcane position of Secretary to the Statute Law Society. Ms Fussell has been "learning the ropes" from the Master over the past few months. I look forward to cooperating with her in the future. For those who want to contact the secretariat by e-mail, the address of the ILA Secretariat is: secretariat@ila-hq.org.

As Editor I would like to thank the Branch Secretaries and members who have sent the material published herein. May I urge others to follow their example? It is a matter of deep regret that some active Branches have not supplied information, despite repeated promises to do so. I understand that several Branches publish their own local Newsletters such as the American, British and New Zealand Branches. The supply of copies of those Newsletters to the Editor would be a relatively painless way of getting information to me. Again it is a matter of regret that promises made have been quickly forgotten. Unfortunately, this issue is the first in many years which does not contain any material in the French language, the other official language of the Association. Again I urge francophone members of the Association to contribute.

In this issue I am publishing a corrigendum about the deaths of two valued members of the American Branch. I am very sorry that the information published in the last Newsletter was incorrect. Understandably, this has caused some distress amongst members of the American Branch. This publication, unlike a newspaper, does not have the resources to check the information supplied, particularly when it comes from a member of the Branch concerned, and we must assume that it is correct. The corrected version that is published herein is copied from the Newsletter of the American Branch. Once again this strengthens the case for sending, or preferably faxing, a copy of this publication to the Editor. If this had been done, at least the Editor would have been put on notice that the information supplied needed checking.

Peter Nygh
Editor/Redacteur

NEWS FROM THE EXECUTIVE COUNCIL

The Executive Council met on 21 November last under the chairmanship of Lord Slynn. The financial report indicates that the Association will be in the black at the end of this year, provided the Branches meet their obligation to pay their contributions. A large number of Branches, and not merely those that are dormant or have currency exchange problems, are still in arrears for 1998 and in some cases for previous years, in one case as far back as 1993. Some members of the Council queried whether nominations to international committees from Branches that are not financial ought to be acted upon.

The Director of Studies presented his report, the contents of which are included under the heading: **News from Committees**. The Report of the Taiwan Conference is still in course of preparation and should be published early in 1999. As usual, it will be distributed free of charge to financial members of the Association. The China (Taiwan) Branch announced that it was preparing a Chinese language version of the Report.

The Council approved the plans for the 1999 Regional Latin American Conference in Sao Paulo, Brazil, and the London 2000 Conference. Both are set out in greater detail in this Newsletter. It accepted the invitation of the Indian Branch to hold the 70th Conference in April 2002 in New Delhi and received with interest an invitation of the German Branch to hold the 71st Conference in 2004 in Berlin.

It recognised the Iranian Association for International Law as the Iranian Branch of the Association and noted the re-structuring of the Hong Kong Branch under the chairmanship of Justice Godfrey of the Court of Appeal and of the Canadian Branch under the chairmanship of Mr Bloomfield. A question was raised about the possible formation of a Branch in the People's Republic of China, especially in view of the fact that some persons resident there had joined the Association through Headquarters and had been nominated to committees. The Chairman replied that this matter, as always, was under active consideration.

The Council had the pleasure of confirming the nomination of Mrs Barbara Osorio as honorary life member of the Association and appointed Ms Juliet Fussell to succeed her as Secretary of the Association upon her forthcoming retirement. Ms Fussell was present at the meeting.

The Executive Council will meet in 1999 on 21 and 22 May and on 12 and 13 November.

CONFERENCES

The Latin American Regional Conference 1999

The Brazilian Branch advises:
As announced in Taipei and in Newsletter 10, the Brazilian Branch will be hosting in Sao Paulo, on 25-27 July 1999, a Regional Latin-American Conference of the ILA. As approved at the Executive Council meeting, discussions shall centre on Regional Integration, Human Rights and Sustainable Development. Immediately following the main conference, a Seminar of the Committee on Legal Aspects of Sustainable Development (probably jointly with the new Committee on Transnational Implementation of International Environmental Law) will take place - but all Committees have been invited to meet in Sao Paulo, and we will be glad to supply those interested with facilities, provided we are informed in time. The programme is available in the ILA-HQ home page (www.ila-hq.org) and will soon be available in the home page of Universidade Sao Francisco, International Affairs (www.usf.com.br).
The Conference will commence on Sunday 25 July 1999 with registration and a Welcoming Cocktail at 7 pm at the Law School of the University of Sao Paulo. The official opening of the Conference will take place at 9 am on Monday 26 July which will be followed by the working sessions as set out in the Home Page. The main Conference will conclude on Tuesday 27 July at 5 pm. On Wednesday the Seminar on the Legal Aspects of Sustainable Development will be held. Provision has been made for Committee Meetings to be held in the afternoon of Tuesday 27 July.

We would like to provide some practical information:

1. CERNE is in charge of handling registrations. For further information contact:

Regional Latin American Conference of the ILA
Cerne Consultoria de Eventos
Av. Brig. Faria Lima 1685, cj. 1B, 1o andar
01452-001 São Paulo, SP, Brazil
Phones: (+55) (11) 212 7904/21
Fax: (+55) (11) 814 15 18
E-mail: cerne@uol.com.br.

2. Registration fees may be paid by Credit Card (VISA) and are:

	until 28/2/99	1/1 to 31/3/99	after 1/4/99
ILA Members	US$ 150	US$ 200	US$ 250
Non-Members	US$ 200	US$ 250	US$ 325
Students	US$ 75	US$ 100	US$ 150
Acc. Persons	US$ 100	US$ 150	US$ 200

3. The best place to stay is the Othon Palace Hotel which is 5 minutes' walk from the Law School of the University of São Paulo where the Conference will be held. However, we realise that nowadays most people are enrolled in mileage programmes and have arranged with VARIG airlines for packages comprising air fare/hotel (VARIG being a partner to Star Alliance). Information/reservations may be obtained directly with VARIG using code CGE3, or via your travel agent.

4. A Brazilian travel agency, ROBERTUR, is offering different services (airport transfer/tourism/hotels). They can be contacted at:

ROBERTUR
rua Cacapava 54
01408-010 São Paulo, SP, Brazil
Phone: (+55) (11) 881 81 33
Fax: (+55) (11) 881 20 16
E-mail: robertur@zaz.com.br

5. At the airport you will also find taxi co-operatives, which are safe and less expensive (around US$ 45.00 one way), or shuttle buses (also safe) for US$ 10. We shall have people at the airport meeting the main flights on 24/25 July.

6. There will be a programme for accompanying persons - details to be provided later on.

7. Weather in July is unpredictable - it is winter in the Southern Hemisphere - it can be pleasant (around 20C day/13C night) sunny and dry, but it can also (rarely) get down to 5C (for North Americans: it freezes at 0C and 20C = 70F approx.). In the north/northeast of Brazil it is never cold.

8. Circumstances permitting, the Conference will be opened by the President of the Republic.
9. The National School of Magistrates which is supporting the Conference has offered to arrange for visits of magistrates to different States of Brazil. Those interested should contact directly Justice Sidnei Beneti (e-mail sbeneti@ibm.net).

10. Conference texts should be available at registration in São Paulo, provided all our speakers send them to our Director of Studies, Professor Paulo Borba Casella.

We are looking forward to welcoming you there and you may rest assured that you will be attending a well organised and interesting Conference - but will also be given a glimpse of Brazilian warmth and hospitality. If you need further information, or are not able for some reason to reach the above addresses, please feel free to contact the Branch secretary, Dr Susana C. Vieira at:
Phone: (+55) (11) 881 5020 or 7844.8370
E-mail: susana@ambras.com.br or susana@usf.com.br

The 69th Conference 2000

The British Branch has confirmed its invitation to the Association to meet for its 69th Conference in London from 24 to 29 July 2000. The Conference will be held at the Barbican Centre. The planning of the Conference is progressing and the Branch hopes to circulate to all members in January 1999 outline details together with a preliminary registration form. The Organising Committee hopes to attract to **ILA 2000** a significantly larger number of participants than other biennial conferences.

Without detracting from the usual work of the Committees of whom at least 22 are likely to deliver reports, the Committee is developing a programme with a slightly different format. This will take place around three main themes, involving different constituencies within the membership. Within each theme, the committees concerned will meet and workshops will take place. In addition, a more structured programme will be organised in order to explore how the ILA can contribute to the development of each theme in the coming years. Committee meetings, workshops and the more structured programme for each theme will take place on different days. Those who wish to concentrate on a single theme will be able to participate in all its aspects; although there will be no bar to participating in the parallel proceedings of the other two themes.

The three themes contemplated are:

(a) Trade and economic law

(b) International Development Law, Human Rights and the Environment

(c) Private International Law and Enforcement of Judgments

To encourage full participation, the Organising Committee proposes to hold the traditional all day excursion on Monday 24 July with the usual Council and business meetings held on Tuesday 25 July. The Conference itself would commence with an Opening Ceremony in the evening of that Tuesday followed by three full working days. The banquet would, as at past Conferences, be held on Friday 28 July with a Closing Session on Saturday morning 29 July.

The 70th Conference 2002

The 70th Conference of the International Law Association will be held in New Delhi, India, in April 2002.

The proposed Fifth Joint Conference of the American Society of International Law and the Nederlandse Vereniging voor Internationaal Recht

This Conference which was to be held in The Hague, The Netherlands on 20 -22 May 1999 is now unlikely to proceed.

NEWS FROM COMMITTEES

Committee on International Litigation in Civil and Commercial Matters

This Committee met on 7 and 8 November 1998 at Leuven, Belgium. The Committee tentatively formulated a set of draft principles on the referral of proceedings between jurisdictions. It is expected that those draft principles will be further discussed and developed at the next meeting of the Committee in Washington DC on 28 and 29 April 1999 and ultimately submitted for approval at the 69th Conference in London in July 2000. The Committee resolved to take as its next project an investigation of the question of national jurisdiction in civil matters over foreign corporations and other legal entities. It aims to present its findings on that subject to the 70th Conference in New Delhi in April 2002.

Committee on International Commercial Arbitration

Professor Emmanuel Gaillard has resigned as chair of the Committee. To succeed him, the Executive Council has appointed Professor Pierre Mayer, Professor of Law at Paris (Pantheon-Sorbonne) and a renowned expert in the field of international commercial arbitration. The Council thanked Professor Gaillard who chaired the Committee for over eight years.

Committee on Aspects of the Law of State Succession

The chair of this Committee, Professor Hanna Bokor-Szego of the Hungarian Branch has resigned. The Executive Council has appointed the existing Rapporteur, Professor Brigitte Stern of the French Branch, to succeed her in the chair and has replaced Professor Stern as Rapporteur with Professor Wladislaw Czaplinsky of the Polish Branch. The Council thanked Professor Bokor-Szego for all the work she did as chair of the Committee since its establishment.

International Trade Law

Professor Oppermann has resigned as Chair. The Council has appointed Professor Petersmann to succeed him. The Rapporteurs will be: Petros Mavroides and F. Abbott. The Council expressed its gratitude to Professor Oppermann.

Teaching of International Law

This is a new Committee established by the Executive Council at its meeting on 21 November 1998. Its establishment follows the very successful Workshop on Teaching of International Law during the Taipei Conference in May 1998. The Committee will focus on the following five areas:

- the place of international law in law school curricula;
- teaching international law in other programmes, both at university and other levels;
- the impact of new information technologies;
- the quality of international law teaching materials;
- the contents of the general introductory course;

The Executive Council appointed Professor Hilary Charlesworth of the Australian Branch as Chair and Professor John King Gamble of the American Branch as Rapporteur. Although the focus initially will be on public international law, the mandate would include private international law. For this purpose a co-rapporteur could be added, preferably familiar with civil law systems.

New Committees

The Executive Council decided that only one new Committee should be established at this stage, bringing the total of active Committees to 24. It anticipates that three further Committees could be created in 1999/2000. Suggestions for new Committees include:

- the problems of the aged and aging;
- international contracts, in particular electronic contracts;
- biotechnology and international law;
- international humanitarian law;
- international law aspects of organized crime;
- a new committee in the area of the law of the sea;
- United Nations Charter; and
- international law in national courts.

Study Group on the Law of State Responsibility

The Council has created a Study Group on the Law of State Responsibility. Its mandate will be to study and comment on the draft texts prepared by the Special Rapporteur on State Responsibility of the ILC, on the discussion of these drafts in the ILC and the texts adopted by the Commission and, eventually, on the Draft Articles on State Responsibility adopted by the ILC on second reading. The task includes reacting to particular questions posed in the reports of the ILC to the General Assembly. The chairman of the Study Group will send copies of the reports to the Special Rapporteur, the chairman of the ILC and the Director of Studies. If possible, the Study Group will make other contributions to the debate on the work of the ILC in the field of State Responsibility through, inter alia, publications, seminars and conferences. Membership of the Group will be restricted to 12.

The following persons have been appointed by the Council to the Study Group so far: Chair: Peter Malanczuk (Netherlands); members: David Carron (US); Pierre-Marie Dupuy (France); Malgosio Fitzmaurice (UK); Vera Gowland-Debas (Switzerland); Bruno Simma (Austria); Werner Meng (Germany); Maria Spinedi (Italy); Zhao Je Li

(China); Tiyanjana Maluwa (Malawi). At the next meeting of the Executive Council some more members from Latin America and Asia will be nominated. It must be remembered that membership of Study Groups is proposed by the Director of Studies and not by individual Branches.

NEWS FROM BRANCHES

German Branch

The German Branch held its very well attended meeting on 3 July 1998 in Heidelberg. The members heard reports by the officers of the Branch about the Taipei Conference and about the amendments approved there to the ILA's Constitution and on the Revised Procedures for Establishing International Committees. All officers of the German Branch were re-elected at this meeting.

The scientific part of the annual meeting focused on the development of the WTO. Professor Oppermann (Tübingen), for many years chairman of the ILA Committee on International Trade Law, spoke about "The WTO - Pillar of the World's Economic Order", Professor Meng (Halle Wittenberg) on "The GATS Agreement on the Liberalization of Financial Services" and Dr Stoll (Heidelberg) on "The Development of WTO Dispute Settlement since 1995". The meeting ended with a vivid discussion of all four lectures.

Australian Branch

On 7 December 1999 the Australian Branch held its Annual General Meeting. At that meeting Miss Margaret Brewster was elected President and Professors Ivan Shearer and David Flint as Vice-Presidents. Martijn Wilder remained as Hon. Secretary, but the position of Treasurer was taken by Damian Sturzaker. Dr Keith Suter was re-elected as Director of Studies. Dr Peter Nygh remained a member of the Executive Committee of the Branch in his capacity as Immediate Past President. Two former Presidents of the Branch, the Honourable Rodney Purvis and Sir Lawrence Street, did not offer themselves for re-election. The Branch is saddened that these persons who have given the Branch distinguished service which in the case of Rodney Purvis goes back some 30 years, will no longer be available to take a part in the management of the Branch, but notes with immense pleasure that they will remain active members.

Following the Meeting, the Branch was addressed by Mr Paul Kelly, Foreign Editor of The Australian newspaper, and Mr Mack Williams, former Ambassador to the Republic of Korea and the Philippines, on the challenges facing Australia following the Asian Financial Crisis. Dr Nygh in his Farewell Address as President reviewed a successful year in which the Branch and its local Chapters in Queensland, Victoria and Canberra had conducted a number of well attended seminars. During the year the Constitution of the Branch was amended in order to abandon its previous claim to inclusion of New Zealand following the establishment of the New Zealand Branch. The opportunity was also taken to rationalise the membership structure by removing some categories which had never been used and defining the rights of international student and corporate members. Provision was also made for local students and others to join in some of the activities of the Branch at a modest fee without joining the Association as a whole the cost of which for some young persons has become prohibitive in view of the recent sharp fall of the Australian dollar against the pound sterling.

The Branch published its Bulletin twice in the past year giving news of its activities to its members. Thanks are due to Ms Lesley-Gaye Wong who will continue in that task in the New Year. The Branch is also very grateful to Professor Alexis Goh who has published the 1998 issue of the Australian Journal of International Law. Under her editorship this has become a very distinguished Journal with a rapidly growing international reputation. The Branch now has a Website at www.ila.org.au. It will contain information about the Branch and its activities.

Netherlands Branch

The Netherlands Branch held its Annual Meeting on 6 November in The Hague. Professor Th. C. van Boven (University of Maastricht) was elected President and Mme Dr J.J. van Haersolte-van Hof (advocate in Rotterdam) was elected Secretary. Following the business part of the Meeting, papers were delivered on "Transborder Aspects of Insolvency Procedures outside of a Treaty" by Messrs R.J. van Galen and J. C. van Apeldoorn and on "A Comparison between the European Convention on Insolvency Procedures and the UNCITRAL Model Law on Transnational Insolvency" by Dr A.J. Berends. The presentation of those papers led to a very lively discussion.

British Branch

Following the great success of the 1998 Spring Meeting at Oxford where many applicants had to be turned away for lack of space, the British Branch will hold its Spring Conference at Peterhouse College, Cambridge on 16 and 17 April. The theme will be New Frontiers of International Law: The Law and Practice of the WTO.

Contact: Professor Alan Boyle
Faculty of Law, University of Edinburgh
Old College, Edinburgh EH8 9YL UK
Fax No. +44-131 662-4902

REPRESENTATION AT CONFERENCES

The Hague Conference on Private International Law

The ILA was represented at the Special Commission held on 8 to 20 November 1998 to consider a Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters by Dr Mojtaba Kazazi (Headquarters - Iran) and Dr Ines Weinberg (Argentinian Branch). This continues the practice of members of the Committee on International Litigation in Civil and Commercial Matters attending as observers on behalf of the Association at the meetings of the Special Commission. The Commission has commenced the drafting of individual articles of the Convention on such important aspects as: substantive scope of the Convention, general jurisdiction, specific jurisdictions in relation to claims in contract, tort and in respect of branch activities, express and tacit prorogation, prohibited (exorbitant) jurisdictions, recognition of judgments (including the problems of non-compensatory and excessive damages), *lis alibi pendens* and whether a court may decline the jurisdiction conferred upon it by the Convention. It hopes to complete its task of drafting the Convention at its next meeting in June 1999. It is expected that the ILA will continue to be represented at that important meeting as well as the Diplomatic Conference planned for October 2000.

Marine Environment Protection Committee (MEPC)

Professor Verlaan writes:

The ILA was represented as an observer at the 42nd meeting of the Marine Environment Protection Committee (MEPC 42) of the International Maritime Organisation (IMO) held in London at IMO Headquarters from 2-6 November 1998 by Philomene A. Verlaan (US Branch - Adj. Professor of Ocean Policy at the University of Hawaii). The meeting was attended by delegates from 75 countries and observers from 5 intergovernmental and 31 non-governmental organisations.

IMO's MEPC is a fertile source of customary law ranging from the emerging to the developing, customary and fully conventional. Perhaps the most interesting items for the ILA membership arising at MEPC 42 are:

1. The development of three new, global, legally binding instruments:

- a Protocol to extend the Oil Pollution Preparedness, Response and Cooperation (OPRC) Convention to cover Hazardous and Noxious Substances.

- an instrument whose final form (new annex to MARPOL 73/78, new Convention or amendments to an existing MARPOL 73/78 Annex) will be decided at MEPC 43 to control harmful aquatic organisms in ballast water.

- a global, legally binding international instrument on harmful anti-fouling paints which will include a global prohibition on the application of organotin compounds acting as biocides on ships by 1 January 2003 and a complete prohibition on the presence of these compounds by 1 January 2008.

It is intended to convene diplomatic conferences for the adoption of these instruments during the 2000-2001 biennium.

2. Revision of Annex IV (sewage) of MARPOL 73/78 to promote its entry into force.

3. Amendment of Annex III (Harmful Substances) of MARPOL 73/78 to make the International Maritime Dangerous Goods (IMDG) Code mandatory under it.

5. Further development of the delicate relationship between flag states, coastal states and port states for the enforcement of the multiplicity of provisions to protect the marine environment.

ILA was the only organisation present at MEPC 42 that did not represent either a national, commercial or environmental concern. Its status as one of the rare "neutral" observers and the expertise in the full spectrum of international law represented by its membership enable ILA to provide a uniquely useful contribution in assisting with the reconciliation of complex and often conflicting priorities and interests and with developing workable international legal instruments.

In addition to its presence in plenary meeting, ILA can be particularly helpful by participating in the appropriate working and drafting groups which are active during the week of the meeting. Such participation is essential to the retention of consultative status with IMO, a status which is a highly sought after privilege, difficult to obtain and easily lost. For example, at this meeting, the application by the International Council on Environmental Law (ICEL) for consultative status was denied on the basis that ICEL could have access to MEPC through other organisations including the ILA.

MEPC 43 will be held in London at IMO Headquarters from 28 June to 2 July 1999. It will feature, *inter alia*, three Working Groups, one each for the elaboration of the three international instruments described in item 1, *supra*, and two Drafting Groups, one each on proposed amendments to MARPOL and PSSAs.

UNISPACE III PREP CONFERENCE FOR LATIN AMERICA AND THE CARIBBEAN

Professor Maureen Williams (ILA Representative at the Conference) writes:

A number of topics envisaged for the forthcoming UNISPACE III Conference (scheduled for July 1999 in Vienna) were pre-discussed from a variety of angles at the PREP Conference held on 12-16 October 1998, in Concepcion, Chile. The meeting - of a truly interdisciplinary nature - was presided over by Ambassador Raimundo Gonzalez, the Chilean member of the ILA Space Law Committee. The striking feature of the Conference was the fact that the countries of the region spoke generally with one single voice. The need to develop this new branch of international law and the importance of international cooperation to correct socio-economic imbalances in Latin America were common denominators of the meeting. With this objective in mind, the Latin American and Caribbean countries considered that both the public and private sectors of society should be involved in the exploitation of outer space.

Similarly, the need to create public awareness of the laws presently governing the use of outer space was the recurring note of the week. These views, enshrined in the Declaration of Concepcion adopted by consensus at the end of the Conference, together with the recommendations stemming from the two working groups reporting to this Conference, are indicative of the realistic attitude these countries will take at UNISPACE III next July in Vienna.

Further comments

Interesting for its implications, was a presentation made by Bolivia concerning its experience on the role of private entities in programmes where space technologies were applied. The paper duly emphasised international cooperation and proposed a "pilot programme" for each region of Bolivia. The government, together with the United Nations and the private sector, were expected to participate in this project.

Also interesting was a study submitted to the Conference by Colombia dealing with the work and results of an inter-institutional group set up by that country in preparation for UNISPACE III. Both governmental and private entities were represented on this group and the resulting document stressed the need of developing space law and the growing importance of the activities of private entities in space. Space debris, and the urgency of having effective rules on this subject was, likewise, a matter of concern to Colombia.

The work of the ILA on these topics was brought to the attention of participants by Professor Williams. Argentina, Brazil and Uruguay voiced their thoughts in a manner consistent with the above-described thinking, and so did governmental and non-governmental institutions represented at the Conference.

THE ILA TAKES PART IN A CONSULTATION OF EXPERTS IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

The International Law Association was a co-sponsor of a formal Consultation on the Peaceful Resolution of Major International Disputes, held in London from 11-15 December 1998. The Consultation was opened by a lecture at Chatham House, delivered by Mr. Hans Corell, Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations, on the subject: "The Feasibility of Implementing The Hague/St. Petersburg Centennial Recommendations Under the UN System". ILA Director of Studies, Professor Alfred Soons, was the Chairman.

The Consultation brought together leading experts world-wide with experience in many fields of major conflict resolution, such as border disputes, arms control negotiations, commercial disputes, law of the sea arrangements, as well as methods used by the United Nations, the International Court of Justice and in Arbitration and Conciliation procedures. It was organised by the Consortium on International Dispute Resolution, in collaboration with the International Law Association, as well as the Royal Institute of International Affairs and a number of important proposals were made.

The Co-ordinator of the Consultation, Dr. Julie Dahlitz, who is a member of all three organisations and Chairman of the ILA International Committee on Arms Control and Disarmament Law, stressed the overarching importance of the subject in her opening remarks. She pointed out that so long as States could not rely on the peaceful resolution of their disputes, there can be no genuine reversal of the global arms race; no adequate resources for development; no proper respect for human rights or the environment; nor sufficient funds for health, education, the arts and humanities. Not to mention the ever present risk of major war. The aim is to solve these problems at their source.

In an unprecedented contribution, the relevant experts identified elements of guidelines relating to two types of "Model Negotiations", one suitable for border and territorial disputes, and the other for a variety of disputes including arms control, environmental complaints and various perceived hostile acts by rival states. The guideline elements are drawn from the experience of two outstanding successes – one based on the methods used to reach agreement between China and the Soviet Union/Russia on their vast common borders, and the other, based on many innovative methods that enabled the United States and the Soviet Union/Russia to reach agreement on the management and reduction of their nuclear arsenals.

The hope is that these guideline elements may actively help many states to settle difficult disputes. They could even be useful for preliminary consultations between states that have some irritant in their relationship that does not yet qualify as a full blown dispute. It is envisaged that the guideline elements could be utilised by the states themselves or, in cases where they agree, using the good offices of experienced negotiators.

The result of the Consultation may stimulate further research and recommendations. Several other outcomes are envisaged, including the publication of papers delivered. Inter alia, the results of the Consultation, will be submitted to Conferences to be held at The Hague and in St. Petersburg during 1999 in commemoration of the First Peace Conference convened one hundred years earlier.

The General Assembly initiated and subsequently endorsed a Programme of Action dedicated to the 1999 centennial and the closing of the United Nations Decade of International Law. The Programme of Action, drawn up by the Governments of the Kingdom of the Netherlands and of the Russian Federation, aims at contributing to the further development of the themes of the first International Peace Conferences, as devised by Czar Nicholas II of Russia and Queen Wilhelmina of the Netherlands. One of the most significant outcomes of the original conferences was the signing of the Convention on the Peaceful Settlement of International Disputes. It was that aspect of the centennial that formed the subject of the Consultation.

Copy of Hans Corell's Opening Lecture on 'The Feasibility of Implementing The Hague/St. Petersburg Centennial Recommendations Under the UN System' is available from Headquarters in London.

PERSONALIA

APPOINTMENTS

Congratulations to Nigel Rodley on the award of a KCMG and to Jeremy Carver on his CBE, in the New Year's Honours List.
The Executive Council at its meeting in November congratulated the following persons:

Ross Cranston MP (member of the British Branch and of the ILA Committee on International Monetary Law) on his appointment as Solicitor-General.

Professor Herbert Kronke (member of the German Branch) on his appointment as Secretary-General of UNIDROIT by the Governing Council of that body at its 77th Session in February 1998 and who took up his post on 1 September 1998.

Professor Nina Vajic, President of the Croatian Branch, on her appointment to the European Court of Human Rights in Strasbourg.

IN MEMORIAM

The Council noted with deep sorrow the passing of:

Professor Albert E. Utton, a member of the American Branch and Secretary of the ILA Committee on Water Resources Law. Professor Charles Bourne has written:

He was a Rhodes Scholar at Oxford and there met his wife, a fellow student from Cornwall. On his graduation from Oxford, he joined the Faculty at the School of Law, University of New Mexico at Albuquerque. In due course he became Director of the Law School's International Transboundary Resources Centre (ITRC) and also was the editor of the Natural Resources Journal for many years. He had a profound knowledge of international water law, having practical experience of the complex boundary water problems between the USA and Mexico. He was a great asset to the ILA's Water Resources Committee. He performed his duties as Secretary of this committee with distinction, having the generous support of the ITRC and his Law School for his work. He will be sorely missed.

Mr Ludwig Baeumer and Mr Joachim Bilger, both Directors of the World Intellectual Property Organisation, who died aboard Swissair Flight SR111 which crashed on 2 September 1998 off the coast of Canada.

CORRIGENDUM

At the request of the American Branch the following memorial, as prepared by the Branch, is published to the late David G. Gill and the late Myres S. McDougal whose careers were wrongly described in the last issue:

We must record our sorrow at the passing on 27 April 1998 of David G. Gill. Long an Honorary Vice President of the American Branch, David had been President of the American Society of International Law. His advice was widely sought and always given gently and wisely.

A second blow was struck not only to our colleagues in the American Branch but to the wider world of international legal scholarship with the death on 7 May 1998 of Myres S. McDougal, for many years an Honorary Vice President of the American Branch. "Mac", as he was almost universally called by friends and colleagues, was an innovative and productive scholar as Sterling Professor of International Law at Yale Law School. His collaboration with Professor Harold Lasswell resulted in the so-called "New Haven School of Jurisprudence" which many found insightful and liberating. Long retired and in ill health, he was 91 years old.

NOTE TO CONTRIBUTORS

Contributions from individual members and Branches are greatly welcomed. They may be submitted in either of the two official languages of the Association: French and English. The next issue is planned for June 1999 and the

deadline for contributions to that issue is 1 May 1999. Any contributions and letters should be addressed to the Editor c/o Ms Juliet Fussell, Executive Secretary, ILA at Headquarters.

The Newsletter will gladly accept advertising and we urge all members to assist us in finding suitable advertisers. Rates can be obtained from Ms Fussell. We will also be glad to publish announcements by Branches about forthcoming events and seminars. However, the onus lies clearly on Branches to supply us with the necessary material.

DISTRIBUTION OF THIS NEWSLETTER

The Newsletter is distributed to all members whose names and current addresses are held by Headquarters, whether belonging to a Branch whose contributions are paid up to date or not. Some complaints have been received about late or non-arrival of the Newsletter. This is almost always due to the absence of up to date addresses of members. To avoid this problem, members should notify the Branch Secretary of any change of address forthwith and Branches should supply Headquarters with updated membership lists at regular intervals. Headquarter members should, of course, notify Headquarters direct of any change of address. We draw your attention to the slip printed at the end of this Newsletter. Since mailing expenses constitute the largest part of the cost of this Newsletter, your cooperation and that of Branch Secretaries is vital.

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New Publications

Cornelius van Bynkershoek: His Role in the History of International Law

by **Kinji Akashi**

The primary aim of this work is to present a critical analysis of the writings of Cornelius van Bynkershoek (1673-1743), an eminent Dutch jurist known traditionally as a `positivist', in the history of international law. However, it goes beyond an analysis of the `classics' per se and attempts to clarify some basic questions concerning the history of international law, such as the relationship between legal doctrine and state practice, and the re-consideration of methodological differences among historical figures like Grotius, Pufendorf and Vattel. In addition to these questions, the work also covers some fundamental problems of international law in general, such as the meaning of positivism and positive law, and the function of reason.

To discuss these issues, the work is divided into three main parts. The construction of Bynkershoek's general theory of the law of nations is covered in the first part. The second offers an overview and analysis of the contemporary practice relevant to his theories on the laws of neutral commerce. The final part discusses the `genealogy' of Bynkershoek's works, namely his relation to Grotius and to his later generations of publicists.

Kluwer Law International, The Hague
October 1998, 224 pp., Hardbound
ISBN: 90-411-0599-9
Price: NLG155.00 / US$84.00 / GBP53.00
INTERNATIONAL LAW IN JAPANESE PERSPECTIVE 4

Landmark Cases in International Law

by **Professor M. Fitzmaurice** *&* **Dr. E. Heinze**, *Queen Mary and Westfield College, University of London*

This book contains excerpts *in extenso* from leading cases in general international law, and seeks to provide a greater volume of case law than that currently available on the market.

It contains no editorial commentary and no secondary literature as these are widely available in other works. It can serve either as a principal text or as a supplement to other standard books.

It is thoroughly up-to-date, including recent ICJ judgments on the Bosnia case, the Gavcìkovo-Nagymaros Project, the Advisory Opinion on Nuclear Weapons, and the Lockerbie case. It will be of inestimable value to all libraries of international law, large and small, institutional and private.

No student or practitioner in the field should be without it.

Kluwer Law International, The Hague
November 1998, 1200 pp. Hardbound
ISBN: 90-411-9709-5
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REGIONAL LATIN AMERICAN CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION

A REGIONAL MEETING OF THE INTERNATIONAL LAW ASSOCIATION, TO DISCUSS MERCOSUL, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT, CO-SPONSORED BY THE BRAZILIAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, THE BRAZILIAN SOCIETY OF INTERNATIONAL LAW, UNIVERSIDADE DE SÃO PAULO, UNIVERSIDADE SÃO FRANCISCO, AND IDIRI -INSTITUTO DE DIREITO INTERNACIONAL E RELAÇÕES INTERNACIONAIS

SÃO PAULO, BRAZIL, JULY 25/27TH, 1999
FACULDADE DE DIREITO DA UNIVERSIDADE DE SÃO PAULO
FACULDADE DE DIREITO DA UNIVERSIDADE SÃO FRANCISCO

PRELIMINARY PROGRAMME

Sunday, July 25TH, 1999:
4.00 p.m. – Registration
7.00 p.m. - Welcome Cocktail

Monday, July 26th., 1999:
9 am: Opening Remarks – ILA Chairman
ILA President
ILA Director of Studies
ILA Brazilian Branch President
President of the Republic
Brazilian Minister for Justice
President of the Supreme Court

Theme I – MERCOSUL
10:00-10:50 - MERCOSUL, an Introduction
Chairperson: André Franco Montoro, Brazilian Congressman
Speakers: Didier Operti (Ministry for Foreign Affairs, Uruguay)
Rubens Barbosa (Ministry for Foreign Affairs, Brazil)
10:50-11.00: Coffee Break
11:00-11:50: MERCOSUL, European Union and NAFTA – Intra-regional Co-operation Possibilities
Chairperson: Marcos Martinez-Mendieta (Ministry for Foreign Affairs, Paraguay)

Speakers:
Felix Peña (Ministry for Foreign Affairs, Argentine)
Celso Lafer (Minister for Development, Brazil)

11:50-12:40: Dispute Settlement Mechanisms and Judicial Co-operation in Integration Processes
Chairperson: Siegbert Rippe (Uruguay)
Speakers: G. Slynn of Hadley (Chamber of Lords, U.K.)
Cynthia Lichtenstein (Boston College Law School, U.S.A)
12:40-13:00: Debate

13:00-14:30 - Lunch

Theme II - International Law and the Environment
14:30-15:45: Implementation status of the Main International Environmental Treaties
Chairperson: Francisco Resek (International Court of Justice)
Speakers: Francisco Villagran-Kramer (Iripaz, Guatemala)
Maria Eduarda Barroso Gonçalves (ISCTE, Portugal)
15:45-16:30 - Environmental Aspects of the Law of the Sea
Chairperson: Vicente Marotta Rangel (Law of the Sea Tribunal)
Speakers: A H. Soons (University of Utrecht, Netherlands)
Hugo Caminos (Law of the Sea Tribunal)
16.30-16:45 - Coffee Break
16:45-17:30 - Environmental Aspects of International Co-operation in River Basins
Chairperson: Geraldo E. do Nascimento e Silva (Institut de Droit International)
Speakers: Eduardo Valencia-Ospina (International Court of Justice)
Rubens Ricúpero (UNCTAD)
17:30-18:00 - Debate

TUESDAY July 27th., 1999
Theme III - Human Rights and Sustainable Development Law
09:00-09:45: The Inter-American System for the Protection of Human Rights
Chairperson: Jeanette Irigoin (University of Chile)
Speakers: Antonio A Cançado Trindade (Inter-American Court for Human Rights)
Christina Cerna (Inter-American Commission for Human Rights)
09:45-10:30: The Central American Experience
Chairperson: Hungdah Chiu (University of Maryland/ Taiwan)
Speakers: Luiz Alberto Padilla (Ministry for Foreign Affairs, Guatemala)
Manuel Ventura Robles (Inter-American Court for Human Rights)
10:30-10.45: Coffee Break
10.45-11:30: The Right to Development, Environmental Protection and National Sovereignty over Natural Resources
Chairperson: Ricardo Ballestra (Argentine)
Speakers: Kamal Hossain (Bangladesh)
Nico Schrijver (Free University of Amsterdam, Netherlands)
11:30-12:00: Debate
12:30-14:00: Lunch
14:00-16:30: Committee Meetings
Panel: The Impact of Regional Integration Processes upon Companies
Chairperson: Jeremy Carver (Clifford Chance)
16:30: Closing Ceremony

Wednesday, July 28th.
"Sustainable Development in the XXI Century" - Seminar of the Committee "Legal Aspects of Sustainable Development", at Universidade São Francisco.

ADDITIONAL INFORMATION

1. CERNE is in charge of handling registrations. Their email address is cerne@uol.com.br, phones (55-11)212.7904/21.4008/fax (55-11)814.15.18, address Av. Brig. Faria Lima 1685 cj1B 1°.and, 01452-001 S.Paulo, SP, Brasil.
2. Registration fees from abroad may be paid by Credit Card (VISA only) and are:

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ILA Members	US$ 150.00	US$ 200.00	US$ 250.00
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6. Taxi co-operatives (safe and around US$45.00 one way) and shuttle buses (also safe and around US$10.00/person) are available at airport. Students will meet main flights of 24/25th July.
7. There will be a programme for accompanying persons - details to be provided later on.
8. July weather unpredictable - can be pleasant (around 20oC day/13oC night) sunny and dry, but also (rarely) get to 5oC or under. North/northeast of the country are never cold; direct flights available to/from Europe/USA.
9. Events permitting, the Conference should be opened by the President of the Republic.
10. The National School of Magistrates, which is supporting the Conference, has offered to arrange for visits of Magistrates to different States of Brazil. Those interested should contact directly Justice Sidnei Beneti (email sbeneti@ibm.net).
11. Conference texts should be available at registration in São Paulo, provided all speakers send them in time to our Director of Studies, Prof. Paulo Borba Casella.
12. For updating, see www.ila-hq.org or www.usf.com.br (international affairs)

I REGIONAL LATIN AMERICAN CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION - ILA BRAZILIAN BRANCH

São Paulo, Brazil, July 25/27th, 1999

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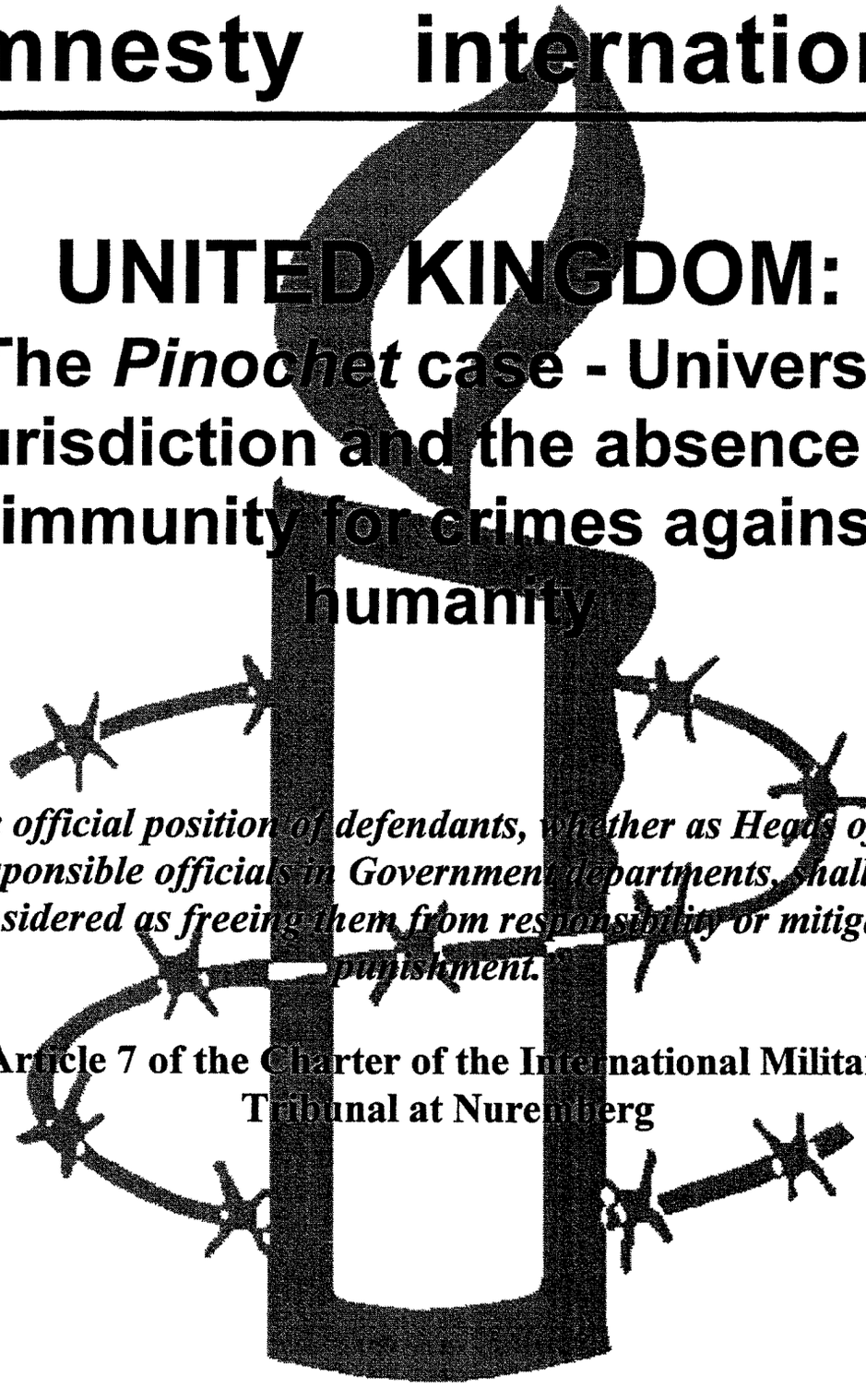
UNITED KINGDOM:

The *Pinochet* case - Universal jurisdiction and the absence of immunity for crimes against humanity



"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."

Article 7 of the Charter of the International Military Tribunal at Nuremberg

January 1999
AI Index: EUR 45/01/99
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INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 8DJ, UNITED KINGDOM

TABLE OF CONTENTS

UNITED KINGDOM

Universal jurisdiction and absence of immunity for crimes against humanity

"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."

Article 7 of the Charter of the International Military Tribunal at Nuremberg

This paper sets forth Amnesty International's position on three of the legal issues involved in the rehearing of the appeal to the House of Lords of the judgment by the English High Court of Justice, Queen's Bench Division on 28 October 1998 in the cases, *In the Matter of an Application for a Writ of Habeas Corpus ad Subjicendum (Re: Augusto Pinochet Ugarte)* and *In the Matter of an Application for Leave to Move for Judicial Review between: The Queen v. Nicholas Evans et al. (Ex Parte Augusto Pinochet Ugarte)*. The three issues which Amnesty International addresses in this paper are:

(1) the immunity under Chilean law and practice for certain crimes under international law committed since 1973, including crimes against humanity and torture;

(2) the scope of universal jurisdiction over certain crimes under international law, including crimes against humanity and torture, and

(3) the absence of immunity under international law of heads of state for certain crimes under international law, including crimes against humanity and torture.

This paper does not address the other issues in the case, such as the claim that a former head of state is immune from prosecution for crimes against humanity and other crimes under international law under the act of state doctrine, a corollary to the doctrine of state immunity. The act of state doctrine "cannot be pleaded as a defence to charges of war crimes, crimes against peace, or crimes against humanity" (Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (London and New York:Routledge 1997), p. 122). On 13 January 1999, Amnesty International was granted leave to intervene as a third party in the rehearing of the appeal of the High Court judgment, together with the family of William Beausire, who "disappeared" in Chile; Sheila Ann Cassidy, who was tortured in Chile; the Medical Foundation for the Care of Victims of Torture; the Redress Trust and the Association of Relatives of Disappeared Prisoners.

On 17 October 1998, while General Pinochet was on a visit to the United Kingdom, he was arrested based on a Spanish provisional arrest warrant, issued the day before at the request of a Spanish court, alleging that he had been responsible for the murder of Spanish citizens in Chile at a time when he was President of that country. On 22 October 1998 he was served with a second Spanish provisional arrest warrant alleging that he was

responsible for systematic acts in Chile and other countries of murder, torture, "disappearance", illegal detention and forcible transfers. A Spanish court, the *Audiencia Nacional*, on 29 October 1998 rejected a challenge by state prosecutors to the jurisdiction of the Spanish judiciary to try General Pinochet.

This Spanish case is only one of a number of cases which have been instituted in national courts against former General Pinochet. The Swiss government has sent an extradition request to the United Kingdom in the case of a person with Chilean and Swiss citizenship who was kidnapped in Buenos Aires, Argentina by members of DINA (Directorate of National Intelligence) of Chile, transferred to Chile and then "disappeared" in Chile. The French government has filed an extradition request in the cases of French nationals who "disappeared" or were killed in Chile. Other criminal proceedings have begun, or reportedly are planned, in national courts in Belgium, Italy, Luxembourg, Norway, Sweden and the United States of America.

The English High Court, in an opinion by Lord Chief Justice Bingham of Cornhill, stated with respect to the first Spanish provisional extradition warrant alleging murders of Spanish citizens in Chile that neither Spain nor the United Kingdom had criminal jurisdiction (Judgment, pp. 14-15). He also concluded that under English law a former head of state of a foreign country was "entitled to immunity as a former sovereign from the criminal and civil process of the English courts" with respect to systematic murder, torture, "disappearance", illegal detention and forcible transfer committed outside the United Kingdom while he was head of state (Judgment, pp. 30). Justice Collins and Justice Richards agreed. Justice Collins rejected the argument that such crimes could never be part of the sovereign functions of a head of state:

> "Unfortunately, history shows that it has indeed on occasions been state policy to exterminate or to oppress particular groups. One does not have to [l]ook very far back in history to see examples of that sort of thing having happened. There is in my judgment no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists." (Judgment, Opinion of Justice Collins, p. 34)

On 25 November 1998, the House of Lords concluded in a three to two decision that a former head of state did not have immunity with respect to crimes against humanity (*R. v. Stipendary Magistrate ex parte Pinochet*). On 17 December 1998, the House of Lords set aside its decision of 25 November on the ground that one of the judges was linked to Amnesty International, which had intervened in the hearing, and scheduled a rehearing of the appeal before a new panel on 18 January 1999.

As explained below, there is no possibility of an effective and impartial criminal investigation or prosecution in Chile with respect to the crimes alleged in the French, Spanish or Swiss extradition requests. However, under long-settled rules of international law, *any* court may exercise universal jurisdiction over acts amounting to crimes against humanity, such as widespread or systematic murder, torture, forced disappearance, arbitrary detention, forcible transfer and persecution on political grounds, and heads of state and former heads of state do not enjoy immunity under international law - whether in international or national courts - for crimes under international law, including crimes against humanity and torture.

In short, no sovereign state has the power under international law to *enact* national legislation providing immunity for any individual, including a head of state, from criminal or civil responsibility for crimes against humanity and no other state has the power to *recognize* such legislation. This follows from the

> "increasing acceptance that rules of international law are the foundation upon which the rights of states rest, and no longer merely limitations upon states's rights which, in the absence of a rule of law to the contrary, are unlimited. Although there are extensive areas in which international law accords to states a large degree of freedom of action (for example, in matters of domestic jurisdiction), it is important that freedom is derived from a legal right and not from an assertion of unlimited will, and is subject ultimately to regulation within the legal framework of the international community." (Sir Robert Jennings, QC & Sir Arthur Watts, KCMG, QC, 1 *Oppenheim's International Law* (London and New York: Longman 9th ed. 1996), p. 12).

BACKGROUND TO THE CASE - THE WIDESPREAD AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS IN CHILE SINCE 1973 AMOUNTING TO CRIMES AGAINST HUMANITY

A. Conclusions by intergovernmental organizations and the Chilean government

The 11 September 1973 Chilean military coup, which overthrew the democratically elected government of Salvador Allende, heralded the implementation of a policy of systematic and widespread human rights violations under the government headed by General Augusto Pinochet. Thousands were detained without charge or trial, tortured, extrajudicially executed, "disappeared", abducted or persecuted on political grounds. The international community was aware of the widespread and systematic policy of human rights violations implemented in the aftermath of the coup. In 1975 the UN General Assembly (GA Res. 3448 (XXX) of 9 December 1975) recognized the existence of an institutionalized practice of torture, ill-treatment and arbitrary arrest. The UN Ad-Hoc Working Group on Chile established by the UN Commission on Human Rights in its Resolution 8 of 27 February 1975, together with the Inter-American Commission on Human Rights of the Organization of American States, extensively documented these systematic and widespread violations. In 1976, the UN Ad-Hoc Working Group on Chile concluded that cases of torture, as crimes against humanity, committed by the military government should be prosecuted by the international community (UN Doc. A/31/253, 8 October 1976, para. 511).

The systematic and widespread nature of these human rights violations has been officially recognized by the civilian government of Chile in its 1990 report to the UN Committee against Torture, a body of experts established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) to monitor implementation of that treaty. The Chilean National Commission on Truth and Reconciliation (Truth and Reconciliation Commission), established by President Patricio Aylwin pursuant to Supreme Decree 335 of April 1990, together with the Chilean Government's report to the Committee against Torture, concluded

that the intelligence service, DINA, under the direct command of Augusto Pinochet, played a central role in the policy of systematic and widespread human rights violations in Chile. Similarly, they concluded that the DINA developed a variety of criminal tactics including killings and "disappearances" of individuals of Chileans and other nationalities, considered to be "enemies" of the military regime, in other countries. They found that these violations required intelligence coordination and planning at the highest levels of the state.

In 1996 the Reparation and Reconciliation Corporation, which had been set up under the administration of President Aylwin in 1992 as a successor to the Truth and Reconciliation Commission, presented its final report. The Corporation officially recognized a further 123 "disappearances" and 776 extrajudicial executions or death under torture during the military period, in addition to those previously documented by the Truth and Reconciliation Commission. Combined with the findings of the Truth and Reconciliation Commission this brought the number of "disappearances" to 1,102 and extrajudicial executions and death under torture to 2,095, making a total of 3,197 cases that were officially recognized by the Chilean state. The victims of these human rights violations included real, potential or suspected ideological opponents of the military government.

According to these reports, during the period 1973 to 1977, the DINA reported directly to General Pinochet through its Director, General Contreras. In February 1998 the former head of DINA told the Chilean Supreme Court that Augusto Pinochet was in overall command of its operations. General Pinochet was also head of the armed forces, which also played a role in carrying out the policy of widespread and systematic human rights violations (Pol. Corte: 30: 30.174-93 - Apelacion Sentencia).

B. The failure to tackle impunity in Chile

For quarter of a century victims of human rights violations in Chile and their relatives have campaigned for justice, as well as truth, with the support of lawyers, organizations and judges. As senior members of the Chilean Government and politicians have stated, the issue of human rights violations committed during the military government is an unresolved one.

Several mechanisms guaranteeing impunity have blocked effective judicial investigations and prosecutions of those responsible for violations of human rights during the military government in Chile. These included the 1978 Amnesty Decree and the parliamentary immunity granted by the 1990 Chilean Constitution. Moreover, even if these obstacles were removed, the role of the military courts would make the possibility of an effective and independent prosecution illusory.

1978 Amnesty Decree. In 1978, the military government of General Pinochet decreed an amnesty (Decree 2191) designed to shield those responsible for human rights violations committed between 11 September and 10 March 1978 from prosecution. This decree has made it impossible for the relatives to find the answers on the whereabouts of those "disappeared" and to obtain justice. Those responsible for committing human rights violations played a major role in dictating the terms of transition to civilian rule to ensure immunity from prosecution for human rights violators. Those seeking truth and justice have been sidelined, often violently. The Amnesty Law was declared constitutional by the Chilean Supreme Court on 28 August 1990.This self-amnesty has effectively guaranteed up to now the impunity of those responsible for systematic and widespread human rights

violations in Chile.

The Inter-American Commission on Human Rights has stated that the Chilean Amnesty Law is incompatible with the international obligations of the Chilean State under international law and considered that "the legal effects were part of a general policy of human rights violations in Chile" (Inter-American Commission on Human Rights, Report No. 25/98, para. 76; *see also* Inter-American Commission on Human Rights, Report No. 36/96).

The Human Rights Committee, a body of experts established under the International Covenant on Civil and Political Rights to monitor implementation of that treaty, also, considered this kind of amnesty law incompatible with the international obligations of states under the international human rights law (Views of 19 July 1994, Case Hugo Rodriguez, Communication 322/1988, UN Doc. CCPR/C/51/D/322/1988; Preliminary observations of the Human Rights Committee - Peru, 25 July 1996, UN Doc. CCPR/C/79/Add.67, para. 20; Observations of the Human Rights Committee - France, UN Doc. CCPR/C/79/Add.80, para. 13; Observations of the Human Rights Committee - Uruguay, UN Doc. CCPR/C/79/Add.19, para. 7, Observations of the Human Rights Committee - Argentina, UN Doc. CCPR/C/79/Add.46, para.10; Human Rights Committee - El Salvador, UN Doc. CCPR/C/79/Add.34, paras 7 and 12; General Comment No. 20, para. 15).

The Vienna Declaration and Programme of Action, adopted by states on 25 June 1993, during the UN World Conference on Human Rights, reaffirmed the need for states to "abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violation, thereby providing a firm basis for the rule of law" (UN Doc. A/CONF.157/23, para. 60).

The Chilean Constitution. The Chilean Constitution , which former General Augusto Pinochet was instrumental in drafting, included a system of Senators for life who, as parliamentarians, have complete immunity under Chilean law. Since Augusto Pinochet retired from the armed forces, he has been covered by parliamentary immunity in his capacity as a Senator for life. Under this immunity, and according to Article 58 of the Chilean Constitution, Augusto Pinochet cannot be tried under any charges brought against him. This parliamentary immunity which covers former General Pinochet also guarantees impunity of those responsible for systematic and widespread human rights violations and is also an obstacle to obtaining justice in Chile. Although the Chilean Constitution (Article 58) and the Penal Procedure Code (Articles 611 to 618) provide the possibility of lifting parliamentary immunity for the purpose of judicial procedures, this possibility is severely constrained in Chile under the current political situation and the strong influence of the military. Moreover, even if the parliamentary immunity could be lifted, the period between 1973 and 1978, when most of the systematic and widespread human rights violations were committed and which are the main crimes included in the extradition requests from European countries, would remain protected by the Amnesty Law provisions.

The role of military courts. In the hypothetical event that the Amnesty Law were repealed and the parliamentary immunity lifted, according to Chilean legislation it would be within the jurisdiction of a military tribunal to try former General Augusto Pinochet in relation to the human rights violations which were committed during his period as army commander (Articles 2 and 3 of the Code of Military Justice). The Inter-American

Commission in its 1985 report on the Situation of Human Rights in Chile stated that military courts in Chile do not guarantee the right to justice and "the actions of these courts have served to provide a veneer legality to cover-up the impunity which the members of the Chilean Security Forces enjoy when they are found to be involved in flagrant violations of human rights" (Organization of American States document OAS/Ser.L/V/II.66, para. 180). The military legislation remains substantially unchanged and continues to be the source of impunity as established by the Special Rapporteur on Torture, Mr. [now Sir] Nigel Rodley, in his 1996 report to the Human Rights Commission (U.N. Doc. E/CN.4/1996/35/Add.2, paras 62, 68, 74 and 76).

The Human Rights Committee and the Inter-American Commission on Human Rights have repeatedly stated that the trial of members of the armed forces on human rights violations by military courts is incompatible with the States" obligations under international law (Human Rights Committee: Concluding observations - Colombia, UN Doc. CCPR/C/79/Add.2, para. 5 and CCPR/C/79/Add.76, para. 18; Concluding observations - Brazil, UN Doc. CCPR/C/79/Add.66, para. 10; Concluding observations - Peru, UN Docs CCPR/S1519 and CCPR/C/SR1521; Concluding observations - Lebanon, UN Doc. CCPR/C/79/Add.78, para.14. Inter-American Commission on Human Rights, OEA/Ser.L./V/II.66, para. 139; OEA/Ser.L/V/II.84, Doc. 39 rev, 14 of October 1993; OEA/Ser.L/V/II.97, 28 September 1997) .

The Draft Declaration on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers (UN Doc. E/CN.4/Sub.2/1988/Add.1 and Add./Corr.1) (the Singhvi Declaration), stated in Article 5 (f) that the jurisdiction of military courts is limited to infractions of military discipline by members of the armed forces (*"la compétence des tribunaux militaires se limite aux infractions d'ordre militaire commises par des membres des forces armées")*. The UN Commission on Human Rights, in its Resolution 1989/32, invited Governments to take into account the principles set forth in the draft declaration in implementing the Basic Principles on the Independence of the Judiciary.

The UN Declaration on the Protection of All Persons from Enforced Disappearance (adopted by the UN General Assemby in Resolution 47/133 of 18 December 1992) provides that persons alleged to have committed enforced disappearances "shall be tried only by the competent ordinary courts in each State, and not by any special tribunal, in particular military courts" (Article 16 (2)). The Inter-American Convention on the Forced Disappearance of Persons, which Chile signed on 10 June 1994, has a similar provision (Article IX).

In Chile there are currently 17 judicial investigations related to the findings of human remains in secret graves which could be those of victims of "disappearances" and on cases of other victims of human rights violations committed during the period of the military government (1973 -1990). However, if the relevant judicial authority establishes the criminal responsibility of Augusto Pinochet, the judicial procedures could be blocked either by his parliamentary immunity or by the application of the Amnesty Law.

As of 13 January 1999, Chile had not filed a request for the extradition from the United Kingdom of former General Pinochet.

I. ACTS ALLEGED IN THIS CASE WHICH AMOUNT TO CRIMES AGAINST

HUMANITY

The widespread and systematic nature of the human rights violations which were committed under the military government in Chile between September 1973 and March 1990 constitute crimes against humanity under international law.

A. Crimes against humanity recognized in international treaties and other instruments

Crimes against humanity recognized by international law include the practice of systematic or widespread murder, torture, forced disappearances, deportation and forcible transfers, arbitrary detention and persecutions on political or other grounds. All of these crimes have been alleged in one or more of the three extradition warrants.

Each of these crimes against humanity have been recognized as crimes under international law in international conventions or other international instruments, either expressly or as other inhumane acts, including:

- the Declaration of France, Great Britain and Russia on 24 May 1915 (stating that those responsible for "crimes against humanity and civilization", including massacres of civilians, would "be held responsible");
- Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented to the 1919 Preliminary Peace Conference (murder and massacres, systematic terrorism, torture of civilians, internment of civilians under inhuman conditions);
- Article 6 (c) of the Charter of the International Military Tribunal at Nuremberg (1945) (Nuremberg Charter) (murder, deportation and other inhumane acts and persecutions);
- Allied Control Council Law No. 10 (1946) (murder, deportation, imprisonment, torture and other inhumane acts and persecutions);
- Article 6 (c) of the Charter of the International Military Tribunal for the Far East (1946) (murder, deportation and other inhumane acts and persecutions);
- Article 2 (10) of the Draft Code of Offences against the Peace and Security of Mankind (1954) (murder, deportation and persecutions);
- Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (1993) (murder, deportation, imprisonment, persecutions and other inhumane acts);
- Article 3 of the International Criminal Tribunal for Rwanda (1994) (murder, deportation, imprisonment, persecutions and other inhumane acts);
- Article 18 of the UN Draft Code of Crimes against the Peace and Security of Mankind (1996) (murder, torture, persecution, arbitrary imprisonment, arbitrary

deportation or forcible transfer of population, forced disappearance of persons and other inhumane acts); and

- Article 7 of the Statute of the International Criminal Court (1998) (murder, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, persecution, enforced disappearance of persons and other inhumane acts).

Although the crime of enforced disappearance was not expressly mentioned in the Nuremberg Charter, Field Marshal Wilhelm Keitel was convicted of committing this crime, invented by Adolf Hitler in 1941, by the Nuremberg Tribunal (see Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) - Nuremberg 30th September and 1st October 1946, Cmd. 6964, Misc. No.12 (London: H.M.S.O 1946), pp. 48-49).

B. Crimes against humanity as part of customary law

Crimes against humanity. Moreover, the acts alleged in the three extradition warrants are recognized as crimes against humanity under international customary law (Article VI (c) of the International Law Commission's Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (1950); Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press 4th ed. 1991), p. 562; Eric David, *Eléments de Droit Pénal International* (1997-1998) (Bruxelles: Presses Universitaires de Bruxelles 1998), p. 540). As the UN Secretary-General made clear in his report to the Security Council on the establishment of the International Criminal Tribunal for the former Yugoslavia, which has jurisdiction over crimes against humanity, "the application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise" (Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 34). He also stated that "[t]he part of conventional international humanitarian law which has beyond doubt become part of international customary law" includes the Nuremberg Charter (*Ibid.*, para. 35). The Security Council expressly stated when it established the International Criminal Tribunal for the former Yugoslavia in Resolution 827 (1993) that it: "*Approves* the report of the Secretary-General". The Ambassador of the United Kingdom, Sir David Hannay, stated, "We welcome and endorse the Secretary-General's excellent report on the most effective and expeditious means of establishing the tribunal" (UN Doc. S/PV.3217, 25 May 1993).

Indeed, even before the adoption of the 1996 UN Draft Code of Crimes against the Peace and Security of Mankind and the 1998 Rome Statute of the International Criminal Court, the UN General Assembly had recognized that "the systematic practice" of enforced disappearances "is of the nature of a crime against humanity" (UN Declaration on the Protection of All Persons from Enforced Disappearances, adopted by the UN General Assembly in Resolution 47/133 of 18 December 1992, Preamble, para. 4).

Genocide and torture. Genocide, a crime against humanity, is a crime under

customary international law as well as under the Convention for the Prevention and Punishment of the Crime of Genocide of 1948 (UN General Assembly Res. 96 (I) (1946); *Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide* , Advisory Opinion, 1951 I.C.J. Rep. 15). Torture is a crime under general international law (J. Herman Burgers & Hans Danelius, *The United Nations Covention against Torture: A Handbook* (Dordrecht: Martinus Nijhoff Publishers 1988), p. 1 ("the *Convention* is based upon the recognition that the above-mentioned practices [torture and cruel, inhuman and degrading treatment and punishment] are already outlawed under international law"); (now Sir) Nigel Rodley, *The Treatment of Prisoners under International Law* (1987), p. 156.

II. UNIVERSAL JURISDICTION OVER CRIMES AGAINST HUMANITY AND TORTURE

The crimes against humanity committed in Chile since 1973 are subject to universal jurisdiction. This principle has been recognized under international law since the establishment of the International Military Tribunal of Nuremberg, which had jurisdiction over crimes against humanity regardless where they had been committed. The principles articulated in the Nuremberg Charter and Judgment were recognized as international law principles by the UN General Assembly in 1946 (Resolution 95 (I)). Similarly, genocide and torture are crimes under international law which are subject to universal jurisdiction.

A. The *jus cogens* and *erga omnes* nature of crimes against humanity

Jus cogens. Crimes against humanity and the norms which regulate them form part of *jus cogens* (fundamental norms). As such, they are peremptory norms of general international law which, as recognized in Article 53 of the Vienna Convention of the Law of Treaties (1969), cannot be modified or revoked by treaty or national law. That article provides that "a peremptory norm of general international law is 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". Similarly, the prohibition of torture "is itself a norm of *jus cogens* or a 'peremptory norm of general international law'" (Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon Press 1997), p. 110; *see also* Theodor Meron, "International Criminalization of Internal Atrocities", 89 Am. J. Int'l L. (1995), pp. 554, 558; *Restatement (Third) of Foreign Relations Law*, §702, comment n.; Rodley, *supra*, p 70; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-718 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993)). Indeed, Chile itself has declared that "the prohibition on torture has the character of *jus cogens* or obligation *erga omnes*" (Submissions to be made by the Republic of Chile if leave to intervene is given, *R. v. Metropolitan Stipendiary Magistrate, ex parte Pinochet*, House of Lords, 13 January 1999).

Erga omnes. As an eminent authority has explained, "*Jus cogens* refers to the legal status that certain international crimes reach, and obligation *erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *jus cogens* . . . . Sufficient legal basis exists to reach the conclusion that all of these crimes [including torture, genocide and crimes against humanity] are parts of the *jus cogens*" (M. Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*", Law & Contemp. Prob., 25 (1996), pp. 63, 68). Indeed, as the International Court of Justice recognized in *Barcelona*

Traction, Light and Power Company Ltd., Judgment (ICJ, 1972 Report, p. 32, paras. 33-34) the prohibition in international law of acts, such as those alleged in this case, is an obligation *erga omnes*, which is duty *all* states have a legal interest in ensuring is fulfilled:

> "[A]n essential distinction should be drawn between the obligations of a State toward the international community as a whole, and those arising vis-à-vis another State . . . By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have an interest of a legal nature in their protection; they are obligations *erga omnes*.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character."

B. The *ability* of any state to exercise universal jurisdiction over crimes against humanity and other crimes under international law

Crimes against humanity. The legal interest *erga omnes* permits any state to exercise universal jurisdiction over persons suspected of committing crimes against humanity (M. Cherif Bassiouni, *Crimes against Humanity* (Dordrecht/Boston/ London: Martinus Nijhoff Publishers 1992), pp. 510-527; Brownlie, *supra*, p. 304; Eric David, *Principes de Droit des Conflits Armés* (Bruxelles: Editions Bruylant 1994), para. 4.194 *et seq.*, pp. 643 *et seq.*; Bernard Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court", 1 Eur. J. Int'l L. 1990), 67, 68; Christopher Joyner, "Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability", 59 Law & Contemp. Prob. (1996), pp. 153, 160, 165, 168 ("Every state may prosecute violations of modern fundamental norms of international law, particularly those relating to war crimes and crimes against humanity"), 169; Menno T. Kamminga, "Universal Jurisdiction in Respect of Gross Human Rights Offences: Putting the Principle into Practice", Int'l L. Ass'n Y.B. (1995/1996), pp. 485-491; F.A. Mann, "The Doctrine of Jurisdiction in International Law", 113-1 Recueil des Cours (1964), pp. 9, 95; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (London and New York: Routledge 7th ed.1997), p. 113 (crimes against humanity "are a violation of international law, directly punishable under international law itself (and thus universal crimes), and they may be dealt with by national courts or by international tribunals"); Theodor Meron, 89 Am. J. Int'l L. (1995), pp. 554, 569 ("It is now widely accepted that crimes against humanity . . . are subject to universal jurisdiction."); Kenneth C. Randall, "Universal Jurisdiction under International Law", 66 Tex. L. Rev. (1988), pp. 785, 814; Ratner & Abrams, *supra*, p. 143; Restatement (Third) of Foreign Relations (1987), § 404; Rodley, *supra*, pp. 101-102; Malcolm N. Shaw, *International Law* (4th ed. 1997), p. 472; *see also* Convention on the Suppression and Punishment of the Crime of *Apartheid*, Art. V ("Persons charged with the acts enumerated in article II [the crime against humanity of *apartheid*] may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused . . .").

Crimes against humanity are considered as crimes of the same nature as piracy,

which any state may punish. With respect to such a crime,"*le droit ou le devoir d'assurer l'ordre public n'appartient a aucun pays [...] tout pays, dans l'intérêt de tous, peut saisir et punir*" ("the right and duty to ensure public order (*ordre public*) does not belong to any particular country . . . [;] any country, in the interest of all, can exercise jurisdiction and punish" - unofficial translation) (Cour Permanente de Justice Internationale, Affaire du Lotus (France/Turquie), arret du 7 septembre 1927, Serie A, No 10, p. 70, opinion individuelle du Juge Moore).

More than a third of a century ago, the scholar F.A. Mann explained the rationale for universal jurisdiction over crimes under international law:

> "The second exception [to the general rule that states do not have criminal jurisdiction over crimes committed by aliens abroad] arises from the character of certain offences. This is such as to affect and, therefore, justify and perhaps even compel every member of the family of nations to punish the criminal over whom jurisdiction can in practice be exercised. These are crimes which are founded in international law, which the nations of the world have agreed, usually by treaty, to supress and which are thus recognized not merely as acts commonly treated as criminal, but dangerous to and, indeed, as attacks upon the *international* order. Traffic in women and children, trade in narcotics, falsification of currency, piracy and trade in indecent publications are crimes covered by such treaties, and therefore by the principle of universality. By its very nature this principle can apply only in a limited number of cases, but the existence of a treaty is not a prerequisite of its application. It is founded upon the accused's attack upon the international order as a whole (Mann, *supra*, p. 95 (footnotes omitted, emphasis in original)).

In a footnote, F.A. Mann cited the *Eichmann* Case, which involved crimes against humanity and genocide, as an example of such crimes: "It is, therefore, likely that Israel was entitled to exercise international jurisdiction in the *Case of Eichmann* which arose from a unique case of such an attack." (*Ibid.*, p. 95, n. 188).

National legislation authorizing the exercise of universal jurisdiction over crimes against humanity.

According to information available to Amnesty International, including information supplied by Redress, a number of states, including ***Chile***, have enacted legislation permitting their courts to exercise universal jurisdiction over crimes against humanity, war crimes or other crimes under international law, such as torture or enforced disappearances, or they make treaty obligations to try or extradite persons suspected of such crimes directly applicable as part of their national law. These states include:

- ***Belgium:*** Under the Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions (Moniteur Belge, 5 août 1993), Belgian courts have universal jurisdiction over violations of the four Geneva Conventions of 1949 and their Protocols. In addition, Belgian courts are considered to have jurisdiction over crimes against humanity under customary law. *See* Luc Reydams, "De Belgische wet ter bestraffing van inbreuken op het internationaal humanitair recht: een papieren tijger?", 7 Zoeklicht (1998) p. 4. In addition, Loi 13 avril 1995, art. 8, loi relative aux abus sexuels à l'égard des mineurs provides for universal jurisdiction over crimes

against minors.

- ***Bolivia:*** The Bolivian Penal Code (Article 1 (7)) provides that national courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

- ***Brazil:*** The Brazilian Penal Code (Article 7) provides that national courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

- ***Canada:*** Section 7 (3.71) of the Canadian Criminal Code provides for universal jurisdiction over non-Canadians found in Canada for conduct outside Canada that constitutes a crime against humanity or a war crime if the conduct would have constituted an offence in Canada had it been committed in Canada.

- ***Chile:*** Article 5 of the Chilean Constitution recognizes as limits on sovreignty the respect for law which are inherent in the person and provides that the authorities have the duty to promote and respect rights guaranteed by treaties ratified by Chile which are in force. The Supreme Court of Justice of Chile has recognized under Article 5 the possibility of the direct application of the provisions of international treaties to which Chile is a party and which are in force (Judgment of 10 September 1988, *Pedro Enrique Poblete Cordoba*, paras 9 & 10). Chile is a party to the Inter-American Convention to Prevent and Punish Torture, which it ratified on 30 September of 1988. Article 12 of that treaty provides for universal jurisdiction over persons suspected of torture. Chile has also signed the Inter-American Convention on Forced Disappearance of Persons on 10 June 1994. Article IV provides for universal jurisdiction over this crime under international law and Chile is obliged under international law to refrain from acts which would defeat the object and purpose of the Convention pending a decision on ratification (Vienna Convention on the Law of Treaties, Art. 18). Chile has also ratified the Convention against Torture on 23 September 1989, which provides for universal jurisdiction in Article 5.

- ***Colombia:*** The Colombian Penal Code (Article 15 (6)) provides that Colombian courts have jurisdiction over crimes committed abroad by foreigners against other foreigners, when the person presumed responsible is within Colombian territory.

- ***Costa Rica:*** The Costa Rican Penal Code (Article 7) states that national courts, independently of the place of the event and the nationality of the person presumed responsible, have jurisdiction to judge according to national law the crime of genocide and any crimes against human rights according to treaties accepted by Costa Rica or by its Penal Code.

- ***Denmark:*** Article 8 (5) of the Danish Penal Code gives the courts jurisdiction to try those reponsible for certain crimes when Denmark is bound to do so by treaty (*see* Marianne Holdgaard Bukh, "Prosecution before Danish Courts of Foreigners Suspected of Serious Violations of Human Rights or Humanitarian Law", 6 Eur. Rev. Pub. L. (1994), p. 339).

- ***Ecuador:*** The Ecuadorean Penal Code (Article 5) provides that national courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when international treaties or conventions establish this jurisdiction.

- ***El Salvador:*** The Penal Code of El Salvador (Article 9) provides the competence of national courts to exercise jurisdiction over crimes committed abroad, when they are considered crimes of international significance according to international treaties or conventions.

- ***France:*** On 6 January 1998, the *Cour de Cassation* held in the *Weceslas Munyeshyaka* case that France has universal jurisdiction under the French Law 96-432 of 22 May 1996 over genocide and crimes against humanity.

- ***Germany:*** Article 6 (1) of the German Penal Code provides that German criminal law applies to acts of genocide committed abroad. Article 6 (9) of the German Penal Code provides that German criminal law applies to conduct, including conduct abroad, which Germany is obliged to prosecute under a treaty to which it is a party.

- ***Guatemala:*** The Guatemala Penal Code (Article 5 (5)) provides that national courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

- ***Honduras:*** The Honduran Penal Code (Article 5 (5)) provides that courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them, or when principles of international permit courts to exercise such jurisdiction.

- ***Israel:*** The Israeli Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, Sections 1 and 3, which prohibit certain crimes, including crimes against humanity, have been interpreted as applying to acts committed outside Israel by non-Israeli citizens. See discussion below of *Attorney-General of the Government of Israel v. Eichmann*, 36 Int'l L. Rep. 18, 50 (Isr. Dist. Ct. - Jerusalem), *aff'd*, 36 Int'l L. Rep. 277, 299 (Isr. Sup. Ct. 1962).

- ***Mexico:*** Mexican Penal Code (Código Penal para el Distrito Federal en materia de Fuero Común y para toda la República en materia de Fuero Federal, art. 6) provides that courts have jurisdiction to try those crimes under international treaties imposing this obligation on Mexico.

- ***Nicaragua:*** The Penal Code of Nicaragua (Article 16 (3) (f)) provides for universal jurisdiction, *inter alia*, over crimes of piracy, slave commerce, racial discrimination and genocide.

- ***Norway:*** Section 12 (4) of the Norwegian Criminal Code provides that, "Unless it is otherwise specially provided or accepted in an agreement with a foreign State,

Norwegian criminal law shall be applicable to acts committed: . . . (4) abroad by a foreigner when the act either" (a) constitues murder, assault and certain other crimes under Norwegian law or (b) "is a felony also punishable according to the law of the country in which it is committed, and the offender is resident in the realm or is staying therein".

- ***Panama:*** The Panamanian Penal Code (Article 10) provides that courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the offence was established by international treaties or conventions ratified by Panama.

- ***Peru:*** The Peruvian Penal Code (Article 2) provides that courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

- ***Spain:*** Article 65 of the 1985 Judicial Power Organic Law (*Ley Orgánica del Poder Judicial, Ley orgánica 6/1985*) gives Spanish courts juisdiction over acts committed outside Spain where the conduct would violate Spanish law if committed in Spain or violates obligations under international treaties. Article 23 (4) of this law gives Spanish courts jurisdiction over other offences which international treaties require Spain to prosecute, including genocide, terrorism and where treaties require Spain to prosecute such crimes (*see* "The Criminal Procedures against Chilean and Argentinian Repressors in Spain: A Short Summary" (Revision One), 11 November 1998, Derechos Human Rights, http://www.derechos.org).

- ***Switzerland:*** Article 6*bis* of the Code pénal suisse gives the courts universal jurisdiction over crimes committed outside the territory which Switzerland is obliged to prosecute under a treaty, such as torture. *See* Switzerland's Initial Report to the UN Committee against Torture, UN Doc. CAT/C/5/Add.17, para. 52. Article 109 of the Code pénale militaire (Violations of the Laws of War) provides that it is a crime for anyone to act "contrary to the provisions of any international agreement governing the laws or the protection of persons and property, or . . . in violation of any other recognized law or custom of war". Article 2 (9) extends the application of the Code to civilians and members of foreign armed forces, even if they commit the crimes abroad during an international armed conflict and have no link to Switzerland. Article 108 (1) provides for the application of Articles 109 to 114 to international armed conflict; Article 108 (2) extends their application to non-international armed conflict (*See* Andreas R. Zeigler, "*In re* G.", 92 Am. J. Int'l L. (1998), pp. 78, 79).

- ***Uruguay:*** The Uruguayan Penal Code (Article 10 (7)) provides that courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

- ***Venezuela:*** The Venezuelan Penal Code (Article 4 (9)) provides that courts have jurisdiction to try and punish crimes against humanity committed abroad, by nationals or foreigners, when they are in Venezuelan territory.

National courts which have exercised universal jurisdiction over crimes against humanity. National courts have exercised universal jurisdiction over crimes against humanity during the Second World War in national tribunals established under the authority of Allied Control Council Law No. 10 in Europe or in other national tribunals or commissions elsewhere, and subsequently in ordinary national courts and they have exercised such universal jurisdiction over crimes against humanity which have been committed since the Second World War.

The Allies conducted over 1,000 trials in national tribunals after the Second World War under the authority of the ***Allied Control Council Law No. 10*** of persons accused of crimes against peace, war crimes or crimes against humanity, based largely on universal jurisdiction (Kenneth J. Randall, *supra*, at pp. 804-810; Ratner & Abrams, *supra*, p. 143; Sponsler, "The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen", 15 Loy. L. Rev. (1968), pp. 43, 53; *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) ("it is generally agreed that the establishment of these tribunals and their proceedings were based on universal jurisdiction"), *cert. denied*, 475 U.S. 1016 (1986)). Indeed, several of these national tribunals expressly stated that they were asserting universal jurisdiction in cases where the accused were convicted of crimes against humanity or war crimes. For example, in a case in which the accused were convicted of both crimes against humanity and war crimes, the United States court in Nuremberg declared that a state which captures a person responsible for war crimes either may "surrender the alleged criminal to the state where the offence was committed, or . . . retain the alleged criminal for trial under its own legal processes."
(*In re List* (*Hostages* Case), 11 Trials of War Criminals (1946-1949), p. 1242). The United States argued that the court had jurisdiction because the accused had committed crimes that were "universally recognized" under existing customary and conventional law (*Ibid.*, p. 1235).

In 1961, ***Israel*** tried and convicted Adolf Eichmann of crimes against humanity committed in Germany during the Second World War based in part on universal jurisdiction. The District Court of Jerusalem stated:

> "The State of Israel's 'right to punish' the accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source . . ." (*Attorney General of Israel v. Eichmann*, 36 Int'l L. Rep. 18, 50 (Isr. Dist. Ct. - Jerusalem 1961), *aff'd*, 36 Int'l L. Rep. 277 (Isr. Sup. Ct. 1962)).

On appeal, the Israeli Supreme Court reached the same conclusion:

> "[T]here is full justification for applying here the principle of universal jurisdiction since the international character of 'crimes against humanity' . . . dealt with in this case is no longer in doubt . . . ." (*Attorney General v. Eichmann*, 36 Int'l L. Rep. 277, 299 (Isr. Sup. Ct. 1962).

F.A. Mann and numerous other scholars have concluded that this case was a proper exercise of universal jurisdiction by a national court over crimes against humanity (Mann, *supra*, p.

95, n. 188; *see, for example,* Joyner, *supra*, p. 168, n. 53).

In 1985, a ***United States*** court authorized the extradition of a person alleged to have committed acts in Germany and other countries which amounted to genocide and other crimes against humanity to Israel (*In matter of Demjanjuk*, 603 F. Supp. 1468 (N.D. Ohio, *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 457 U.S. 1016 (1986)).

In 1993, the **French** *Cour d'Appel* (Court of Appeal) recognized the existence of the fundamental rule of international law of universal jurisdiction in the *Barbie* Case when it noted that "by reason of their nature, the crimes against humanity with which Barbie is indicted do not simply fall within the scope of French municipal law, but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign" (*Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie, Cour de Cassation (Chambre Criminel)*, Judgment, 6 October 1983 (summarizing decision of *Cour d'Appel*), 78 Int'l L. Rep. 128).

Canadian courts exercised universal jurisdiction over a non-Canadian accused of crimes against humanity during the Second World War (*see R. v. Finta*, 28 C.R (4th) 265 (1994)).

According to information available to Amnesty International, including information provided by the Redress Trust, after the establishment of the International Criminal Tribunal for the former Yugoslavia in 1993, a number of courts have exercised universal jurisdiction over crimes under international law committed in the former Yugoslavia, including those in:

- ***Austria:*** In March 1995, Duško Cvjetkovic, a Serb charged with murder, arson and genocide, was retried for acts committed in Bosnia and Herzegovina in July 1992 after the Austrian Supreme Court ruled that Austria had jurisdiction (*see* Axel Marschik, "The Politics of Prosecution: European National Approaches to War Crimes", *in* Timothy L.H. McCormack & Gerry J. Simpson, eds, *The Law of War Crimes* (1997), pp. 65, 79-81). He was ultimately acquitted.

- ***Denmark:*** In November 1994, in *Prosecution v. Refik Šaric*, Danish High Court, Third Chamber, Eastern Division, 25 November 1994, of a Bosnian Muslim was convicted and sentenced to eight years' imprisonment of torture of prisoners of war in violation of the grave breaches provisions of the Third and Fourth Geneva Conventions; the verdict was confirmed on appeal by the Supreme Court on 15 September 1995. The Prime Minister of Denmark, Poul Nyrup Rasmussen, has requested the Minister of Justice, Frank Jensen, to study the possibility of asking for the extradition of the former head of state of Chile ("Primer Ministro Danés analiza posible demanda extradition", 11 December 1998 (EFE)).

- ***Germany:*** There have been at least six criminal investigations or prosecutions of persons charged with crimes committed in the territory of the former Yugoslavia. In the case of *Prosecutor v. Duško Tadic*, the Supreme Court of Germany (*Bundesgerichtshof*) on 13 February 1994 held that a Bosnian Serb could be prosecuted in Germany for genocide committed in Bosnia and Herzegovina. He was subsequently surrendered to the International Criminal Tribunal for the former Yugoslavia and convicted (

Prosecutor v. Tadic, Judgment, Trial Chamber, Case No. IT-94-1, 7 May 1997). He has appealed the conviction. In *Public Prosecutor v. Djajic*, No. 20/96 (Sup. Ct. Bavaria, 3d Strafsenat, 23 May 1997) (reported in 92 Am. J. Int'l L. (1998), pp. 528-532), a Bosnian Serb was acquitted of the crimes of genocide and attempted genocide in Bosnia and Herzegovina, but convicted of grave breaches of the Fourth Geneva Convention and Protocol I. On 26 September 1997, Nikola Jorgic was convicted of 11 counts of genocide and 30 counts of murder and sentenced to life imprisonment by the Düsseldorf High Court
(*Public Prosecutor v. Jorgic*, Oberlandesgericht Düsseldorf, 26 September 1997). He has appealed against his conviction. The Federal Prosecutor in Karlsruhe stated on 8 December 1997 that charges were being pressed against Maksim S. for crimes of genocide, murder, rape and torture of Bosnian Muslims in former Yugoslavia.
A Federal Prosecutor has opened a criminal investigation of Djuradj Kušic, a Bosnian Serb who was arrested in Munich in September 1997 on suspicion of murder and complicity in crimes against humanity in former Yugoslavia. Another case is reported to be pending in the Düsseldorf High Court against a Bosnian Serb charged with genocide.

- ***The Netherlands:*** Prosecutors are investigating a number of cases of crimes under international law committed in other countries. On 11 November 1997, the *Hoge Raad* (Netherlands Supreme Court) held that a Military Court had could exercise universal jurisdiction to try Darko Knezevic for laws and customs of war, including grave breaches of the Geneva Conventions committed in the former Yugoslavia (*Prosecution v. Darko Knezevic*, Sup. Ct. Neth., 11 November 1997).

- ***Sweden:*** In February 1995, the Public Prosecutor ordered the opening of a criminal investigation against Siniša Jazic, a Bosnian Serb, for the murder of Bosnian Muslims in detention camps in the territory of the former Yugoslavia.

- ***Switzerland:*** On 28 February 1997, Goran Grabez, a Bosnian Serb was charged with violating the laws and customs of war by torturing prisoners in in the Omarska and Keraterm camps in Bosnia and Herzegovina, but was later acquitted. *In re G.* (Military Tribunal, Division 1, Lausanne, Switzerland, 18 April 1997) (reported in 92 Am. J. Int'l L. (1998), pp. 78-82).

After the establishment of the International Criminal Tribunal for Rwanda in 1994, a number of prosecutors opened criminal investigations in different states concerning crimes against humanity, genocide or war crimes which occurred in Rwanda, including prosecutors in:

- ***Belgium:*** Criminal investigations were opened against several Rwandans for violations of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II). Three who had been arrested in 1995 were subsequently transferred to the International Criminal Tribunal for Rwanda pursuant to a request made in January 1996. In August 1996, a Belgian court refused to dismiss a criminal case against Vincent Ntezimana charged with genocide in Rwanda during 1994.

- ***France:*** An investigating magistrate opened a criminal investigation against a Rwandan priest, Wenceslas Munyeshyaka, for genocide and crimes against humanity committed in Rwanda in 1994. On 6 January 1998, the *Cour de Cassation* rejected a

challenge to the investigating magistrate's jurisdiction and held that there was universal jurisdiction under international law based on Security Council Resolution 955, which established the International Tribunal for Rwanda and which was implemented by Law 96-432 of 22 May 1996.

- ***Switzerland:*** In December 1998, the trial of a Rwandan mayor of a commune in Gitarama province, accused of committing crimes against humanity in 1994 was rescheduled until April 1999 before a military court (*Le Temps* (Switzerland), 17 December 1998). In May 1997, Switzerland agreed to surrender Alfred Musema, arrested in Switzerland in February 1995 and then under investigation by Swiss military judicial authorities, to the International Criminal Tribunal for Rwanda.

More recently, a number of national courts are reported to have determined that they, or other national courts, have universal jurisdiction over acts in other countries which amount to crimes against humanity or torture, including:

- ***Belgium:*** In November 1998, a Brussels investigating magistrate, Daniel Vandermeersch, declared that he had jurisdiction to open a criminal investigation against former General Pinochet following the submission of a complaint by six Chileans (Belga/Belgian Press Agency, 6 November 1998).

- ***Spain:*** A Spanish judge has opened criminal investigations against former General Pinochet concerning crimes committed in Chile involving victims of Spanish, Chilean and other nationalities and a criminal investigation against the members of the Argentinian military junta concerning crimes committed during the military government..

- ***Switzerland:*** A Geneva prosecutor has opened a criminal investigation of former General Pinochet concerning the death of person with Chilean and Swiss nationality. A Swiss court has requested has requested the extradition of former Admiral and deputy military junta member Emilio Massera in December 1998 for kidnapping a person with Chilean and Swiss nationality in Argentina in 1977.

Statements by government officials recognizing universal jurisdiction over crimes against humanity. There have have been a number of statements by governmental officials or extradition requests approved by executive officials which demonstrate that their states recognize that national courts have universal or extraterritorial jurisdiction over crimes against humanity, genocide, torture or war crimes, including: ***Belgium:*** The Minister of Foreign Affairs, Erik Derycke, stated in a television interview that "the British and Spanish authorities have the right to arrest the former Chilean dictator Pinochet "("Interview met Minister van Buitenlandse Zaken Erik Derycke over de arrestatie van Pinochet", VRT-TV1, 1900, 22 October 1998). ***Canada:*** On 27 November 1998, the Foreign Minister of Canada, Lloyd Axworthy, welcomed the judgment of the House of Lords in the *Pinochet* case two days before, noting that it "makes clear the global dimension of this challenge and our collective responsibility to address this issue" (Address by the Honourable Lloyd Axworthy to theInternational Conference on Universal Rights and Human Values - A Blueprint for Peace, Justice and Freedom", Edmonton, 27 November 1998. ***France:*** The French Minister of Justice, Elisabeth Guigou, stated that she believed that former General Pinochet had a case to answer in France and would send extradition requests to the United Kingdom if they

are approved by French courts (see "Pinochet Gets Bail - But Stays under Police Guard in Hospital", PA News, 30 October 1998, mfl 301659 OCT 98; AFP, "*Londres et Madrid statuent sur le sort du général Pinochet*", *Le Monde*, 29 October 1998, p. 4). Such a request has been sent. ***Luxembourg:*** Jacques Poos, the Foreign Minister of Luxembourg, said on 31 October 1998 that Luxembourg may seek General Pinochet's extradition. ***Sweden:*** On 25 November 1998, the Minister for Foreign Affairs, Anna Lindh, welcomed the House of Lords judgment, saying: "It is good that yet another step has been taken in a process that may lead to Pinochet being brought to justice in Spain" (Ministry of Foreign Affairs Press Release, 25 November 1998). ***United Kingdom:*** The Secretary of State, Jack Straw, on 9 December 1998, issued an order to a magistrate authorizing the magistrate to proceed with a hearing on a request for extradition to Spain for acts amounting to crimes against humanity and torture committed in a third country. Order to the Chief Metropolitan Stipendiary Magistrate or other designated Metropolitan Stipendiary Magistrate sitting at Bow Street, 9 December 1998. ***United States:*** In 1997, after reports that Pol Pot, the head of the Khmer Rouge, had been taken into custody by other members of the Khmer Rouge, the United States Secretary of State, Madeline Albright, and other high-level United States officials pressed states like Denmark and Canada to accept custody with a view to a possible trial either by an international criminal tribunal for Cambodia or, if this proved impossible to establish, by their national courts (*see, for example,* Mark Kennedy & Giles Gherson, "Canada in a spin over U.S. request", The Ottawa Citizen, 14 June 1997, p. A3). Although Pol Pot died before arrangements could be made to transfer him to any national jurisdiction outside Cambodia, these efforts by the Secretary of State and other high-level officials are strong evidence that the United States believes that national courts have universal jurisdiction over crimes against humanity. The former Foreign Minister of ***Australia***, Gareth Evans, stated that Australia would have been a suitable venue for a trial of Pol Pot (The Independent, 30 July 1997).

Universal jurisdiction over genocide. Although the framers of the Convention for the Prevention and Punishment of the Crime of Genocide in 1948 did not extend the scope of jurisdiction under that treaty beyond territorial jurisdiction and the jurisdiction of an international criminal court, genocide is a crime under customary international law over which any state may exercise universal jurisdiction (Theodor Meron, "International Criminalization of Internal Atrocities", Am. J. Int'l L. 89 (1995), p. 569; Rodley, *supra*, p. 156; Kenneth C. Randall, *supra*, pp. 785, 835-837; *Restatement (Third) of Foreign Relations Law*," 702, reporter's note 3 (1986); see also *In matter of Demjanjuk*, 603 F. Supp. 1468 (N.D. Ohio), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 457 U.S. 1016 (1986) (authorizing extradition to Israel of person alleged to have committed acts which amounted to genocide and other crimes against humanity); *Attorney General of Israel v. Eichmann*, 36 Int'l. L. Rep. 277; F.A. Mann, *supra*, p. 95, n. 188); Kenneth C. Randall, *supra*, pp. 785, 836; Ratner & Abrams, *supra*, pp. 142-143; Rüdiger Wolfrum, "The Decentralized Prosecution of International Offences through National Courts", Israel Y.B. Int'l Hum. Rts (199), pp.183; *see also* Octavio Colmenares Vargas, *El Delito de Genocido* (Mexico 1951).

Universal jurisdiction over torture. The UN Special Rapporteur on torture, (now Sir) Nigel Rodley, before he assumed that post concluded more than a decade ago that "permissive universality of jurisdiction [over torture] is probably already achieved under general international law" (Rodley, *supra*, p. 107; *see also* Ratner & Abrams, *supra*, p. 111; *Restatement (Third) of Foreign Relations Law*, " 404).

C. The *duty* to try or extradite persons responsible for crimes against humanity, torture, extrajudicial executions and enforced disappearances

Given that crimes against humanity are *erga omnes*, it follows that all states, including Chile, France, Spain, Switzerland and the United Kingdom, are under an *obligation* to prosecute and punish crimes against humanity and to cooperate in the detection, arrest, extadition and punishment of persons implicated in these crimes. It is now widely recognized that all states are under an obligation to try or extradite persons suspected of committing crimes against humanity under the principle of *aut dedere aut judicare* (*see, for example,* Bassiouni, *Crimes against Humanity, supra*, pp. 499-508; Brownlie, *supra*, p. 315). Moreover, every state which is a party to the UN Convention against Torture (including the United Kingdom, as well as Belgium, Chile, France, Italy, Luxembourg, Spain, Switzerland and the United States) is under a solemn duty under Article 7 (1) of that treaty to extradite anyone found in its jurisdiction alleged to have committed torture or to "submit the case to its competent authorities for the purpose of prosecution". Failure to fulfil this obligation would be a violation of international law.

Only six months ago on 17 July 1998, the international community reaffirmed the fundamental obligations of every state to bring to justice at the national level those responsible for crimes against humanity, genocide and war crimes and to exercise its jurisdiction over those responsible for these crimes. In the Preamble of the Statute of the International Criminal Court, the states parties affirmed "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation", determined "to put an end to impunity for the perpetrators of these crimes" and recalled "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" (Rome Statute of the International Criminal Court, Preamble, paras. 4-6).

The international community has also recognized that every state should bring to justice those responsible for extrajudicial executions and enforced disappearances. Principle 18 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the UN Economic and Social Council (ECOSOC) in its Resolution 1989/65 of 24 May 1989 and welcomed by the UN General Assembly in its Resolution 44/159 of 15 December 1989, provides:

> "Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. *This principle shall apply irrespective of* who and where the perpetrators or the victims are, their nationalities or *where the offence was committed.*" (emphasis supplied)

Article 14 of the UN Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly in Resolution 47/133 of 18 December 1992, provides:

> "Any person alleged to have perpetrated an act of enforced disappearance in a

particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force. *All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be in their jurisdiction or under their control.*" (emphasis supplied)

Five years before the UN General Assembly adopted this Declaration, it had been recognized that "general international law probably permits, though it may not require, a state to exercise criminal jurisdiction over an alleged perpetrator [of enforced disappearance], regardless of the latter's nationality or the place where the offence was committed" and that, to the extent that enforced disappearances constitute torture, states parties to the UN Convention against Torture will be required to exercise universal jurisdiction over persons found in their territories who are responsible for enforced disappearances (Rodley, *supra*, p. 206).

The Human Rights Committee, a body of 18 experts established under the International Covenant on Civil and Political Rights to monitor implementation of that treaty (to which the United Kingdom is a party), in an authoritative interpretation of that treaty concluded that enforced disappearances inflict severe mental pain and suffering on the families of the victims in violation of Article 7, which prohibits torture and cruel, inhuman or degrading treatment or punishment (*Elena Quinteros Almeida v. Uruguay*, Communication No. 107/1981, views of the Human Rights Committee adopted on 21 July 1983, para.14, *reprinted in* Selected Decisions of the Human Rights Committee under the Optional Protocol, 2 (1990)). The European Court of Human Rights reached the same conclusion, finding that the extreme pain and suffering an enforced disappearance inflicted on the mother of the "disappeared" person violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibist torture and inhuman or degrading treatment (*Kurt v. Turkey*, Judgment, Eur.Ct.Hum.Rts, Case No. 15/1997/799/1002, 25 May 1998, para. 134).

A quarter century ago, the UN General Assembly declared that all states have extensive obligations to cooperate with each other in bringing to justice those responsible for crimes against humanity wherever these crimes occurred and must not take any measures which would be prejudicial to these obligations. These obligations include:

"3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.

4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.

5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.

6. States shall co-operate with each other in the collection of information and evidence which would help to bring to trial the persons indicated in paragraph 5 above and shall exchange such information.

. . . .

8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest extradition and punishment of persons guilty of war crimes and crimes against humanity." (UN Principles of international co-operation in the detection, arrest extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by the General Assembly in Resolution 3074 (XXVIII) of 3 December 1973).

Although these Principles state that "as a general rule" persons responsible for crimes against humanity should face justice in their own courts, this general rule clearly does not apply when that country has given the person an amnesty or has otherwise demonstrated an unwillingness or inability to bring the person to justice (See, for example, the principle of complementarity in Article 17 of the Rome Statute of the International Criminal Court permitting the Court to exercise its concurrent jurisdiction over genocide, other crimes against humanity and war crimes when states parties themselves are unable or unwilling to do so).

D. Duty to bring to justice those responsible for crimes against humanity regardless whether they are crimes under national law

The failure to incorporate international law on crimes against humanity within the domestic criminal law of a state does not excuse a state from international responsibility for failing to pursue judicial investigations. The International Covenant on Civil and Political Rights (Article 15(2)), to which Chile, France, Spain, the United Kingdom and Switzerland are parties, and the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (Article 7(2)) establish that a person accused of committing crimes against humanity can be prosecuted according to the principles established and recognized by international law. The UN Committee against Torture has considered that, as regards torture, this obligation exists regardless whether a State has ratified the UN Convention against Torture, as there exists "a general rule of international law which should oblige all States to take effective measures to prevent torture and to punish acts of torture", recalling the principles of the Nuremberg judgement and the Universal Declaration of Human Rights (UN Committee against Torture, decision of 23 November 1989, Communication Nos. 1/1988, 2/1988 and 3/1988, Argentina, decisions of November 1989, para. 7.2).

The UN International Law Commission reaffirmed the principles established by the Nuremberg Tribunal by which "international law may impose duties on individuals directly without any interposition of internal law" (Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, UN Doc. A/51/10, p. 16); *U.S. v. Montgomery*, (11th Cir., 27 September 1985) ("International law as such binds every citizen"), *cited in* 80 Am. J. Int'l L. (1986), p. 346).

III. CRIMINAL RESPONSIBILITY UNDER INTERNATIONAL LAW OF HEADS OF STATE FOR CRIMES AGAINST HUMANITY

A. The evolution of the rule excluding head of state immunity

Those responsible for torture, genocide and other crimes against humanity cannot invoke immunity or special privileges as a means of avoiding criminal or civil responsibility. The fundamental rule of international law that heads of state and public officials may be held individually responsible for crimes against humanity has been long established and it was widely accepted before the adoption of the Nuremberg Charter on 8 August 1945 that heads of state could be held criminally responsible for crimes under international law. As Vattel recognized more than two centuries ago, a head of state who commits murder and other grave crimes in the course of a war

> "is chargeable with all the evils, all the horrors, of the war; all the effusions of blood, the desolation of families, the rapine, the violence, the revenge, the burnings, are his works and his crimes. He is guilty towards the enemy, of attacking, oppressing, massacring them without cause, guilty towards his people, of drawing them into acts of injustice, exposing their lives without necessity, without reason, towards that part of his subjects whom the war ruins, or who are great sufferers by it, of losing their lives, their fortune, or their health. Lastly, he is guilty towards all mankind, of disturbing their quiet, and setting a pernicious example" (*Quoted in* Quincy Wright, "The Legal Liability of the Kaiser", 13 Am. Pol. Sci. Rev. (1919), pp. 120, 126)

The rule that heads of state can be held responsible for crimes against humanity is simply a specific example of the general rule of international law recognized in the Treaty of Versailles of 28 June of 1919 that immunities of heads of state under international law have limits, particularly when crimes under international law are involved. In Article 227 of that treaty the Allied and Associated Powers publicly arraigned "William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties" and provided for a special tribunal to try the former head of state, with judges appointed by Great Britain and other countries. Article 227 was based on the report presented to the 1919 Preliminary Peace Conference by a commission of 15 leading international law scholars, including Sir Ernest Pollock, Sir Gordon Hewart and W.F. Massey on behalf of the British Empire, André Tardieu of France, Rolin-Jaequemyns of Belgium, N. Politis of Greece, and A. De Lapradelle of France as General Secretary. The Commission, noting the grave charges, including crimes against humanity, against members of the former enemy forces, stated that it desired

> "to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is

> quite different. . . . If the immunity of a sovereign is claimed to extend beyond the limits above staed, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind." (Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, *reprinted in* 14 Am. J. Int'l L. (1920) (Supp.), pp.95, 116).

Only the Japanese and American members of the Commission dissented on this point, but the two American members said that their objections did "not apply to a head of state who has abdicated or has been repudiated by his people"
(*Ibid.*, p. 136).

The Allies had planned to bring Adolf Hitler, the head of state of Germany, to justice for crimes under international law, and on 3 January 1945, at a time when Hitler was still in power, President Roosevelt wrote to the Secretary of State asking for a report on the charges to be brought against the Fuerher (Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knopf 1992), p. 38). This request came against a background of proposals for an international criminal court made during the Second World War which expressly provided for trials of heads of state (*see, for example,* Conclusions adopted by the London International Assembly on 21 June 1943, para. 3 (c) ("Crimes committed by Heads of State."); and Draft Convention for the Creation of an International Criminal Court of the London International Assembly, 1943, Art. 2 (3) ("War crimes can be perpetrated, as a principal or an accessory, by any person whatever, irrespective of rank or position, Heads of State included."); London International Assembly, *Reports on Punishment of War Crimes* (1943), pp. 324-346; United Nations War Crimes Commission, Draft convention for the establishment of a United Nations war crimes court with an explanatory memorandum, Art. 1 (2) ("The jurisdiction of the Court shall extend to the trial and punishment of any person - irrespective of rank or position - who has committed, or attempted to commit, or has ordered, caused, aided, abetted or incited another person to commit, or by his failure to fulfil a duty incumbent upon him has himself committed, an offence against the laws and customs of war.").

Great Britain, France, the United States and the Soviet Union began drafting Article 7 of the Nuremberg Charter in the spring and early summer of 1945 at a time when there was still some doubt whether Adolf Hitler was still alive, and the list of proposed defendants agreed at a meeting headed by Geoffrey Dorling Roberts of the British War Crimes Executive on 23 June 1945 included Adolf Hitler (Taylor, *supra*, p. 86). The final list of defendants in the indictment included Karl Doenitz, Adolf Hitler's successor as head of state of Germany from 1 May 1945 until the end of the Second World War in Europe a week later.

Article 7 of the Nuremberg Charter expressly provided: "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." As Justice Robert Jackson, the United States Prosecutor at Nuremberg and one of the authors of the Charter, explained in his 1945 report to the President on the legal basis for the trial of persons accused of crimes against humanity and war crimes,

> "Nor should such a defense be recognised as the obsolete doctrine that a head of State is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still 'under God and the law'" (Justice Robert H. Jackson, "Report to President Truman on the Legal Basis for Trial of War Criminals", Temp. L.Q. (1946), 19, p. 148).

In its Judgment, the International Military Tribunal at Nuremberg declared: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" (Nuremberg Judgment, *supra*, p. 41). The Nuremberg Tribunal went beyond the Charter by concluding that state immunities do not apply to crimes under international law:

> "It was submitted that . . . where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, [this contention] must be rejected. . . . The principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings" (*Ibid.*, pp. 41-42) .

The Nuremberg Tribunal made clear sovereign immunity of the state did not apply when the state authorized acts, such as crimes against humanity, which were "outside its competence under international law":

> "[T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law" (*Ibid.*, p. 42).

The Nuremberg Tribunal found that Karl Doenitz, as head of state of Germany from 1 to 9 May 1945, was "active in waging aggressive war", in part based on his order in that capacity to the Wehrmacht to continue the war in the East and he was convicted of Counts Two and Three of the indictment and sentenced to 10 year's imprisonment (*Ibid.*, pp. 110, 131).

The Tokyo Tribunal reached a similar conclusion to that of the Nuremberg Tribunal when it declared that "[a] person guilty of such inhumanities cannot escape punishment on the plea that he or his government is not bound by any particular convention"(B.V.A. Röling and Rüter, *The Tokyo Judgment* (Amsterdam: University Press 1977), II, pp. 996-1001). Although the Emperor of Japan was not charged with crimes against humanity, war crimes or crimes against peace by the Prosecutor of the Tokyo Tribunal, the decision not to

prosecute him was not based on the belief that he was immune under international law as head of state, but was made "by the good grace of General Douglas MacArthur" (Bassiouni, *Crimes against Humanity, supra*, p. 466; see also the view of B.V.A. Röling that the decision not to prosecute the Emperor was the result of a political, rather than a legal, decision by the American President, contrary to the wishes of Australia and the Soviet Union, in his book with Antonio Cassese, *The Tokyo Trial and Beyond* (Cambridge: Polity Press 1994) (paperback edition), p. 40).

B. The principle of individual criminal responsibility of heads of state for crimes against humanity is part of customary international law

The principles articulated in the Nuremberg Charter and Judgment, including the principle that heads of state may be held criminally responsible for crimes against humanity, have long been recognized as part of general international law. The fundamental rule of international law that heads of state and public officials do not enjoy immunity for crimes against humanity has been consistently reaffirmed for more than half a century by the international community. The evidence that this principle is part of customary international law includes resolutions of the UN General Assembly, international treaties and instruments, decisions of national courts, extradition requests sent and honoured by executive officials, state proposals for international criminal courts, reports and codifications of international law by the International Law Commission, writings of international law scholars and statements by intergovernmental organizations.

UN General Assembly. The UN General Assembly unanimously endorsed "the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal" in GA Res. 95 (I) of 11 December 1946.

International treaties and instruments. The principle of criminal responsibility of heads of state has been included in numerous treaties and other international instruments since Nuremberg, including: Article 6 of the Charter of the International Military Tribunal for the Far East (1946); Article IV of the Convention for the Prevention and Punishment of the Crime of Genocide (1948); Principle III of the Principles of Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal (1950), Article 3 of the UN Draft Code of Offences against the Peace and Security of Mankind (1954), Article III of the Convention on the Suppression and Punishment of the Crime of *Apartheid* ("individuals . . . and representatives of a State"), Article 7 (2) of the 1993 Statute of the International Tribunal for the former Yugoslavia, Article 6 (2) of the 1994 Statute of the International Criminal Tribunal for Rwanda and Article 7 of the UN Draft Code of Crimes against the Peace and Security of Mankind adopted in 1996, as well as in Article 27 of the Statute for the International Criminal Court, adopted in Rome on 17 July 1998 by a vote of 120 (including the United Kingdom) in favour to only seven against, with 21 abstentions).

State proposals for international criminal courts. Indeed, the UN Secretary-General in his report to the Security Council on the establishment of the ***International Criminal Tribunal for the former Yugoslavia*** noted:

> "Virtually all of the written comments received by the Secretary-General have suggested that the Statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials

and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment." (Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 55)

The ***French*** proposal submitted to the Secretary-General stated, "in keeping with the Nürnberg precedent - it should be reaffirmed that the fact that a person was performing official duties in no way constitutes a factor relieving him of responsibility. 'Act of State' does not exist." Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations addressed to the the Secretary-General, UN Doc. S/25266, 10 February 1993, para. 96). The ***Italian*** government proposal provided: "The official status of the author of any of the crimes referred to in article 4 [war crimes, genocide, crimes against humanity and torture], and particularly the fact of having acted in the capacity of head of State or member of the Government, does not exclude criminal liability." (Letter dated 16 February 1993 from the Permanent Representative of Italy to the United Nations addressed to the Secretary-General, UN Doc. S/25300, 17 February 1993, Art. 5 (1)) The then ***44 member states of the Organization of the Islamic Conference*** included a provision in their proposal stating: "The Tribunal shall be competent to try persons accused of responsibility for such crimes at any level, whether as leaders, intermediaries or subordinates, and no form of imunity shall be deemed a bar to prosecution." (Letter dated 31 March 1993 from the Representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey to the United Nations addressed to the Secretary-General, UN Doc. A/47/920*, S/25512*, 5 April 1993, Annex, Art. II (2)). The ***Russian Federation's*** proposed statute for the tribunal stated: "The official position of an individual who commits a crime specified in article 12 of this Statute [war crimes, genocide, crimes against humanity and torture]and, in particular, his position as head of State or the responsible official of any Government department shall not be regarded as grounds for relileving him of responsibility or mitigating the penalty." (Letter dated 5April 1993 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc. S/25537, 6 April 1993, Art. 14 (3)). The ***United States*** proposal included a provision stating: "The official position of an accused person, including as a Head of State or a responsible official in a Government, shall not be considered as freeing him or her from responsibility or grounds for mitigating punishment." Letter dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/25575, 12 April 1993, Annex I, Art. 11 (c). At the time the Statute was adopted, the Permanent Ambassador of the ***United Kingdom***, Sir David Hannay, declared: "It is essential that those who commit such acts be in no doubt that they will be held individually responsible. It is essential that these atrocities be investigated and the perpetrators called to account, whoever and wherever they may be." (UN Doc. S/PV.3217, 25 May 1993).

United States and ***United Kingdom*** officials have stated on numerous occasions that the current President of Iraq, Saddam Hussein, should be brought to justice for crimes under international law, possibly by an ***international criminal tribunal for Iraq***, and a 1997 ***United States*** proposal for an ***international criminal tribunal for Cambodia*** included a provision excluding immunity of heads of state for crimes against humanity, genocide and war crimes. The draft statute for an international criminal tribunal for Cambodia which was

drafted by the United States and discussed in the Security Council, a copy of which Amnesty International has obtained, provided in Article 8 (2): "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."

Similarly, states supported the inclusion of this rule in the ***Statute of the International Criminal Court*** (*See* Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Sess., Supp. (No. 22), UN Doc. A/51/22 (1996), para. 193). The principle of no immunity for heads of state and public officials in Article 27 of that treaty had been omitted in the 1994 International Law Commission draft, but included at the insistence of many states and without objection from any state. Article 27 provides:

> "1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

As of 13 January 1999, the Rome Statute of the International Criminal Court has been signed by at least 73 states from all parts of the globe in the six months since it was adopted on 17 July 1998, including ***Chile, France, Switzerland*** and the ***United Kingdom*** (***Albania, Andorra, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Belgium, Bolilvia, Burkina Faso, Burundi, Cameroon, Canada, Chile, Colombia, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Denmark, Djibouti, Ecuador, Eritrea, Finland, France, Gabon, Gambia, Germany, Georgia, Ghana, Greece, Honduras, Iceland, Ireland, Italy, Jordan, Kyrgyzstan, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia (the former Yugoslav Republic of), Madagascar, Mali, Malta, Mauritius, Monaco, Namibia, Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Portugal, Samoa, San Marino, Senegal, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Tadjikistan, United Kingdom, Venezuela, Zambia, Zimbabwe***). The Foreign Secretary of the ***United Kingdom***, Robin Cook, has stated that the United Kingdom will be among the first 60 states to ratify the Statute (Hansard, 28 July 1998).

International criminal court decisions since Nuremberg. A Trial Chamber of the ***International Criminal Tribunal for the former Yugoslavia*** recently emphasized with respect to a charge of torture that the rule of criminal responsibility of heads of state under international law in its Statute and in the Statute of the International Criminal Tribunal was a rule of customary international law:

> "Those who engage in torture are personally accountable at the criminal level for such acts. . . . Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7 (2) of the Statute and article 6 (2) of the Statute of the International Criminal Tribunal for Rwanda . . . are indisputably declaratory of customary international law." (*Proscutor v. Furundzija*,

Judgment, Case No. IT-95-17/1-T, para. 140).

International criminal prosecutor. The ***Prosecutor of the International Criminal Tribunal for the former Yugoslavia and for Rwanda*** recently stated, "Legally, it would be wrong to believe that heads of state who came to power after the break-up of Yugoslavia are exonerated from responsibility for acts committed during the war". In addition, she noted that "the tribunal's statutes are very explicit, . . . they do not exonerate a person acting as head of state from responsibility towards the tribunal" ("Top officials in ex-Yugslavia not immune from prosecution: UN", Zagreb, AFP, 11 January 1999).

National courts and extradition requests. National courts have authorized the prosecutions of a former head of state of another country for alleged crimes against humanity, genocide or torture and the executive authorities of those states have made formal requests for the extradition of the former head of state (see Part III.D below).

The International Law Commission. The UN International Law Commission recently stated:

> "As further recognized by the Nürnberg Tribunal in its judgment, the author of crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence" (Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, UN Doc. A/51/10, p. 41).

Leading scholars. Eminent international scholars have concluded that the principles of the Nuremberg Charter and Judgment, which include the principle that individuals notwithstanding their official position, even as head of state, are not immune for crimes against humanity, are part of international law (*See* Jennings & Watts, *supra*, pp. 505, para. 148; Claude Lombois, *Droit pénal international*, (Paris: Dalloz 1971), pp. 142, 162 and 506; Georg Schwarzenberger, 2 *International Law as Applied by International Courts and Tribunals* (1968), p. 508; *see also* André Huet & Renée Koering-Joulin, *Droit pénal international* (Paris: Thémis 1994), pp.54-55). Sir Arthur Watts, KCMG, Q.C., has concluded:

> "The idea that individuals who commit international crimes are internationally accountable for them has become an accepted part of international law . . . . It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be called to account if there is sufficient evidence that he authorized or perpetrated such serious international crimes." (247-1 Receuil des Cours, (1994), pp. 9, 82-84).

The leading commentators on the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda have stated that "The Nuremberg precedent laid the foundation for the general recognition of the responsibility of government officials for crimes under international law notwithstanding their official position at the time of the criminal conduct." (Virginia Morris & Michael P. Scharf, 1 *The International Criminal Tribunal for Rwanda* (Irvington-on-Hudson, New York: Transnational Publishers, Inc.

1997), p. 246). They concluded that "[t]his fundamental principle is a cornerstone of individual responsibility for crimes under international law which by their very nature and magnitude usually require a degree of involvement on the part of high-level government officials." (Morris & Scharf, *supra,* p. 249).

Declarations and recommendations by intergovernmental organizations. On 25 November 1998, the ***UN High Commissioner for Human Rights***, Mary Robinson, the former President of Ireland, said with respect to the judgment of the House of Lords in the Pinochet case earlier that day that it "confirmed the emerging international consensus against impunity" (Tim Weiner, "Europeans, but not U.S., Rejoice at Ruling", New York Times, 26 November 1998, p. 12). On 17 November 1998, the ***Committee against Torture***, the body of experts established under the Convention against Torture to monitor implementation of that treaty, after the decision of the High Court holding that under English law a former head of state enjoyed immunity from prosecution for crimes against humanity, found that Sections 134 (4) and (5) (b) (iii) of the Criminal Justice Act "appear to be in direct conflict with article 2 of the Convention [against Torture]" and Sections 1 and 14 of the State Immunity Act 1978 "seem to be in direct conflict with the obligations undertaken by the State Party pursuant to articles 4, 5, 6 and 7 of the Convention" (Concluding observations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland, 17 November 1998, UN Doc. CAT/C/UK (unedited version). It recommended that these laws be amended to bring them into conformity with the United Kingdom's obligations under the Convention and recommended that in the case of the former head of state,

> "the matter be referred to the office of the public prosecutor, with a view to examining the feasibility of and if appropriate initiating criminal proceedings in England, in the event that the decision is made not to extradite him. This would satisfy the State party's oblilgations under articles 4 to 7 of the convention and article 27 of the Vienna Convention on the Law of Treaties of 1969" (*Ibid.*).

The ***European Parliament*** on 22 October 1998, noting that "the 1992 Treaty on European Union lays down certain obligations relating to cooperation between Member States in combatting international crime, notably inbetween Member States in combating international crime", congratulated Spanish and United Kingdom authorities "for their effective cooperation in the arrest of General Pinochet", reaffirmed "its commitment to the principle of universal justice to protect human rights" and called upon the Spanish government "to request the extradition of General Pinochet as soon as possible" (Eur. Parl. Res. B4-0975/98). On 8 December 1998, the ***Inter-American Commission on Human Rights*** has reiterated the principle of universal jurisdiction, under which any state has jurisdiction to prosecute and try persons responsible for crimes against humanity regardless of the place where the crimes were committed, the nationality of the person responsible and the nationality of the victim (Inter-American Commission on Human Rights, Recommendation concerning Universal Jurisdiction and the International Criminal Court, 101st Session, 8 December 1998, p. 2).

C. The long-settled applicability of the rule of international law to national courts

The international law rule that heads of state and government officials are not immune from criminal prosecution for crimes under international law applies to national courts as well as

to international courts. International instruments demonstrate that national courts must apply the same customary law rule of criminal responsibility for heads of state as international courts. National prosecutors have conducted investigations and prosecutions in accordance with rules of international criminal responsibility, national courts have issued indictments and extradition requests or have honoured them, executive authorities of states have transmitted such requests or honoured them and executive authorities have made statements demonstrating that they believe this rule applies to national courts, not just international courts.

International instruments. Indeed, international instruments make this clear. For example, Allied Control Council Law No. 10, promulgated by the Allies, which authorized the establishment of national military tribunals to try Axis defendants for crimes against humanity, war crimes and crimes against peace, provided in Article 4 (a) that "[t]he official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment." Article IV of the Convention for the Prevention and Punishment of the Crime of Genocide applies to prosecutions which states parties are required to take under Article VI in national courts, as well as to international courts. Principle 18 of the UN Principles for the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions requires that "[g]overnments shall either bring such persons [those identified as having participated in such killings] to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction .... irrespective of who ... the perpetrators ... are ....") Article 14 of the UN Declaration on the Protection of All Persons from Enforced Disappearance requires that "[a]ll States should take any lawful and appropriate action available to them to bring to justice *all persons* presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control." (emphasis supplied) (*see also* Eric David, *Principes de Droit des Conflits Armés Internationaux* (Bruxelles: Editions Bruylant 1994), para. 4.127, p. 605).

The Rome Statute of the International Criminal Court is predicated on the principle of complementarity under which states have the primary duty to bring to justice those responsible for crimes against humanity, genocide and war crimes, but the International Criminal Court may assert its concurrent jurisdiction in any case where a state is unable or unwilling genuinely to investigate or prosecute (Art. 17). Thus, if a state party were to decline to investigate or prosecute a head of state who was suspected of these crimes or to extradite the person to another state willing to do so, it would undermine the very purpose of the Statute, as expressed in the Preamble, "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" (Preamble, para. 4).

Both the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda envisage concurrent jurisdiction with national courts investigating and prosecuting persons responsible for crimes against humanity, genocide and war crimes, including heads of state, but permit the two tribunals to assert their primary jurisdiction to retry persons tried in national courts in any case where "the national court proceedings ... were designed to shield the accused from international criminal responsibility" (Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 10 (2) (b); Statute of the International Criminal Tribunal for Rwanda, Art. 9 (2) (b)).

National prosecutors and courts. The rule that immunities under international law of heads of state and public officials are limited, particularly when they have been accused of crimes under international law, has been recognized by national prosecutors and courts, either in opening criminal investigations and prosecutions or in honouring extradition requests, including those of:

- ***Argentina:*** *Trial of the nine military commanders who had ruled Argentina between 1976 and 1982*, Argentinean Federal Court of Appeals, Judgment on 9 December 1985 and Argentinean Supreme Court of Justice, Judgment 30 December 1986. A criminal investigation has been opened by Argentinan Federal Judge Roberto Marquevich regarding the illegal adoption of children abducted by the security forces from their parents who had been "disappeared" between 1976 and 1978. The former head of the junta and President General Jorge Videla and Admiral Emilio Massera have been arrested.

- ***Belgium:*** In November 1998, a Brussels investigating magistrate, Daniel Vandermeersch, declared that he had jurisdiction to open a criminal investigation against the former head of state of Chile following the submission of a complaint by six Chileans (Belga/Belgian Press Agency, 6 November 1998).

- ***Bolivia:*** *Trial of former President General Luis García Meza and his collaborators on multiple charges relating to gross human rights violations* Bolivian Supreme Court of Justice, Judgment on 21 April 1993.

- ***Denmark:*** The Prime Minister of Denmark, Poul Nyrup Rasmussen, has requested the Minister of Justice, Frank Jensen, to study the possibility of asking for the extradition of the former head of state of Chile ("Prime Ministro Danes analiza posible demanda extradition", 11 December 1998 (EFE)).

- ***Equatorial Guinea:*** There former President Macias Nguema for genocide and other crimes. Judgment of Special Military Tribunal on 29 September 1979.

- ***France:*** In November 1998, a French court sought the extradition from the United Kingdom of the former head of state of Chile, former General Pinochet.

- ***Germany:*** The former President of the German Democratic Republic was tried by a German court, although the case against him was dropped on grounds of his ill-health. *Honecker* case, BverfG (third chamber of second Senate), Order on 21 February 1992, DtZ 1992, 216.). The German Prosecutor General has argued that the former head of state of Chile has no immunity with respect to crimes under international law and Supreme Court transmitted allegations of such crimes to the provincial court of Düsseldorf to determine whether he has immunity
(*see* Kai Ambos, "Der Fall Pinochet und das anwendbare Recht", Juristen Zeitung, 8 January 1999, pp. 16-24).

- ***Italy:*** The Italian Minister of Justice, Oliviero Dilimberto, has asked Milan investigating magistrates to consider opening a criminal investigation of the former head of state of Chile under Article 8 of the Italian Criminal Code

(*L'Unita*, 11 November 1998). On 7 January 1983, at the request of the Minister of Justice, a criminal investigation was opened under Article 8 of the Italian Criminal Code concerning Italians who had "disappeared" in Argentina. These proceedings are continuing under the supervision of an investigating judge of Rome court concerning Jorge Rafael Videla, the former head of state, and other Argentine military officials (Case No. 3402/92 r.g. n.r. P.M - No. 1402/93 r.g. GIP).

- ***Luxembourg:*** On 31 October 1998, the Foreign Minister of Luxembourg, Jacques Poos, said that it may seek the extradition of the former head of state of Chile.

- ***Spain:*** On 4 November 1998, the *Audiencia Nacional* authorized the prosecution of members of the Argentinian junta and others (Apelacion No. 84/89, sumario 79/97). The following day, the *Audiencia Nacional* approved the prosecution of former General Pinochet and others for genocide, terrorism and other crimes on 5 November 1998 (Apelation No. 173/98, sumario 1/98).

- ***Switzerland:*** A Geneva prosecutor has opened a criminal investigation of the former head of state of Chile.

- ***United Kingdom:*** The Secretary of State, Jack Straw, on 9 December 1998, issued an order authorizing magistrates to proceed with a hearing on a request for extradition to Spain of a former head of state for acts amounting to crimes against humanity and torture committed in a third country. Order to the Chief Metropolitan Stipendiary Magistrate or other designated Metropolitan Stipendiary Magistrate sitting at Bow Street, 9 December 1998.

- ***United States:*** On 7 January 1999, the Attorney General of the United States said that the Justice Department was fully cooperating with the Spanish government in its criminal prosecution of the former head of state of Chile: "We are continuing to try to do everything we can to make sure that material that Spain has sought under the mutual legal assistance treaty is made available to Spain, and that we do everything else that we can to cooperate." (United States Department of Justice, Press Conference, The Honorable Janet Reno, Attorney General, 7 January 1999, p. 6). She also said that the Justice Department was considering if former General Pinochet could be brought to trial in the United States in connection with a murder committed in Washington, D.C. in 1976 while he was in office: "[W]e're reviewing the case that occurred here to see what appropriate steps can be taken there") (*Ibid.*, p. 7). See also *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994) (holding that the Foreign Sovereign Immunity Act did not prevent United States court from exercising jurisdiction over the estate of the former President of the Philippines for alleged acts of torture and wrongful death since those acts were not official acts committed within the scope of his authority).

Approving statements by executive officials of states. A number of executive officials of states have made statements approving either the provisional arrest in the United Kingdom of a former head of state or the judgment of the House of Lords on 25 November 1998 that a former head of state had no immunity from prosecution in a court of another state for crimes against humanity and torture committed in his own state, including those of:

- ***Belgium:*** On 21 October 1998, the spokesperson for the Minister of Foreign Affairs, M. Pierre-Emmanuel Debauu, declared after the provisional arrest of the former head of state of Chile that it was "good that grave crimes not remain unpunished" (*"bon que des crimes graves ne restent pas impunis"*) ("Arrestation Pinochet: satisfaction de la Belgique", Belga, 21 October 1998). The following day, the Minister of Foreign Affairs, Erik Derycke, stated in a television interview that "the British and Spanish authorities have the right to arrest the former Chilean dictator Pinochet ("Interview met Minister van Buitenlandse Zaken Erik Derycke over de arrestatie van Pinochet", VRT-TV1, 1900, 22 October 1998).

- ***Canada:*** On 25 November 1998, the Foreign Minister, Lloyd Axeworthy, said that the House of Lords judgment earlier that day was "a very important precedent-setting decision, where a national court [is] taking on the responsibilities for applying international standards for crimes against humanity". He added, "The fact that immunity was denied is a very symbolic decision in establishing that there is an international standard that does not prevent any person escaping accountability" ("Canada, UN Human Rights Commissioner welcome House of Lords ruling", AFP, 25 November 1998, AFP-TC35).

- ***France:*** The President of France, Jacques Chirac, said in respect of the decision by the House of Lords on 25 November 1998: "May justice be done, and may light be fully shed on Pinochet's responsibilities"; the French Prime Minister, Lionel Jospin, added: "It's a surprise, it's a joy, it's bad news for dictators." (Tim Weiner, "Europeans, but not U.S., Rejoice at Ruling", New York Times, 26 November 1998, p. 12.).

- ***Germany:*** According to press reports, the Foreign Minister, Joshka Fischer, and the Minister of Justice, Herta Daeubler-Gmelin, both supported the extradition of former General Pinochet for crimes he was alleged to have committed when he was head of state. (Tim Weiner, "Europeans, but not U.S., Rejoice at Ruling", New York Times, 26 November 1998; "Fischer Recibe Satisfacccion Decision Camara de los Lores"; Nacional Cronica, Chile, 5 November 1998 (Internet webpage: http://tercera.copesa. cl/diario/ 1998/11/05); Agence EFE, 25 November 1998).

- ***Luxembourg:*** On 18 October 1998, the Foreign Minister of Luxembourg, Jacques Poos, issued a press release stating:

  "The news that the arrest of General Pinochet by the British authorities following a formal request made by the Spanish judiciary gives me great satisfaction. It would, indeed, be unthinkable that the former dictator of Chile, who had committed numerous violations of human rights in his country, including some which were committed against European citizens, could continue to enjoy impunity on the territory of a European democracy."(*"La nouvelle de l'arrestation du général Pinochet par les autorités britanniques suite à une demande formulée par la justice espagnole m'a rempli d'une grande satisfaction. Il était en effet impensable que l'ancien dctateur du Chile, qui a commis de nombreuses violations des droits de l'homme dans son pays, y compris contre des citoyens européens, puisse de jouir de l'impunité sur le sol d'une démocratie européene."*) (Grand-Duché de Luxembourg, Ministère des Affaires Etrangères, Communiqué de Presse 18 octobre 1998)

D. The reason for the rule of customary international law

The UN International Law Commission has explained why the rule that heads of state and public officials may be held criminally responsible when they commit crimes under international law is an essential part of the international legal system:

> " . . . crimes against the peace and security of mankind often require the involvement of persons in positions of governmental authority who are capable of formulating plans or policies involving acts of exceptional gravity and magnitude. These crimes require the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes. A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required for carrying out the crime, but also abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the [Draft Code of Crimes against the Peace and Security of Mankind] to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security." (1996 Report of the International Law Commission, *supra*, p. 39)

E. The inapplicability of statute of limitations and the prohibition of asylum

The international law rule which provides that there is no immunity for heads of states or public officials for crimes against humanity is buttressed by the exclusion of statutes of limitation and the prohibition of granting asylum for persons responsible for such crimes. Crimes against humanity are unaffected by statutes of limitation as recognized in the Convention on Imprescriptibility of Crimes of War and Against Humanity, adopted by the General Assembly of the United Nations, Resolution 2391 (XXII) of 1968, and in the Council of Europe's treaty: Non-applicability of Statutory Limitations to Crimes against Humanity and War Crimes, E.T.S. No. 82, adopted on 25 January 1974. This fundamental rule of international law was reaffirmed in Article 29 of the Statute of the International Criminal Court. Furthermore, those responsible for crimes against humanity cannot benefit from asylum or refuge in another country. (GA Res. 3074(XXVIII), 3 December 1973; Convention relating to the Status of Refugees (Article 1 (f)); and UN Declaration on Territorial Asylum (Article 1 (2)).

CONCLUSION

For the reasons stated above, all states have universal jurisdiction over torture, extrajudicial executions, enforced disappearances, genocide and crimes against humanity and they have a duty to bring such persons to justice in their own courts, to extradite them to a state willing to do so or to surrender them to an international criminal court with jurisdiction over these crimes. It is a fundamental rule of international law that neither a head of state nor a former head of state has immunity from criminal prosecution for crimes against humanity, whether in international or national courts. In the words of the Nuremberg Tribunal more than half a century ago:

"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. . . . It was submitted that . . . where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, [this contention] must be rejected. . . . The principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings" (Judgment., pp. 41-42).

Source Amnesty International International Secretariat, 1 Easton Street, WC1X 8DJ, London, United Kingdom