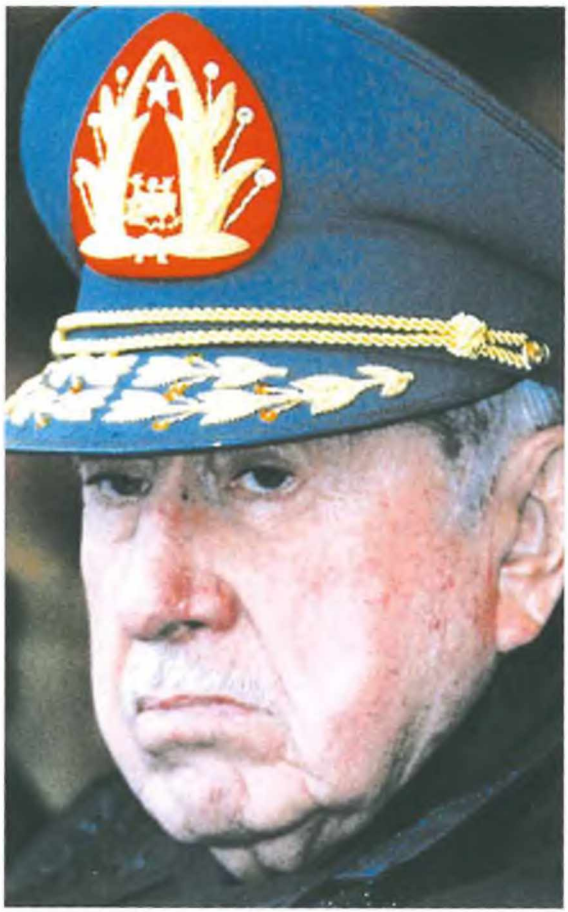
# Crimes Against Humanity
## Pinochet Faces Justice



*International Commission of Jurists*
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# Preface

The International Commission of Jurists (ICJ) has actively monitored the human rights situation in Chile for over twenty-five years now, since General Augusto Pinochet Ugarte overthrew the democratic government led by Dr. Salvador Allende. Since the beginning, Dr. Alejandro Artucio, ICJ Senior Legal Officer for Latin America and the Caribbean, closely followed the Chilean situation on behalf of the ICJ and in solidarity with the Chilean people, visiting the country to unearth the truth behind the regime and then disseminating information to the rest of the world through ICJ publications and reports to various intergovernmental bodies. From the moment Chile's democratic institutions were overthrown by a bloody military *coup d'Etat* on 11 September 1973, the ICJ voiced its concern over the brutal violation of human rights that descended the country into a decades long nightmare. Indeed, on 15 September 1973, only four days after the *coup*, the ICJ, jointly with Amnesty International, officially requested the UN to adopt measures to halt the human rights violations in the country. The ICJ was also the first international non-governmental organisation to send an observer mission to Chile, in April 1974. It committed itself to maintaining the Chilean situation as a major issue before the UN, the OAS and the Council of Europe throughout the duration of the Pinochet regime.

Once democracy finally returned to Chile in 1990, the ICJ cooperated with the National Commission for Truth and Reconciliation *(Comisión Nacional de Veridad y Reconciliación)*, established by the newly elected President, Dr. Patricio Aylwin Azócar. Indeed, there have been many lies to uncover and much to reconcile. Pinochet was a dictator who would stop at nothing to consolidate his power. His regime eliminated thousands of opponents. During the dictatorship, arbitrary executions, arrests, assassinations, torture and "disappearances" were common practice. Tens of thousands of Chileans met their fate at the hands of Pinochet's ruthless regime.

While he was violating the rights of millions of Chileans, Pinochet developed several measures for his own self-protection. In 1978, the Amnesty Law was passed which was designed to protect those in power from future judicial actions. Then in 1980, with the creation of the new Constitution, Pinochet included a clause providing for himself and eight others to become "senators for life" and, therefore, immune from prosecution, in the event of the replacement of his dictatorship by a democracy.

However, he did not anticipate all possible eventualities. He may have arranged for his immunity in Chile, but that would prove to be insufficient abroad.

On 16 October 1998, Pinochet was arrested while in London at the request of a Spanish judge, Dr. Baltasar Garzón, who sought his extradition to Spain to face charges of genocide, terrorism and torture. On 28 October 1998, the High Court of Justice in London ruled in favour of Pinochet and held that he was entitled to sovereign immunity. This judgment was appealed by the Prosecutor, representing also the interests of Spain, to the Appellate Committee of the House of Lords where, on 25 November 1998, they issued their historic judgment overturning the lower court's ruling. By a three to two majority the Lords held that Pinochet could be extradited. The Home Secretary then gave his approval for the extradition. However, the victory appeared short-lived. Pinochet's lawyers appealed the verdict on the grounds that Lord Hoffmann, one of the three Law Lords who had formed the majority, could have been unduly influenced because of his connections to the international human rights non-governmental organisation Amnesty International, which had intervened in the case. The original ruling by the House of Lords was, therefore, quashed, and a new hearing ordered.

On 24 March 1999, a new Appellate Committee comprised of seven other Law Lords issued its ruling. By a six to one majority, they held that Pinochet could not benefit from immunity so as to prevent his extradition to Spain. This decision, therefore, clearly confirmed the findings concerning immunity made by the first Appellate Committee on 25 November 1998. On 14 April 1999, the Home Secretary issued his second authority to proceed with the extradition process, pursuant to English law. The process is now underway. However, there are aspects of the judgment which are unsatisfactory according to the ICJ. The judgment severely narrowed the kinds of crimes and dates for which Pinochet can stand trial, on the basis of the provisions of the Criminal Justice Act of 1988, and ratification by London of the Convention against Torture. As well as providing a detailed analysis of each of the decisions, this report details the opposition of the ICJ to the restrictive approach adopted in the final judgment on immunity.

The House of Lords decisions did not mark the end of this saga, however. On 26 May 1999, another appeal by Pinochet's lawyers was rejected at the High Court. They are not conceding defeat, however, and

in June 1999 they made a submission to the Spanish courts, claiming once again that Spain has no jurisdiction to try Pinochet. It is the desire of both Pinochet and the Chilean government that he should be sent back to Chile.

Clearly, this is a complicated and emotional case and one with far reaching implications for both the people involved and for international law in general. This publication seeks to provide a thorough analysis that will elucidate the critical issues that have been raised by the Pinochet case thus far. The case has already contributed to stimulating debate around major human rights issues that can no longer be ignored. It should be seen as an important step in the struggle against impunity and bodes well for the future prosecution of others, however mighty and powerful, who commit crimes against international law. Hopefully, the Pinochet case will encourage the prompt establishment of the International Criminal Court, allowing the international community to bring to justice other perpetrators of such egregious crimes.

Finally, some acknowledgements are due. First, I wish to express my thanks and deep appreciation to Dr. Alejandro Artucio, author of this publication and a devoted human rights defender, who has always committed himself wholeheartedly to improving the situation of human rights around the world. It is my firm belief that the work of Dr. Artucio will inspire others to continue this cause. The present publication could not have been finalised without the work and commitment of our press officer Nicolas Bovay; without the translation from the Spanish – expertly done by Dennis Clagett – and without the most valuable editorial assistance provided by Amanda Roelofsen.

**Adama Dieng**
*Secretary-General*

# CRIMES AGAINST HUMANITY
# PINOCHET FACES JUSTICE

## The *Coup d'Etat* of 11 September 1973
## Response of the International Commission of Jurists (ICJ)

The International Commission of Jurists has monitored the human rights situation in Chile with keen interest and concern from the moment that the democratic institutions of the country were assaulted by a bloody military *coup d'Etat* on 11 September 1973. The coup was led and directed by the then General Augusto Pinochet Ugarte, who at the time held the post of Commander-in-Chief of the Chilean Army, a position to which he had been named on 23 August 1973, by the Constitutional President, Dr Salvador Allende. The action by the military cost the lives of hundreds of Chileans during the initial weeks and days of the coup, including that of President Allende himself. It destroyed the constitutional order to which the military owed obedience, suspended the operation of essential institutions of the State and converted General Pinochet into a dictator armed with exceptional powers.

Thus began a long dark night for the Chilean people and a process which would litter the country with the corpses of hundreds of the regime's opponents. The nightmare made innocent people the victims of torture and prisoners, detained in the secrecy of obscure dungeons. Thousands were forced into exile to save their lives and liberty by abandoning their homeland. It was not until 1990 that this nightmare would end, when democracy was reestablished and Mr. Patricio Aylwin Azócar was elected President by popular vote. Through the action of his government, President Aylwin would demonstrate his firm democratic convictions.

But the restoration of the country's institutions and the transition from dictatorship to democracy were not made without cost. Democracy's growth was stifled by the continuing prominence of the military. Today, nine years later, the regime's brutal legacy has given way to a clamorous national and international protest demanding that Mr. Pinochet be judged by an independent tribunal and receive a punishment befitting the gravity of the crimes with which he is charged.

From the outset of the military intervention, the International Commission of Jurists understood the magnitude of the tragedy unfolding and was determined to employ all the forces at its disposal that

might contribute to dissipating the darkness of the Chilean situation. On 15 September 1973 (four days after the coup), the ICJ joined forces with Amnesty International to officially request that the United Nations adopt measures to halt the human rights violations being committed in Chile.

The ICJ was also the first international NGO to send an observer mission to the field. The purpose of the mission was twofold: to disseminate firsthand information on the situation to the international community, and to express solidarity with the victims of the persecution. The mission took place in April 1974 and involved the participation of several eminently qualified legal experts: the then ICJ Secretary General, Mr. Neill MacDermot, former Minister in the Government of the United Kingdom of Great Britain and Northern Ireland; Dr. Kurt Madlener, Professor and specialist in Latin American criminal law at the Max Planck Institute in Freiburg-im-Bresgau, Germany; and Dr. Covey Oliver, Professor of International Law at the University of Pennsylvania, former Ambassador of the United States of America and former US Assistant Secretary of State for Latin American Affairs.

The mission met with government ministers, high-ranking military officers, members of the Supreme Court, authorities of the Chilean Bar Association, defence lawyers for political prisoners, clergy members of the Catholic Church and other denominations, representatives of national non-governmental organisations, families of the victims, university academics, accredited diplomatic representatives in Chile and representatives of inter-governmental organisations present in the country.

Numerous other international non-governmental organisations followed the Chilean situation closely, gathering and documenting proof of human rights violations, along with other evidence and their own reflections. They therefore acted both as a source of information for inter-governmental organisations and the international community as a whole, and as a source of solidarity to the Chilean people.

At the request of the General Assembly of the United Nations, the UN Commission on Human Rights created an Ad-Hoc Working Group on the Situation of Human Rights in Chile, composed of five members from different geographical and political regions, which reported annually to the Commission and to the General Assembly. When the Government of Chile created obstacles to the functioning of the Working Group, the Commission on Human Rights designated a Special Rapporteur on Chile, who also reported annually to the Commission as well as to the General Assembly.

The UN Working Group on Forced Disappearances received and investigated numerous complaints and charges concerning the forced disappearance of persons in Chile, in each case requesting information from the Chilean government.

The International Labour Organisation (ILO) published numerous reports concerning the situation of labour unions in Chile, detailing the persecution, assassination and forced disappearance of many trade union leaders.

The United Nations High Commissioner for Refugees (UNHCR) maintained a presence in Chile, and handled the relocation to third countries of Bolivian, Brazilian, Paraguayan, Uruguayan and other refugees who had been detained in Chile.

The Inter-American Commission on Human Rights of the Organization of American States (OAS) undertook several missions to Chile and annually published thorough and well-documented reports on what was happening in the country in the field of human rights.

Other inter-governmental organisations also addressed the situation, for example the European Parliament, which on more than one occasion denounced violations of human rights in Chile.

The International Commission of Jurists provided all of these institutions and organisations with written documentation, data and analysis, and both the ICJ Secretary General and the ICJ Legal Officer for Latin America and the Caribbean (the author of this report) appeared before all of these bodies to explain the ICJ point of view concerning the Chilean situation. They also participated in numerous international conferences on Chile convened in various countries.

This course of action continued until the assumption of the reins of power by President Aylwin, at which point the ICJ changed its strategy by putting itself at the disposal of the elected president and collaborating with his National Commission of Truth and Reconciliation (also known as the Rettig Commission after its Chairman, and composed additionally of seven distinguished personalities, among them the Chilean Member of the ICJ, Mr. José Zalaquett Daher). Among other things, this collaboration included opening the ICJ archives to the work of the Commission.

* * *

On 16 October 1998, the former General and ex-dictator of Chile, Augusto Pinochet Ugarte, was arrested in London by the English police. His provisional detention had been requested by the Spanish judge Baltasar Garzón with a view to enabling the interrogation and possible extradition of Mr. Pinochet to stand trial in Spain and had been ordered by a London judge, Dr. Nicholas Evans. Pinochet's arrest constituted an important milestone in international human rights law by establishing a considerable crack in the seemingly impenetrable wall of impunity which usually protects major violators of human rights around the world. The very fact of the detention raised significant hopes.

The ex-dictator and now "Senator-for-Life" in Chile would seem to have accumulated more than sufficient grounds since 1973 to appear as a defendant in a criminal court. Such a court could investigate his conduct and issue a verdict in accordance with the law, taking into account his actions as Commander-in-Chief of the Chilean army, subsequently as President of Chile, and simultaneously head of the DINA (Office of National Intelligence). The DINA was the structure charged with carrying out political repression and reported directly to General Pinochet. While it sometimes operated within the confines of the law, far more frequently it worked outside of it.

## Acts for which Pinochet is blamed

When he occupied the post of Commander-in-Chief of the Army of Chile, Mr. Pinochet Ugarte organised and directed a *coup d'Etat* against the elected Chilean President, Dr. Salvador Allende, transforming himself into a dictator and assuming exceptional powers.

However, it is not for having made himself dictator of the country that prosecution of Mr. Pinochet is sought, but rather for having criminally and illegitimately repressed those who defended the legal Constitution that Pinochet attacked, and later all those who opposed his plans in any way, regardless of whether such opposition was translated into acts or only took the form of words. As part of this action he eliminated thousands of opponents by means of what the international community later termed "extralegal or arbitrary executions" and arrested tens of thousands of other people, who were subsequently cruelly tortured on a large scale by the military and security forces. Many of these persons were assassinated, others were executed after show trials in military courts,

and a large number of them were made to suffer the tragic and inhuman condition of "disappeared persons". Mr. Pinochet's regime censored the press and educational institutions, prohibited political and trade union activity and expelled Chilean citizens from their own country. In short, he severely restricted enjoyment of basic human rights among a considerable portion of the Chilean population.

Immediately following the *coup d'Etat*, the armed forces, under the direction of a military junta led by General Pinochet, assumed total control of the state and unleashed a repression in which the distinction between legal and illegal acts became blurred. The guarantees established by the Constitution of Chile were suspended, if not ignored. Pursuant to Decree Law No. 27 of 21 September 1973, the Parliament was dissolved and its legislative competencies transferred to the Junta of Commanders-in-Chief, which over the course of the regime approved hundreds of additional "Decree Laws". Further, the military junta gave itself constitutional powers and approved four "Constitutional Acts" – a legal instrument unheard of in Chile – which modified key aspects of the Constitution. Decree Law 527 of 26 June 1974 (the Statute of the Governing Junta) provided that "the Executive Power is exercised by the President of the Governing Junta (General Pinochet) who is the Supreme Commander of the Nation". Later, a subsequent Decree Law, No. 806, reestablished the title of "President of the Republic", which it conferred on General Pinochet.

Each and every one of the military intelligence services – the Office of Air Force Intelligence (DIFA), the Naval Intelligence Service (SIN), the Office of Army Intelligence (DINE) and the Office of Federal Police Intelligence (DICAR) – participated in hunting down the regime's opponents, with each branch specialising in a particular group of people or political theme.[1]

Beginning on the day of the coup itself, 11 September 1973, a "state of siege" was decreed in Chile, which was gradually modified to establish four distinct degrees or possible "emergency regimes". Throughout virtually the entire period of military rule, some form of "state of emergency" was maintained, involving greater or lesser restrictions of rights and liberties, depending on the historical circumstances.

1 See the excellent paper issued by Amnesty International – October 1998 AMR 22/13/98/s "Chile, un deber irrenunciable; juzgar los crímines contra la humanidad".

Decree Law No. 5, in interpreting Article 418 of the Code of Military Justice, had declared that

> the state of siege decreed as the result of internal disorder, in the circumstances which the country is currently undergoing, should be understood as a 'state or time of war' in terms of applying the penalties established for such periods by the Code of Military Justice and other criminal laws.

After the first few weeks of the *coup d'Etat*, the political repression gradually became more selective and sophisticated. The essential mechanism used by Pinochet for this purpose was the operations of the DINA (*Dirección de Inteligencia Nacional*), which he himself created by Decree Law 521 on 14 June 1974, but which in fact had already been functioning for some time within the framework of the army's various intelligence services.

Although the DINA was formally under the authority of the Governing Junta as a whole, the National Commission on Truth and Reconciliation stated that "in practice it responded exclusively to the President of the Republic."[2] The DINA appears then to have been a semi-secret structure exercising enormous powers and in direct contact with the Head of State, a structure disposing of ample resources and more than fifteen interrogation, torture and detention centres through which passed hundreds of disappeared persons. In some cases, illegally detained persons were released after having been tortured or, more frequently, reappeared with the status of official or recognised detainees. Others became disappeared persons. On occasions in which Chilean judges tried to intervene in cases involving *habeas corpus* or protection appeals, they were never able to count upon the cooperation of the DINA, which shielded itself behind the secret character of its operations and maintained that it was only obliged to inform the President of the Republic of its actions.

But the DINA did not confine itself to committing crimes within Chile's own borders; it also committed such offences outside the country, for instance in the assassination of the former Chancellor of Chile, Mr. Orlando Letelier, and his assistant, Ms. Ronnie Moffit, in September 1976 in Washington. Similarly, in Argentina it coordinated its actions with the paramilitary Argentine Anticommunist Alliance (Triple A) and with

2 Report of the National Commission on Truth and Reconciliation, Vol..II, page 452.

sectors of the Argentine army, for example in the assassination of the former Commander-in-Chief of the Chilean Army, General Carlos Prats and his wife in September 1974.

The DINA also emerged as one of the prime actors working within the framework of the so-called "Operation Condor", the product of a clandestine accord between the governments of Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay (at that time all anti-democratic regimes) to allow agents from each of the military and security services of the region to undertake the systematic elimination of their political opponents within the territory of any other participating country. Dozens of citizens from these countries were assassinated as the result of Operation Condor, among them the ex-President of Bolivia, General Juan José Torres, the President of the Chamber of Deputies of Uruguay, Mr. Héctor Gutiérrez Ruiz, and the Uruguayan Senator, Dr. Zelmar Michelini.

The former Director of the DINA, General Manuel Contreras Sepúlveda, was finally put on trial and sentenced to seven years in prison for the assassination in Washington of Letelier and Moffit. While he did not admit his own guilt, he declared before the Supreme Court that he carried out the orders of Pinochet and "informed him daily" about the DINA's activities. In its ruling, the Supreme Court described the DINA as a criminal organisation with clear links to Pinochet.

Given the extensive international criticism of the actions of the DINA in Chile, including a description of some of its activities by the United Nations Commission on Human Rights and by the Inter-American Commission on Human Rights, as well as in the reports issued by various governments on this subject, the Executive power dissolved the DINA by Decree Law 1876 in August 1977, establishing in its place the *Centro Nacional de Informaciones* (CNI). Regrettably, the CNI followed the same repressive pattern and used the same brutal methods as its predecessor.

## *Proof and evidence that would establish Pinochet's guilt*

The vast quantity of human rights violations committed in Chile, which resulted in thousands of persons murdered, tortured or disappeared, has been amply documented by the main inter-governmental organisations. The United Nations Commission on Human Rights; its Ad Hoc Working Group on the Situation of Human Rights in Chile; the Special Rapporteur on Chile of the same UN Commission; the UN Working Group on Forced Disappearances; the United Nations High Commissioner for Refugees

(UNHCR); the International Labour Organization (ILO), the Inter-American Commission on Human Rights of the Organisation of American States and the European Parliament have all documented human rights violations in Chile. All of these organisations periodically published comprehensive reports on what was happening on the human rights scene in Chile, thereby isolating the regime and gradually forcing it to change its approach. In the long run such action – together with the efforts and participation of Chilean political, trade-union and civic organisations – resulted in the downfall of the dictatorship. Numerous non-governmental organisations followed the Chilean situation closely, providing the intergovernmental organisations and the public at large with documented proof, evidence and analysis of the situation. They therefore decisively contributed to the international isolation of the dictatorship and to the strengthening of the position of domestic civil and social organisations in Chilean civil society.

The reign of terror was also the subject of investigation within Chile itself. The painful odyssey experienced by family members of the murdered and the disappeared who tirelessly searched for information about the fate suffered by their loved ones led to the discovery of sites containing human remains – some of which were identified. As a result, the families were able to secure declarations from some of the repressors, former agents of the security services and other witnesses, confirming that many of the disappeared had been held, sometimes for long periods, in clandestine interrogation and detention centres.

On 19 April 1978, the military government approved Decree Law 2191, granting amnesty to the authors, accomplices or abettors of "criminal acts committed during the period of the application of the state of siege" (i.e. between 11 September 1973 and 10 March 1978). The decree added: "provided that such persons are not currently subject to prosecution or already convicted." At that time no member of the military or the security services had been brought to trial or convicted for crimes consisting of human rights violations; however, in the ranks of the opposition (violent or peaceful) numerous persons had been tried and convicted, thus leaving a majority of opposition figures out of the scope of the amnesty. This led the international community, including the United Nations and the Organization of American States, to qualify the Decree Law of 1978 as an "auto-amnesty".

When the dictatorship came to an end, the National Commission on Truth and Reconciliation (Rettig Commission) was given the mandate of

investigating and officially accounting for the most serious human rights violations resulting in death. The investigation was limited to the period ranging from 11 September 1973 to 11 March 1990, the date Mr. Aylwin assumed control of the government. The results of the Rettig Commission report, presented in February 1991, overwhelmingly confirmed the horrors that had been experienced. Some 2,280 persons had died, of which 164 persons were identified as victims of political violence and 2,115 as victims of human rights violations. Of the 2,115 victims of human rights violations, a total of 2,025 had died at the hands of governmental agents, and 90 through the actions of armed opposition groups. Hundreds of other cases were later incorporated into the subsequent investigations pursued by the National Corporation of Reparation and Reconciliation, a structure created to deal with issues pertaining to reparations owed to the families of the victims.

Even though the Rettig Commission's report covers only part of the tragedy inflicted upon the Chilean people (since it only refers to violation of rights that ultimately ended in the death of the victim) it is nevertheless an impressive work. It provides a thorough and scientifically rigorous review of the torture, assassinations, extrajudicial executions and disappearances (957 cases – increased later by several hundred cases through the work of the follow-up commission) carried out in a systematic and persistent manner from within the highest echelons of state power.

The report concludes with a very critical assessment of the functioning of the judicial system during the period of the dictatorship. It states that:

> the Judicial System did not respond with sufficient energy [which resulted in] a worsening of the process of systematic human rights violations, both in terms of the immediate effect of not providing protection to detainees covered in complaints brought to the courts, and because of the effect it had in lending to the agents of the repression a growing sense of impunity concerning the commission of their criminal acts.

Despite the existence of evidence of these crimes, the particular nature of the Chilean transition from dictatorship to democracy did not allow justice to be done in Chile. The military regime had effective control over the judiciary, a control so extensive that the Supreme Court actually ruled in favour of validating the amnesty decreed in 1978. Only a few such cases remained open in the military and civilian courts, primarily for acts committed after

March 1978. Clearly Mr. Pinochet and many of his comrades-in-arms still enjoy total and absolute impunity in Chile. The military regime adopted "preventive" measures so as to establish impunity for human rights violators in a future democratic regime and keep a share of power that would allow the armed forces to continue influencing political life in Chile.

## Preventive measures adopted by the military regime in anticipation of future democracy with the view to guaranteeing the impunity of the violators of human rights, as well as to conserving a degree of power that would permit the armed forces to continue to influence political life in Chile

The military, which had usurped political power under the leadership of General Pinochet, realised that they could no longer continue to rely solely on the force of arms. They began to prepare for a return to democracy that involved minimal risk to themselves or to their supporters.

### *A) The Amnesty of 1978*

As a first step, they imposed an "auto-amnesty" designed to protect themselves from future actions undertaken against them in the justice system. Thus on 19 April 1978, the military government approved Decree Law 2191, which, as noted above, establishes a broad amnesty protecting all members of the military and the security forces, since it refers to those persons who

> in their capacity as perpetrators, accomplices or accessories before or after the fact committed criminal acts during the operative period of the State of Siege, extending from 11 September 1973 until 10 March 1978.

Certain crimes falling under common civil jurisdiction were excluded from the amnesty, but not murder, kidnapping, forced disappearance or torture, all of which were covered by the decree, given that the real objective of the auto-amnesty was to make exemptions from these crimes.

#### ICJ commentary concerning the Amnesty Law

International human rights law imposes limitations on the power of States to grant amnesties or any other type of clemency measures when

such measures would imply waiving investigation or judgment of certain crimes. These restrictions are even more definitive when there are laws deriving from written treaties. In effect, such treaties have binding legal value: States that ratify or adhere to a treaty on human rights freely accept limitations on their sovereignty out of a common interest considered to be superior, such as human dignity. They are, therefore, obliged to fulfil their obligations under such treaties, both *vis-à-vis* the other States that have signed the treaty as well as with regard to their own population. This is particularly so in the case of treaties concerning human rights. As the Inter-American Court on Human Rights noted in September 1982 in its Consultative Opinion No. 2 :

> In approving these treaties on human rights, States submit themselves to a legal order within which, for the common good, they assume various obligations, not in relation to other States but toward the individuals under their jurisdiction.

Furthermore, the international obligations of a State are superior to those that may be established by national law (Art. 27 of the Vienna Convention on Treaty Law, 1969).

Normally, if a State wishes to withdraw from its treaty obligations, it cannot simply do so by creating an overriding municipal law. Indeed, unless the treaty specifically provides for withdrawal or denunciation, a State can get out of a treaty only if it informs the other States Parties of its intention to do so. It is then for the other treaty parties to decide whether or not they wish to consent to the denunciation or withdrawal. This means that if a State is a signatory to international treaties that ban torture or other similar acts, the State cannot grant amnesty or any similar measure for such acts simply through the adoption of a domestic law in violation of the treaty obligations. However, in practice, most conventions do allow for denunciation after a certain period of time from the date of entry into force, with a subsequent waiting period after notification of withdrawal. But governments are often reluctant to take this step due to the international political costs that come with adopting such an attitude.

Treaties of the kind to which we are referring which are of relevance in the Pinochet case include the following (in chronological order):

- Convention on the Prevention and Punishment of the Crime of Genocide (1948);

- International Covenant on Civil and Political Rights (1966);
- American Convention on Human Rights (1969);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984);
- Inter-American Convention to Prevent and Punish Torture (Organization of American States) (1985).

In conclusion, States which have ratified or acceded to any one of these instruments are obliged to:

a) carry out a prompt and impartial investigation as soon as accusations are made of torture, assassination or genocide;

b) bring the accused to trial, and apply penalties appropriate to the gravity of the crime;

c) provide reparation for damages incurred, including the payment of an economic indemnity to the victims or their relatives, while at the same time providing the most extensive means of rehabilitation possible.

A government cannot disengage itself from the above-mentioned obligations *via* the mechanism of having a law approved or issuing an executive decree. Both of these cases would be treated as unilateral acts of State which eliminate neither the obligations assumed *vis-à-vis* other States, nor those concluded in regard to its own population, and which thus constitute a violation of international law.

Authorities may decide that clemency measures, such as amnesty or a similar enactment, shall be applied in order to end conflicts that continue to divide a society. However, such measures may only come into effect once the above-mentioned treaty obligations have been fulfilled and therefore only with a view to waiving full completion of sentences already imposed.

The State of Chile has ratified all of the above-mentioned treaties, and thus must ensure that its conduct conforms with what these treaties require. This requirement of conformity implies that Chile should never have approved the auto-amnesty Decree-Law 2191. To have done so involves a violation of an international law accepted by the State of Chile itself. This being the case, the said amnesty violates international human rights law and cannot be imposed on other States either.

Numerous decisions adopted by the Inter-American Commission on Human Rights (OAS), as well as by the UN Human Rights Commission and the UN Committee against Torture, recommend that various govern-

ments against whom accusations have been filed concerning violations of this kind investigate, prosecute and punish the authors of these acts and indemnify the victims.

In this context it is useful to recall two decisions made on 2 October 1992 by the Inter-American Commission of Human Rights. The decisions, referring to Argentina and Uruguay, declared that the amnesty laws passed in the two countries with a view to favouring national reconciliation violated both the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man.

Furthermore, the Inter-American Commission of Human Rights has specifically affirmed that "Amnesty Law 2191 and its legal effects form part of a general policy of human rights violation by the military regime that governed Chile from September 1973 to March 1990."[3]

### *B) The Constitution of 1980 – Senators-for-Life*

Another measure designed to protect the military usurpers of power was the creation of mechanisms to keep the fledgling democracy under surveillance. When the military regime forced approval of the Constitution of 1980, it managed to incorporate in this text the institutional novelty of nine designated Senators, who were added to the 26 elected ones (a later constitutional reform in 1989 increased the total elected Senators to 38). Among these nine designated Senators were the former Commanders of the three armed forces, the former Director General of the Federal Police (the *Carabineros*), and former Heads of State, including General Pinochet.

## Pinochet's arrest in the United Kingdom following a request from the Kingdom of Spain, who wanted to try him for crimes committed on Chilean territory – Applicable jurisdiction

As we have already mentioned, on 16 October 1998 Mr. Augusto Pinochet Ugarte was detained by police in London, a provisional detention ordered by an English judge at the request of a Spanish magistrate applying within the framework of international cooperative agreements

3 Report of the Comisión Interamericana de Derechos Humanos (CIDH) No. 25/98 of 7 April 1998, par. 76 (Cases 11.505, 11.532 v. Chile)

between Spain and the United Kingdom, specifically the Extradition Treaty of 1985. In his application, the Spanish judge asked the English judicial authorities to decree the provisional detention of Pinochet, with a view to enabling him to interrogate Pinochet in order to determine whether it would be appropriate to solicit his extradition to stand trial in Spain. The Spanish magistrate's first application was dated 15 October 1998; on 22 October he formulated a second application based on a different series of offences.

In the days that followed, in a hitherto unprecedented turn of events in the international arena, a veritable avalanche of extradition applications arrived in the United Kingdom, requesting the transfer of Pinochet so that he could be judged for crimes against humanity (or *lèse humanité*). Specific applications were received from France and Switzerland. Other countries have initiated investigations that could also result in requests for extradition, including Germany, Austria, Belgium, Italy, Luxembourg and Sweden.

### *A) Opinions and judgments of the Spanish courts*

The application for extradition transmitted to the United Kingdom by the Spanish Government was officially presented on 6 November 1998. In it the Spanish judicial authorities requested that Pinochet be handed over to face trial for the crimes of genocide, terrorism and torture.

Proceedings which had been opened in two tribunals in Madrid in 1996 had given rise to a long and careful investigation conducted by two judges of the Spanish High Court (*Audencia Nacional*), the Magistrates Manuel García Castellón and Baltasar Garzón. The complaint filed in the case of Chile had been lodged by the Unión Progresista de Fiscales de España (Progressive Union of Spanish Prosecutors) on 25 July 1996. Subsequently, relatives of victims of Spanish origin who had been tortured, assassinated or disappeared in Chile and Argentina joined the suit, contributing their own information. The complaints filed included cases of homicide, assassination, forced disappearances, torture, illegal mass detentions and kidnapping of children of disappeared detainees, some of them born during the captivity of their mothers and delivered to other families. Government civil servants and members of the military and security forces were later discovered to be directly involved in such actions.

Simultaneously, one of the proceedings dealt with massive human rights violations committed in Argentina during the military dictatorship

there (1976-1983), as well as the coordination of illegal repression in the countries of the Southern Cone (Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay) during the period in which all of these countries lived under dictatorial regimes. This explains why the two cases (Chile and Argentina) are often dealt with jointly, and why the decision of 30 October 1998 by the *Audiencia Nacional* concerns them both.

The two High Court magistrates worked on these cases over the course of two years, receiving written information – some of it already presented to the United Nations and the Organization of American States – questioning dozens of witnesses, survivors, victims and family members of victims, both Spanish as well as Argentine and Chilean, and interrogating more than one repressor.

After learning of the presence of Mr. Pinochet in the United Kingdom, on 15 October 1998 Judge Garzón filed a request with that country asking that Pinochet be arrested and held provisionally, in order that he (Garzón) might interrogate Pinochet personally. Once this interrogation had taken place, Spain would assess whether it wished to have him extradited to stand trial in Spain. On 18 October, Judge Garzón formulated a second application, based on other offences, and issued an international order for the capture of Pinochet.

Judge Nicholas Evans, a magistrate in a London court with jurisdiction in such matters, decreed the arrest and provisional detention of Pinochet, an arrest carried out on October 16, when the police officially informed Pinochet of his detention at the private clinic where he was recuperating from a surgical operation for a slipped disc. The detention was considered provisional while awaiting a formal application for extradition by Spain within a space of no more than 40 days. On the 22 October, a second detention order against Pinochet was decreed by another English judge, Judge Bartle, in anticipation of a separate application by Judge Garzón. It is well known that in accordance with international conventions and customary practice, it is up to the solicited country (in this case the United Kingdom) to declare whether it accedes or not to the request for extradition.

Upon learning of the situation, the **International Commission of Jurists** issued a press release on 19 October 1998.[4] In it, the ICJ welcomed

4 See the full text of the press release in the attached Annex.

the detention of Pinochet and his possible subjection to a criminal trial. It expressed its satisfaction as

> [t]his turn of events constitutes a severe blow against the solid edifice of impunity which protects those who have committed gross violations of human rights.

Recalling some of the grave deeds attributed to Pinochet, it stated that the United Kingdom "has the right and the jurisdiction to prosecute suspects such as Mr. Pinochet when they find themselves within the territory of the UK" due to what is termed "universal jurisdiction", since the acts imputed to Pinochet constitute crimes against humanity. The ICJ further signalled that "the British authorities also have the option to extradite the suspect to another jurisdiction should any other State claim this right," recalling that a Spanish judge had made such an application.

### *Extradition request by the Kingdom of Spain for the crimes of genocide, terrorism and torture and for conspiracy to commit these crimes*

Judge Garzón's argument in requesting the Government of Spain to process the application for extradition was based on the content of the treaties that link Spain and the United Kingdom, specifying that

> crimes against humanity are indefeasible, their authors do not enjoy diplomatic immunity and cannot obtain refugee status or political asylum, and States throughout the world are obliged to prosecute them and to collaborate in the prosecution of such crimes undertaken by other States...

He added that Pinochet

> had created an armed organisation, making improper use of the military structure and its usurpation of power to institutionalise with complete impunity a terrorist regime, which by its very existence subverted the constitutional order to develop an efficacious plan for the disappearance and systematic elimination of members of national groups, subjecting them to forced displacement, abduction, torture, assassination and disappearance, and availing itself of assistance from, and collaboration with, other countries, in particular with Argentina.

Let us examine each of the offences for which extradition is claimed.

### *a – Genocide*

Spain ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide in September 1968, and it makes reference to this Convention in its international claim, referring also to Article 27 of the Vienna Convention on Treaty Law [5].

The arguments advanced by the Spanish claim stem from the basic argument of Judge Garzón, as well as from the ruling issued on 30 October 1998 by the Criminal Division of the Spanish High Court (*Sala Penal de la Audiencia Nacional*) in Madrid concerning the proceedings instituted in Spain against members of the Argentine military and police accused of crimes against humanity. This ruling was resulted from the appeal lodged against the actions of Magistrates Garzón and Castellón by the Office of the State Public Prosecutor (*Fiscalía General del Estado*) and the Public Prosecutor's Department of the Spanish High Court (*Fiscalía de la Audencia Nacional*). The Public Prosecutor's Office maintained that Spanish judges lack jurisdiction for trying offences committed in the territory of other States, and that as a result the two investigating judges should bring their proceedings to a close.

If the appeal filed by the prosecutors had been successful, Spain would legally have been unable to solicit the extradition of Pinochet, and that of any of the other persons accused in the above-mentioned proceedings involving crimes against humanity in Argentina and Chile. (In addition to Pinochet and other members of the Chilean military, various generals and other high-ranking officers in Argentina are implicated in these lawsuits).

The prosecutors disputed the qualification of "genocide" (also that of "terrorism") imputed to Mr. Pinochet, arguing that these categories of crimes did not apply to the situation in Chile. The arguments of the Office of the State Public Prosecutor and the Public Prosecutor's Department of the Spanish High Court (headed respectively by Mr. Jesús Cardenal and Mr. Eduardo Fungairiño) may be summarised as follows: that the public prosecutors do not deny the terrible crimes committed in Chile, but that the jurisdiction of the Spanish judges over acts committed outside the borders of Spain is limited to specifically determined cases, which do not include

5 Article 27 of the Vienna Convention on Treaty Law (1969) stipulates that, "One party cannot invoke the provisions of its internal law as a justification for non-fulfillment of a treaty..."

those for which proceedings have currently been instituted in Spain. The political persecution perpetrated in Chile was not carried out against a "national, ethnic, racial or religious group" but rather was guided by "political motivations". The intention of the repressors had been to eliminate thousands of persons due to their ideology, and not to their nationality or membership in an ethnic, racial or religious group. That the assassinations, disappearances, torture, etc. had been committed neither in Spain nor by Spanish citizens meant that the presumption of extraterritoriality which would authorise the jurisdiction of the Spanish judges did not exist.

The 11 magistrates of the Criminal Division of the Spanish High Court did not share this viewpoint. The Court recalled that Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide grants jurisdiction to the "competent tribunal of the State in the territory of which the act was committed," but that does not exclude the action of judicial organs separate from those of the territory in which the offence was committed or from an international tribunal. As an appropriate international tribunal has yet to be created, the terms of Article VI cannot exclude Spanish jurisdiction nor that exercised by any other State who is party to the Convention and whose legal system accepts the principle of extraterritoriality for the prosecution of genocide, as does the Spanish legal system.

The Court recalled that Article 96.1 of the Spanish Constitution established the prevalence of international treaties over domestic internal law, which implied that Spanish tribunals could only be prevented from hearing a case concerning crimes of genocide if the alleged acts were already being prosecuted by courts in the country in which they had taken place or by an international criminal court.

The central legal problem thus consisted of determining whether the barbaric deeds attributed to Pinochet and his regime technically constitute crimes of genocide as they are defined in international law. If the decision of the Court in fact refers, as explained above, to events that occurred in Argentina, the conclusions of the legal analysis of those events are, *mutatis mutandis*, perfectly applicable to Chile. Thus it was that Judge Garzón could continue acting in the case and could formally request the extradition of Pinochet.

The Court recalled that genocide was already a crime when Law 47/71 of 15 November 1971 incorporated it as such in Article 137bis of the Spanish Criminal Code, no longer in force today. The Court also confirmed that the crime of genocide had been maintained in Article 607 of the

currently valid Criminal Code. The definition of genocide coincides in both texts with that formulated in the international Convention of 1948.

The Judges of the Criminal Division held that given the evolution of the concepts involved, as well as that of the situation in the world and therefore the framework of international law, the crime of genocide should be interpreted more widely than the definition provided for. They spoke of "**genocide as socially understood**," arguing that since the definition of genocide required "the intention to destroy, totally or partially, a national, ethnic, racial or religious group as such", these concepts should be understood as the intention to destroy or exterminate a human group, "whatever the differentiating characteristics of that group". They cited the Statute of the International Military Tribunal of Nuremberg, which in referring in Article 6 to "crimes against humanity", includes beyond those of assassination, extermination and deportation, "persecution for political, racial or religious reasons".

The Court stated that persecution and attempted extermination had been carried out against a "group of Argentine citizens and residents of Argentina liable to differentiation, and who undoubtedly had been differentiated by the architects of the persecution..." It affirmed that the impugned acts all involved the idea of the extermination of a defined sector of the population. The targeted group was made up of persons opposed to the regime, and the repression did not seek to change the attitude of the group but rather to destroy it. Referring to the Genocide Convention, 1948, the Court stated that even if the word "political" did not appear in the wording of the article, this "silence is not equivalent to an infallible exclusion".

The Court further signalled that

> the restrictive interpretation of genocide of the type defended by the appellants would impede the qualification as genocide of acts as odious, for instance, as the systematic elimination by the power of the state or by an armed band, of persons suffering from AIDS, targeted as a differentiated group.

With regard to procedural law, the Court made mention of Article 23, par. 4(a) of the Constitutional Law of the Judiciary (LOPJ/*Ley Orgánica del Poder Judicial*) of 1985, noting that the law is "not a set of penal but rather of procedural guidelines". It neither classifies nor penalises conduct, but rather restricts itself to proclaiming the specifics of Spanish jurisdiction. As the law is not a guideline establishing sanctions, the Court dismissed the argument that there could exist a problem of "non-retroactivity of the

more unfavourable law in criminal matters", since the only thing required by the LOPJ is that the actions imputed in the accusation would have been considered an offence in Spain when they were committed.

In conclusion, the plenum of the Criminal Division (*Sala Penal*) of the Spanish High Court, by the unanimous vote of its 11 magistrates, ruled that Spanish courts are competent to judge the criminality of certain acts – indicated by the LOPJ – committed outside Spanish territory, whether the authors of such acts were of Spanish or foreign nationality, as long as the Spanish Criminal Code or other laws have established such acts as criminal.

With regard to the possible penalty to be applied, this will have to be determined within the limits set out in Article 607 of the Criminal Code, and taking into account any attenuating or aggravating circumstances pertaining to the case.

**Our opinion concerning the crime of genocide**

In our opinion, one of the greatest difficulties, or weaknesses, of the position of the Spanish judges was the characterisation of the crime of genocide, a characterisation based on two legal texts: a) Article II of the Convention for the Prevention and Punishment of the Crime of Genocide, of December 1948 (the Genocide Convention); and b) Article 607 of the Spanish Criminal Code currently in force. The language in the two documents is identical.

As defined in the international treaty, genocide is not measured by the degree of horror of the crimes committed, nor by the number of victims involved. It is even possible to have a case of genocide without a single person having died, as Article II of the Convention establishes that:

> genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> [...]
> c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> d) Imposing measures intended to prevent births within the group;
> e) Forcibly transferring children of the group to another group.

Thus, for example, some of the cases of sterilisation practised on native tribes in the Amazon could qualify as genocide, whereas technically the genocide label would not be applied to cases of important and repeated massacres or mass murder of the inhabitants of a country (Cambodia, Ethiopia).

But under a strict interpretation of what constitutes genocide, acts perpetrated with the intention of totally or partially destroying a group because of its political opinions would remain outside the legal definition of genocide. Such crimes would be considered horrible, but not genocide. This shortcoming in the international Convention has been covered in various states' domestic legislation, which have specifically included in the criminal definition the term "intention to destroy a group due to its political opinions".

If it is difficult to accept a broad interpretation of an international legal document such as Article II of the Genocide Convention, we believe that a strict and literal interpretation of said Article would leave unpunished – at least under the rubric of genocide – almost all of the genocides committed during this century (Cambodia, Ethiopia, Guatemala, etc.). Such an interpretation would conflict with the desire of millions of persons around the world to combat a scourge as odious and inhuman as is genocide.

Without wishing to belabour the subject, we believe that, even leaving aside the accusation of genocide, the acts attributed to Mr. Pinochet constitute crimes against humanity and grave infractions of international humanitarian law. As such, they should be dealt with at an international level, since they are addressed specifically in a series of international treaties and other documents pertaining to international law (III Geneva Convention on the Treatment of Prisoners of War, 1949; IV Geneva Convention on the Protection of Civilians in Time of War, 1949; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; Inter-American Convention to Prevent and Punish Torture, 1985; Declaration on the Protection of All Persons from Enforced Disappearance, 1992; Inter-American Convention on the Forced Disappearance of Persons, 1994). Such documents state that the following are to be considered grave infractions: intentional homicide, torture, inhuman treatment, serious attempts upon the physical integrity or health of persons, hostage-taking, forced disappearance of persons.

Furthermore, if we examine the more recent evolution of international human rights law, we arrive at the Statute of the International Criminal Court, the creation of which was agreed upon in Rome by 120 countries

in July 1998. Article 7 of the Court's Statute defines "crimes against humanity", and even though this text cannot be applied to Mr. Pinochet for reasons of non-retroactivity, it is useful to mention it, in that it demonstrates the consensus of the international community on this question. In Article 7 the following are included as crimes against humanity: assassination; extermination; incarceration and other serious cases of deprivation of physical liberty in violation of fundamental norms of international law; torture; persecution of a group or collectivity having its own identity for political, racial, national, ethnic, cultural, religious, sexual or other motives universally recognised as unacceptable under international law; forced disappearance of persons; and other inhuman acts of a similar character which intentionally cause great suffering or represent serious attempts against the physical integrity or mental or physical health of persons.

Thus, if there was a shortcoming or gap in the text of the Genocide Convention of 1948, Article 7(h) of the Statute of the International Criminal Court deals with it in speaking of the "persecution of a group or collectivity...for political motives".

*b – Terrorism*

Spain also requested the extradition of Mr. Pinochet in order to try him for the crime of terrorism, as foreseen in Article 23 of the current Criminal Code and for which jurisdiction is accorded by Article 23 of the Constitutional Law of the Judiciary (LOPJ).

Can the conduct of the military government of Chile, led by Pinochet, have constituted the offence of terrorism? Can Pinochet himself have practised terrorism? Let us consider what the office of the United Nations High Commissioner for Human Rights said in referring to state terrorism: it defined it as terrorism "committed by agents of the state for repressive purposes", and considered extralegal executions to be "a form of state terrorism."[6]

The Criminal Division of the Spanish High Court meanwhile, in its ruling of 28 October 1998, concluded that the acts imputed as genocide can very well be qualified as terrorism. In this regard, Article 607 of the

6 Cited by Amnesty International, Doc. AMR 22/13/98/s, October 1998, referring to the publication of the Office of the UN High Commissioner for Human Rights, "Human Rights and the Application of the Law" , Doc. No.5 in the Professional Training Series, United Nations Doc. No. S96.XIV.5, par.540, p.104.

Spanish Criminal Code requires that to characterise a particular action as terrorism, there must be evident in those guilty of the act "the intention of subverting the constitutional order or seriously altering the public peace".

The Office of the State Public Prosecutor and the Public Prosecutor's Department of the Spanish High Court (opposed to Pinochet's prosecution in Spain) had maintained and argued that the qualification of terrorism did not fit the crimes committed in Chile, inasmuch as one could not consider the forces of security that had carried out the systematic repression of political opponents – whether Spaniards or other nationals – as an armed band. Nor could it be claimed that they had wished to "subvert" or "alter" the constitutional order or the public peace in Spain – for when the Criminal Code refers to the "constitutional order" and the "public peace", it must be understood that in the mind of the framers of the Code this meant the order and peace in Spain and not in Chile.

The Criminal Division of the High Court rejected this latter argument, affirming that the legal or social order that the culprits would be seeking to subvert must be that "of the country in which the offence of terrorism is committed or which is directly affected as the object of the attack..." (i.e. Argentina and Chile in this case). The Court also concluded that the perpetrators of the repression operated in Argentina as an armed band, with a stable, organised structure, producing insecurity and fear in the population (a conclusion also applicable *mutatis mutandi* to the case of Chile).

The events that occurred in Chile and were investigated by the Spanish judges included homicides, assassinations, torture, forced disappearances, abductions and appropriation of the children of the disappeared, and massive and illegal detentions. These were all actions in which government functionaries and members of the military and security forces were discovered to be directly involved. Article 23.4(b) of the Constitutional Law of the Judiciary (LOPJ), accords jurisdiction for prosecuting cases of terrorism in Spain. The Spanish High Court, in the ruling of its Criminal Division on 30 October 1998, maintained that Spanish Courts do indeed have jurisdiction for judging cases of terrorism – such as those mentioned – committed outside Spanish territory, whether the authors were Spanish citizens or foreign nationals, as long as the Spanish Criminal Code and other laws have established such acts as criminal, as in the present case.

With regard to the possible penalty to be applied, this would have to be determined within the limits foreseen in Article 607 of the Criminal

Code, and taking into account any extenuating and/or aggravating circumstances pertaining to the case.

*c – Torture*

Torture is the third offence on which the Spanish claim is based. The Spanish State has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, 1984 (the Convention against Torture). Article 5 of the Convention grants extraterritorial jurisdiction (so-called "universal jurisdiction") to Spain to judge the acts imputed to Mr. Pinochet, committed in Chile, as long as the victim of the offence is a Spanish national, a requirement met in this case (Article 5(1)(c), Convention against Torture, 1984).

Indeed, in the framework of Spanish domestic law, and from a procedural point of view, Article 23.4(g) of the Constitutional Law of the Judiciary (LOPJ) authorises Spanish jurisdiction for action in the face of any other offence, which "according to its international treaties and conventions should be prosecuted in Spain." This provision, together with the Convention, constitutes a sufficient basis for enabling Spanish tribunals to hear cases of torture which have been committed within the territory of another State, if the victim of the offence is a Spanish national.

As in the case of the other offences, the possible penalty to be applied for torture would have to be determined within the limits foreseen in Article 204 of the current Criminal Code, and taking into account the play of extenuating and/or aggravating circumstances pertaining to the case.

* * *

As previously stated, the Chilean amnesty law of 1978 cannot be cited to oppose the actions of the Spanish authorities, because it lacks applicability in Spain. Even more importantly, as the Chilean amnesty law decriminalises the acts it covers, it does not fit within the framework of "acquitted or pardoned of the charge abroad". Its application in this case would represent an act of subsequent decriminalisation. Thus, the prosecution of Mr. Pinochet in Spain would in no way violate the principle of *non bis in idem* (nor Article 23.2(a) and (c) of the LOPJ). Furthermore, Mr. Pinochet was never tried in Chile, and therefore neither acquitted nor pardoned.

In conclusion, the plenum of the Criminal Division of the Spanish High Court ruled unanimously that Spanish courts are competent to

judge acts involving the crimes of genocide, terrorism and torture, even when these acts took place outside Spanish territory, regardless of whether the perpetrators were of Spanish or foreign nationality. For this jurisdiction to apply, it is necessary for the Spanish Criminal Code and other domestic laws to have established such acts as criminal, which is what happened in this instance. The Court affirmed that said jurisdiction "derives from the principle of universal pursuit of specific offences, a category of international law accepted by our internal legislation". For this reason it unanimously agreed "to reject the appeal and confirm the attribution of Spanish jurisdiction."

This ruling opened the way for an application by Spain to the United Kingdom for the extradition of Pinochet, an application formally made on 6 November 1998.

### *B) Opinions and judgments of the courts of the United Kingdom of Great Britain and Northern Ireland*

#### Decision of the High Court of Justice in London on 28 October 1998 finding in favour of "sovereign immunity" of Mr. Pinochet

The decision of Judges Evans and Bartle acceded to the request of the Spanish judiciary by requiring the provisional arrest of Pinochet with a view toward his extradition. However, Pinochet's lawyers filed an appeal against this decision and on 28 October 1998, amidst great anticipation, a panel of three magistrates[7] at the High Court of Justice in London issued a controversial ruling.

The High Court began by recognising that Mr. Pinochet presided over the Chilean Military Junta from 11 September 1973 until 26 June 1974, the date on which his status changed to that of Head of State, a position he held until 11 March 1990.

The Court maintained that in the circumstances of the case, the death of Spanish citizens in Chile was not a crime for which the United Kingdom was authorised to extradite a suspect. In its judgment, it rejected application of the 1978 Suppression of Terrorism Law, stating further that the European Convention for the Repression of Terrorism of 1977 (the document which regulates extradition in cases of terrorism) was also not applicable, because during the period in which the acts had occurred, Spain was not a party to the Convention, and Chile never had been.

7 Chief Justice Lord Bingham of Cornhill (as President), Justice Collins and Justice Richards.

Reference was made to the domestic State Immunity Act, 1978 and to the Diplomatic Immunities Act of 1964, which incorporated into the legal system of the United Kingdom the provisions of the Vienna Convention on Diplomatic Relations, 1961. Due to the interplay of these national laws and the international Convention, the High Court concluded that the courts of the United Kingdom are not authorised

> to exert criminal or civil jurisdiction over a former Head of State of a foreign country in relation to any act done in the exercise of sovereign power.

The appellant (Pinochet and his lawyers), had maintained that once a person was no longer Head of State, he would not enjoy immunity for personal or private acts that he committed, but would continue to enjoy immunity with respect to actions or omissions which he carried out while Head of State.

According to the High Court, Pinochet

> was charged not with personally torturing or murdering victims or causing their disappearance, but with using the power of the state of which he was head to that end.

Mr. Alun Jones, representing both the State Public Prosecutor's office of the United Kingdom and the interests of Spain, had argued in defence of the judicial decision ordering the detention of Mr. Pinochet that immunity protected a Head of State only in relation to actions or omissions linked to the performance of his functions as Head of State. However, such functions could under no circumstances include acts such as those with which Mr. Pinochet was currently charged. The Public Prosecutor's office stated that

> some crimes are so deeply repugnant to any notion of morality as to constitute crimes against humanity [i.e. genocide, torture and hostage-taking] and that there can be no immunity in respect of them.

In arriving at a surprising conclusion, the High Court rejected the argument of the Public Prosecutor's office. The Court concluded that "a former Head of State is clearly entitled to immunity in relation to criminal acts performed in the course of exercising public functions."

The Court then asked, "If a former sovereign were immune from process in respect of some crimes, where does one draw the line?"

The Court also ruled against the invocation by the Public Prosecutor of Article 4 of the Genocide Convention, because the Genocide Act of 1969, which incorporated the provisions of this Convention into the legislation of the United Kingdom, had not incorporated Article 4, which therefore remained without effect.[8]

In our opinion, even if the domestic legislation failed to incorporate Article 4 of the Genocide Convention which was interpreted as meaning that the state is not *obliged* to act against this crime, this in no way signifies that it is not *allowed* to take such action (we refer in this respect to Article I of the Convention: "The Contracting Parties...undertake to prevent and to punish [acts of genocide]", and Article VI).

The High Court also rejected as irrelevant the references made by the Public Prosecutor to the Charter of the International Military Tribunal of Nuremberg[9], and the Statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, because it considered that these tribunals are derived from specific international accords and include explicit acceptance of extraterritorial jurisdiction.

In the opinion of the ICJ, the statutes of these tribunals should not have been rejected, since it is precisely those texts which most demonstrate the evolution of international law. Perhaps the most recent development in this area is the Statute of the International Criminal Court.

Finally, the ruling of the High Court of Justice established that "the applicant is entitled to immunity as a former sovereign from the criminal and civil process of the English Courts." As a consequence, the orders of detention issued against Mr. Pinochet on 16 and 18 October 1998 were declared invalid and his right to be released confirmed.

### Our opinion of the decision of the London High Court of Justice

On 10 November 1998, the International Commission of Jurists issued a press release reinforcing its position that there can be no "immunity [to] protect someone [like Pinochet] pursued with good reason for crimes against humanity". Referring to the ruling issued on 28 October 1998 by the High Court of Justice in London, the press release stated that the

8 Art. IV – "Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are consitutionally responsible rulers, public officials or private individuals."

9 Recognised as international law by resolution 95 (I) of the General Assembly of the United Nations in December 1946.

International Commission of Jurists considered the High Court to have been profoundly mistaken in disregarding the very meaning of international law, as well as the evolution of that law over the past 50 years.

Specifically, the ICJ press release of 10 November 1998 stated the following:

Let us consider the various aspects of the claim to "diplomatic immunity":

> The High Court in London maintains that Mr. Pinochet is entitled to such immunity by virtue of having been Head of State. In fact, Pinochet attacked the government and usurped the power of State on 11 September 1973, through a bloody coup that cost the lives of hundreds of Chileans, among whom that of the duly elected President of Chile, Dr. Salvador Allende. His status of "Head of State" was granted to him by the military junta which he himself commanded, in a decree issued 26 June 1974.
>
> Thus, during an initial period, in which governmental forces committed numerous crimes, Pinochet was not Head of State, but only the leading member of the military junta which had usurped the government. When this status was converted to that of Head of State, it was not carried out according to regular constitutional procedures, but was imposed exclusively by the armed forces under his control.
>
> Even if the illegality of Mr. Pinochet's access to the "presidency" is ignored, it is impossible to recognise any claim by Mr. Pinochet to "diplomatic immunity" as President and Head of State. In a constitutional reform imposed on the population through fear of a return to the past, and approved in a referendum conducted during a "state of exception" which involved serious restrictions on civil rights, Augusto Pinochet was designated under the new text of the Constitution as President of Chile for a period of eight years. At the same time, the legislative power also remained in the hands of the Junta of Commanders-in-Chief (the Commanders of the three armed forces and the Director-General of the Police).

The above-mentioned referendum, held in 1980, was discredited both by the United Nations and the Organization of American States as incapable of representing the genuine and free expression of the will of the people of Chile. This means Pinochet was never elected by the body of Chilean electorate, nor designated as President in conformity with the legal order, but merely assumed office within the framework of a "new order" illegitimately imposed by the armed forces and by himself. He thus cannot benefit anywhere in the world – except in Chile, and there only in a de facto sense imposed by power – from immunity from prosecution.

The immunity which is conceded to Heads of State – both current and past – is of the same kind as that which States governed by the rule of law accord, for example, to Members of Parliament and Judges of the Supreme Court. It involves an immunity of the "function" rather than of the individual person involved, with the consequence that such persons can not be detained or arrested without an established process for removing this immunity having first been followed. The object of such preferential treatment is to allow such persons to exercise their high functions with independence and to protect them from undue fear and pressure. But naturally this immunity does not signify that such persons can not be held responsible in court for crimes which they may commit. It protects them in connection with the high responsibilities of their function, but at the same time it requires increased responsibility on their part.

The reason why Mr. Pinochet has not had to appear before a Chilean court is directly and exclusively a question of a rapport de force – the joint armed forces and the followers of the ex-dictator have wrested this protection from the democratic State. This demonstrates once again the limits of the Chilean transition from dictatorship to democracy. In any case, such impunity (rather than immunity) guaranteed to Mr. Pinochet is a unilateral act by the State of Chile and cannot be imposed on the international community or on other individual States. In sum, such

immunity cannot be asserted in contradiction to international law.

Even if immunity were to be interpreted as something attached to the person rather than to the function – an interpretation which would run counter to both the law and to the logic of things – never, under any circumstances, would this immunity protect someone pursued with good reason for crimes against humanity. No one has ever maintained, nor could any one ever do so, that among the tasks assigned to the function of President and Head of State are included those of detaining persons arbitrarily; torturing them – sometimes to death; assassinating members of the opposition, detainees and prisoners; or making such persons "disappear" – definitively vanishing, without ever providing an account of their fate or their whereabouts to the families or to judicial authorities. Therefore, immunity by virtue of function – no other kind exists – could not and should not ever have protected Pinochet against detention and prosecution in England, or against his extradition to a State which has lawfully demanded it.

It is for all these reasons that the ICJ affirms today that the High Court of Justice in London was profoundly mistaken and disregarded the very meaning of international law. No interpretation such as that which the ICJ is criticising here could have ever emerged from the norms contained in the Vienna Convention on Diplomatic Relations (1961), or from analysis of this Convention in conjunction with numerous other standards of international law. The High Court in London also neglected to take into account that the organised community of nations decided long ago to pursue and prosecute the authors of crimes against humanity, wherever they may be found, whatever their nationality, whatever the territory in which they committed such offences or whatever the date when such events occurred".[10]

10 For the full text of the press release, see the attached Annex.

## 25 November 1998 judgment of the Law Lords of the House of Lords of the United Kingdom

Decisions and rulings of the High Court of Justice in London can be appealed before the House of Lords, which constitutes the highest judicial authority of the United Kingdom. Upon learning of the ruling of 28 October, the State Public Prosecutor's office of the United Kingdom (as mentioned above also representing the interests of Spain) appealed the decision. The procedure was thus set into motion under which the House of Lords nominates five of its members, all members also of its Judicial Committee (called the "Law Lords"). The procedure for nominating the persons who thus assume the role of Judges of the Judicial Committee is both complex and confidential. The candidates are proposed to the Prime Minister by the head of the judicial branch, the Prime Minister proposes them to the Queen, and it is the Queen who in the last instance appoints them to their position.

The five Law Lords named to settle this specific case included Lord Slynn of Hadley (acting as President), Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann. At the start of their deliberations, the group decided to admit new information for consideration and to listen directly to both parties, i.e. the State Prosecutor's Office of the United Kingdom, also representing the interests of Spain, and Pinochet's lawyers. Contrary to regular practice, they also decided to hear arguments of representatives of human rights organisations, representatives of relatives of the victims, and professors and other experts of international law. The hearings thus stretched for an entire week of full-day public sessions plus an additional week during which the Lords deliberated.

Finally, on 25 November 1998 at 14:00 hrs London time, in the face of enormous worldwide anticipation – at its height in Chile where supporters and opponents of General Pinochet were demonstrating– each of the five Law Lords rose on the floor of the House of Lords to state his position individually before the television cameras broadcasting the event live. The result of the vote was as follows: 3 Lords maintained that Mr. Pinochet could not benefit from immunity due to the type of crimes of which he was accused; the remaining 2 Lords pronounced in favour of granting General Pinochet absolute immunity, which would place him outside the realm of being arrested, tried or extradited.

This historic ruling, by a 3 to 2 majority, revoked the sentence handed down 28 October 1998 by the High Court of Justice in London, which had recognised the right of "sovereign immunity" for Mr. Pinochet. The ave-

nue therefore remained open for the United Kingdom to judge Pinochet or extradite him to one of the States that had requested that he be handed over for trial in their own courts. The positions and votes of the five Lords, summarised very briefly, were as follows:

## *Against immunity*

### *Lord Nicholls*

Lord Nicholls was in favour of allowing the appeal, revoking the sentence of the High Court of Justice and thus rejecting the claim of immunity for Pinochet. In order to analyse the central point, namely the possibility of immunity, which would determine whether Mr. Pinochet could be detained, tried or extradited, he first analysed two of the crimes of which Pinochet was accused: torture and the taking of hostages.

Lord Nicholls pronounced that the immunity conferred on former Heads of State was not, nor could it be, absolute. In relation to the crime of torture, the Convention against Torture and the legislation of the United Kingdom which had incorporated the provisions of that Convention into domestic British law always referred to acts committed by a "public functionary or other person in the exercise of public functions, at his own instigation or with his consent or acquiescence". With respect to the taking of hostages, Lord Nicholls maintained that it would be inconceivable that either the international Convention or the related domestic legislation would exclude cases of hostage-taking involving the participation of a former Head of State.

Neither of these criminal acts was considered by international law as forming part of the functions of a Head of State. Lord Nicholls held that such a conclusion would make a mockery of international law, since it has declared such acts to be illicit and criminal, no matter who commits them. In short, the principles which protect representatives of the state do not extend to protecting acts condemned in international law. Mr. Pinochet is accused of using the power of the state of which he was head to commit crimes against humanity, which are certainly crimes disallowed under international law.

In conclusion he expressed his vote as follows:

> I would allow this appeal. It cannot be stated too plainly that the acts of torture and hostage-taking with which

> Senator Pinochet is charged are offences under United Kingdom statute law. This country has taken extra-territorial jurisdiction for these crimes. The sole question before your Lordships is whether, by reason of his status as a former Head of State, Senator Pinochet is immune from the criminal processes of this country, of which extradition forms a part. Arguments about the effect on this country's diplomatic relations with Chile if extradition were allowed to proceed, or with Spain if refused, are not matters for the court. These are, par excellence, political matters for consideration by the Secretary of State in the exercise of his discretion under section 12 of the Extradition Act.

*Lord Steyn*

Lord Steyn ruled in favour of admitting the appeal, revoking the sentence of the High Court of Justice and thus rejecting the claim of immunity for Pinochet.

He maintained that even if Mr. Pinochet was not accused of having personally committed assassinations, torture and forced disappearances, these acts were committed by the DINA, an official organ that answered directly to Pinochet, received its instructions from him and reported solely to him.

Lord Steyn affirmed that the immunity which protected a former Head of State from criminal prosecution in the United Kingdom was not absolute, but rather only extended to acts which such a person might have committed in the exercise of his functions as Head of State. He gave several examples: if such immunity were absolute, this would mean that when Hitler ordered the "final solution", this act would be included in the exercise of his functions as Head of State and therefore covered by immunity. Another example: if a Head of State in a moment of madness kills his gardener, he cannot introduce this act into the functions of a Head of State. A further example: if a Head of State orders that a person be tortured in his presence with the sole objective of "enjoying the spectacle" of the terrible suffering of the victim, Lord Steyn asked: would this be an act performed in the exercise of his official functions?"

International law condemns and outlaws criminal conduct such as genocide, torture and hostage-taking, considering such acts as requiring punishment. The fact that General Pinochet is not accused of committing

such crimes personally cannot exempt him from responsibility. Lord Steyn did not see the difference between

> the man who strikes, and a man who orders another to strike. It is inconceivable that in enacting the Act of 1978 [Suppression of Terrorism Act] Parliament would have wished to rest the statutory immunity of a former Head of State on a different basis.

In short, Lord Steyn concluded, the acts for which the Spanish judges blame Mr. Pinochet in their extradition application clearly fall outside the scope of the functions of a Head of State. He therefore does not benefit from immunity from criminal proceedings. Nor can it be maintained, as was argued in this case, that customary international law confers an "absolute" immunity on him.

Lord Steyn held that other arguments advanced in the defence of Pinochet such as the consequences that a possible extradition might have on Chilean-United Kingdom relations, the adverse consequences that could stem from such an extradition for the Chilean political process, or the acquiescence of the United Kingdom in receiving Mr. Pinochet in the past, should not be examined by the House since they are political considerations.

In conclusion he held as follows:

> My Lords, since the hearing in the Divisional Court the case has in a number of ways been transformed. The nature of the case against General Pinochet is now far clearer. And the House has the benefit of valuable submissions from distinguished international lawyers. In the light of all the material now available I have been persuaded that the conclusion of the Divisional Court was wrong. For the reasons I have given I would allow the appeal.

*Lord Hoffmann*

Lord Hoffmann ruled in favour of admitting the appeal, revoking the sentence of the High Court of Justice and thus rejecting the claim of immunity for Mr. Pinochet.

In his decision, he expressed the following:

> I have had the advantage of reading in draft the speech of my noble and learned friend Lord Nicholls of Birkenhead and for the reasons he gives I too would allow this appeal.

## *In favour of immunity*

### *Lord Slynn of Hadley*

Lord Slynn was in favour of maintaining the sentence of the High Court of Justice, recognising immunity for Mr. Pinochet before the courts of the United Kingdom and thus rejecting the appeal.

He maintained that the immunity which protects a former Head of State from criminal prosecution derives from the immunity accorded functioning Heads of State and ultimately from the principle of the immunity of the state itself. He explained the reasons for the immunity granted to diplomats by the Vienna Convention: central among these is the development of relations of friendship between States, and so that each State recognises the role of other States in the international order. Even if the Convention refers to diplomats and not to Heads of State, Lord Slynn maintained that by virtue of customary international law this principle is also applicable to the latter "with the necessary modifications".

He likewise analysed the arguments presented in this case, concerning whether acts such as torture, genocide or hostage-taking could be considered as official acts committed in the exercise of the functions of a Head of State. He arrived at the conclusion that these had been committed as part of the discharge of those functions.

In considering the specific crimes for which the extradition of Mr. Pinochet was being sought, he said with respect to genocide that in accordance with the Genocide Convention and the legislation incorporating its provisions into United Kingdom domestic law, the immunity "would only be taken away in respect of the State where the crime was committed or before an international tribunal."

Furthermore, he concluded that torture is also covered by immunity, since both the Convention against Torture and the relevant United Kingdom legislation refer to acts "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity", without any reference to Heads of State or former Heads of State. With respect to the taking of hostages, Lord Slynn maintained that neither the International Convention against the Taking of Hostages 1979 nor the corresponding municipal law contain provisions which bar immunity, which is "accorded by customary international law", for Heads of State who commit these crimes.

For Lord Slynn, the so-called "universal jurisdiction" that makes "certain crimes against international law" actionable by national tribunals has not yet reached the category of jus cogens. Nor does there exist, in his opinion, a universally accepted definition of what constitutes crimes against humanity, nor an international rule that says that the authors of international crimes be excluded from the protection of any immunity they might otherwise benefit from.

Lord Slynn affirmed that sovereign immunity was not absolute: indeed acts of a commercial nature are excluded from it. But he stressed that he could not accept the position that immunity ceased to protect a former Head of State who had committed "international crimes". The only exceptions (which have been expressly established in international conventions), were cases handled by special international tribunals such as the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, and those granted jurisdiction to the future International Criminal Court in its enabling statute.

Lord Slynn briefly noted the other arguments made in defence of Pinochet, such as the efforts realised in Chile to recover democracy; the time that had elapsed since the impugned acts; the possible effect of extradition on relations between Chile and the United Kingdom; the fact that Mr. Pinochet had been officially received in the past in the United Kingdom in official settings; the risk that extradition could create serious political problems in Chile itself; and the advanced age of the person facing extradition, a factor stressed by the defence. He held that it was not fitting for the House to analyse such aspects, these being more properly within the scope of the Executive Power.

In his concluding remarks, Lord Slynn held:

> Accordingly, in my opinion, the respondent was entitled to claim immunity as a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of official acts committed by him whilst he was Head of State relating to the charges in the provisional warrant of 22 October 1998. I would accordingly dismiss the appeal.

*Lord Lloyd of Berwick*

Lord Lloyd held in favour of maintaining the sentence of the High Court of Justice, recognising immunity for Pinochet and therefore rejecting the appeal.

He began his judgment with long and detailed references to the opinions of treaty experts, academics and case law concerning immunity protecting a former Head of State from criminal prosecution in the United Kingdom. He said that instead of "immunity" he would prefer to speak of the person in question as "not being subject to prosecution" based on non-justiciability. He maintained that even though there exist no international treaties which recognise immunity for a former Head of State, in practice it is accepted under customary international law. Only the State of which the person was the Head of State may remove such immunity. The Government of Chile did not do this, and in fact was demanding that Pinochet's immunity be recognised.

Immunity covers only "certain categories of acts", and according to Lord Lloyd, there is a line to be drawn between private acts and official acts carried out in one's capacity as Head of State. Specifically in relation to Pinochet, Lord Lloyd maintained that the acts which Mr. Pinochet was accused of – the elimination of political opponents, torture, the taking of hostages – were carried out under his "sovereign authority", i.e. in exercising his functions as Head of State. In affirming this position, Lord Lloyd emphasised that Pinochet was not accused of killing or torturing with his own hands, but rather that "what is alleged against him is that he organised the commission of such crimes, including the elimination of his political opponents, as head of the Chilean government..." As such, these were not acts committed in his private capacity.

Lord Lloyd rejected the argument that crimes as horrendous as those with which Pinochet was accused could not be considered as "official acts". He insisted that in his view, they were indeed "governmental acts", as was Pinochet's having coordinated the so-called "Operation Condor" with other dictatorial regimes in the region. With respect to the Convention against Torture and the relevant incorporating domestic law, he considered that the term "public official or other person acting in an official capacity " did not refer to the Head of State. Neither this Convention nor the Convention against the Taking of Hostages, or their corresponding domestic laws affect the customary law of sovereign immunity. In his opinion, there is no contradiction between immunity and the condemnation by international law of the acts for which immunity is sought.

Finally, with reference to the disputed Amnesty Law approved by the Pinochet regime in 1978, Lord Lloyd considered that if a tribunal of the United Kingdom were to make a pronouncement on this law it would be

assuming jurisdiction over the internal affairs of Chile. This is an unacceptable infringement on state sovereignty since a British tribunal is not an international court. Moreover, he dealt with the debate about the validity of domestic amnesty laws and their compatibility with international law simply by noting that a series of States had conceded amnesties in the interest of restoring peace to their countries.

Lord Lloyd held in the following manner:

> For these reasons, and the reasons given in the judgment of the Divisional Court with which I agree, I would dismiss the appeal.

**Our opinion of the judgment of 25 November 1998**

For the **International Commission of Jurists**, this decision constituted an historic milestone in that it accorded international law primacy over national law and gave practical and concrete effect to the principle of "universal jurisdiction". In a word, it took into account the evolution of modern international law. The decision in the case itself will have a dissuasive effect on the perpetrators of horrendous crimes such as genocide, crimes against humanity and war crimes. It will send a direct message to such persons: you will no longer be able to benefit from impunity.

## The Minister of the Interior authorises the continuation of the extradition process

The preliminary stage having been concluded (or so it appeared at the time) the Pinochet case then passed for examination to the Minister of the Interior (Home Secretary), Mr. Jack Straw, as stipulated in sections 7 and 12 of the Extradition Act of the United Kingdom. Under the provisions of this law, the Government can either quash or give the go-ahead to the extradition process. After allowing the various parties to submit their arguments in writing, on 9 December 1999 – one day before celebrations marking the 50$^{th}$ anniversary of the Universal Declaration of Human Rights – Home Secretary Straw granted "Authority to Proceed", i.e. permission for judicial examination of the Spanish request to extradite Pinochet.

The Home Secretary considered as liable for extradition the crimes of attempted murder, conspiracy to murder, torture, conspiracy to torture, kidnapping and conspiracy to kidnap, for all of which crimes Spain was

requesting the extradition of Mr. Pinochet. At the same time, Mr. Straw excluded the charge of genocide, considering that the facts presented "do not satisfy the definition of a crime liable for extradition..." (according to the law of the United Kingdom), thereby not allowing this charge to figure in the extradition process. The Minister said he had reached his decision

> on the basis of the fact that Senator Pinochet does not enjoy immunity with respect to the offences in question...Neither do I believe that Senator Pinochet has a right to diplomatic immunity or protection as head of a special mission...

## Another obstacle – nullification on 17 December of the Decision of the House of Lords of 25 November 1998

Contrary to expectations based on one hundred years of judicial practice, the sentence of 25 November 1998 was not definitive and therefore did not bring to a conclusion the discussion concerning immunity. Pinochet's lawyers succeeded in securing consideration of an appeal to reconsider and ultimately annul the Lords' ruling. The central argument of the appeal consisted of an allegation of bias on the part of one of the five judges, Lord Leonard Hoffmann, due to his ties to the human rights organisation Amnesty International. In addition, Pinochet's lawyers argued that, due to the slim three to two majority holding, it was Lord Hoffmann's judgment in the case that resulted in the House of Lords deciding in favour of overturning the decision of the High Court of Justice.

The lawyers for the defence argued that Lord Hoffmann is president of a foundation, Amnesty International Charity Ltd., which is linked to Amnesty International. They also alleged that Ms. Gillian Steiner, wife of Lord Hoffmann, acted as a secretary for the foundation. According to Pinochet's lawyers, the connection of Lord Hoffmann and his wife with Amnesty International "represents a real possibility of partiality, even if unconscious, on his part". The danger thus existed of an "appearance of partiality". Added to this, they continued, was the fact that Amnesty International had actively conducted a public campaign in favour of bringing Mr. Pinochet to trial, and had solicited and been granted by the Lords of the Judicial Committee the right to take part in the hearings in the capacity of "intervenor", in order to inform the Committee on various questions of public international law.

The appeal was allowed and so a Committee was formed consisting of five other of the twelve judges on the Judicial Committee. They heard anew the arguments of both parties (i.e. those of Pinochet and of the State Public Prosecutor's Office of the United Kingdom, representing also the interests of the Kingdom of Spain) and reached a decision. The five members chosen for this function were Lord Browne-Wilkinson, Lord Goff, Lord Nolan, Lord Hope and Lord Hutton. The key legal issue at this point continued to be that of whether or not Mr. Pinochet enjoyed an immunity which would prevent his detention, trial or extradition.

On 17 December 1998 the five Lords issued their decision. Lord Browne-Wilkinson (the most senior Lord) read out a short text. He summarised the background of the case, the decision of the High Court of Justice which had recognised immunity for Pinochet, and the subsequent appeal which led to the ruling of the House of Lords of 25 November 1998 overturning the High Court's judgment and holding that Mr. Pinochet did not benefit from immunity and that therefore his detention in the United Kingdom was in conformity with the law.

Lord Browne-Wilkinson continued by stating:

> Amnesty International, which for many years had promoted campaigns in favour of bringing Senator (sic) Pinochet to trial, obtained permission to participate directly in the appeal hearings before the House of Lords. The human rights organisation presented written arguments and was represented by counsel before the Judicial Committee. Following the sessions, Senator Pinochet's lawyers learned for the first time that Lord Hoffmann was president of the foundation Amnesty International Charity Ltd., which is closely linked to the principal organisation Amnesty International. And they also learned that Mrs. Hoffmann was employed by Amnesty International. These facts had not been revealed to the parties in the proceedings.

Lord Browne-Wilkinson affirmed that this constituted a conflict of interest and that consequently Lord Hoffmann should not have formed part of the Appellate Committee. Despite this, he had participated and had held in favour of the position that Mr. Pinochet did not enjoy immunity. Lord Browne-Wilkinson noted:

> Lord Hoffmann, who did not reveal this relation, was disqualified from forming part of the Appellate Committee.

> I propose that the ruling of 25 November thus be nullified and that the appeal should be considered once again in public audience as soon as possible and before a new and different Appellate Committee.

The other four Lords of the Judicial Committee unanimously agreed with Lord Browne-Wilkinson.

On 18 January 1999, new sessions were inaugurated with a view to re-examining the entire process in the United Kingdom. Seven Law Lords were designated to hear the case at this new stage in the form of a new Appellate Committee. These included: Lord Browne-Wilkinson as President, Lord Millett, Lord Saville of Newdigate, Lord Goff of Chieveley, Lord Phillips of Worth Matravers, Lord Hutton and Lord Hope of Craighead.

In the preliminary hearing several days earlier, the Committee had granted the requests of the Government of Chile and Amnesty International to act as "intervenors", meaning they could present arguments to the tribunal during the course of the hearings. It was also decided to allow the Spanish judge who had requested the extradition, Mr. Baltasar Garzón, to be present during the hearings, although without being authorised to present arguments before the judges. The presence of Judge Garzón was requested by the State Public Prosecutor's office of the British Crown, which also represented the interests of the Kingdom of Spain, so that its lawyers could consult the magistrate during the course of the debates concerning specific points relating to Spanish law or the process of extradition in Spain. His presence was authorised on this basis.

## 24 March 1999 judgment of the Appellate Committee of the House of Lords of the United Kingdom

The seven Law Lords of the Appellate Committee held twelve sessions in which they listened to the two main parties involved (Mr. Alun Jones, the lawyer representing both the State Public Prosecutor's office of the United Kingdom and the interests of Spain, and the lawyers for Pinochet, Ms. Clare Montgomery and Mr. Clive Nicholls) as well as the intervenors (the Government of Chile, represented by the lawyer Mr. Lawrence Collins, and Amnesty International, represented by Mr. Peter Duffy). In addition, the Committee agreed to accept a written report submitted by the NGO Human Rights Watch. On 4 February 1999, the President of the

Committee announced that theirs Lordships would now deliberate, during which time Mr. Pinochet would remain under house arrest at a mansion in Surrey near London, under the custody of Scotland Yard.

Finally, on 24 March 1999 at 14:00 London time, the same hour as in November, and again in the face of enormous worldwide anticipation, including impassioned demonstrations by both partisans and opponents of Pinochet in Chile and elsewhere, each of the seven Law Lords stood up to articulate his individual position in front of the television cameras that were broadcasting the proceedings live from the chambers of the House of Lords.

The result of the judgment was as follows : six of the Law Lords held that Mr. Pinochet did not benefit from immunity which would exempt him from appearing in court. The seventh pronounced in favour of recognising absolute immunity for Pinochet which would render impossible his arrest, trial or extradition.

With regard to immunity, this judgment served to uphold by a vote of six to one the decision issued by the original Appellate Committee in November 1998. The opportunity thus remained open for the United Kingdom to either judge Mr. Pinochet itself or extradite him to Spain.

Nevertheless, for reasons which we shall discuss below, this decision went beyond the issue it was supposed to consider, which was the question of whether or not Mr. Pinochet enjoyed immunity which would prevent his detention, trial or extradition. The Lords incorporated another aspect, which in our opinion did not fall within their jurisdiction but rather should have been decided by the competent English tribunal(s) during the "extradition process" itself. They analysed the crimes for which the extradition had been sought and considered the dates from which such an extradition would have been applicable according to the laws of the United Kingdom. We will return to this question, given that it limits and worse drastically reduces the future criminal prosecution of Pinochet.

As part of the deliberations that lead to their decision, the Law Lords reviewed a series of documents and international legal precedents, cited here in chronological order: the Charter of the Nuremberg International Military Tribunal, 1945; the Charter of the Organization of the United Nations, 1945; Resolution No. 95 (I) of the United Nations General Assembly, December 1946, which recognises as international law the principles contained in the Charter of the Nuremberg International Military Tribunal, as well as the contents of its rulings; Convention for the Prevention and Punishment of the Crime of Genocide, 1948; Universal Declaration of

Human Rights, 1948; Vienna Convention on Diplomatic Relations, 1961; the jurisprudence of the Israeli tribunal that in 1962 judged Adolf Eichmann for war crimes and crimes against humanity; International Covenant on Civil and Political Rights, 1966; Principles of International Cooperation in the Identification, Detention, Extradition and Punishment of Those Guilty of War Crimes or Crimes against Humanity, UN General Assembly, 1973; European Convention for the Repression of Terrorism, 1977; Convention Against the Taking of Hostages, 1983; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; reports of the United Nations working group which prepared the project of the Convention against Torture; European Convention on Extradition, 1989; Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993; Statute of the International Criminal Tribunal for Rwanda, 1994; the jurisprudence of both of these tribunals; the project of the Code of Offences against the Peace and Security of Humanity, prepared by the United Nations International Law Commission, 1995; Statute of the International Criminal Court, 1998. They also reviewed opinions issued by treaty experts, academics and professors of public international law.

They also closely examined the legislation of the United Kingdom, including both written and customary law. The former included: the Offences against the Person Act, 1861, modified by the Criminal Law Act, 1977; the Act of 1957 (modified in 1995) incorporating the Geneva Conventions into the legal system of the United Kingdom and establishing that the "grave infractions" described in these conventions constitute crimes in the United Kingdom; the Diplomatic Privileges Act, 1964, which incorporated into the national legal system the Vienna Convention on Diplomatic Relations, 1961; the Genocide Act, 1969, which incorporated into the legislation of the country the Convention for the Prevention and Punishment of the Crime of Genocide of 1948; the State Immunity Act, 1978; the Suppression of Terrorism Act, 1978, which put into effect in the country the European Convention for the Repression of Terrorism of 1977; the Taking of Hostages Act, 1982, which brought into effect the 1983 Convention Against the Taking of Hostages; the Criminal Justice Act, 1988, which brought into operation in the country the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; and the Extradition Act, 1989, which put into effect the current European Convention on Extradition.

The positions, arguments and format of the decisions of the seven Lords were very brief, as is indicated below.

## *Against recognising immunity*

### *Lord Browne-Wilkinson*

Lord Browne-Wilkinson maintained that in order to proceed with the extradition, the principle of "**double criminality**" (the act must be criminal both in the country demanding the extradition as well as in the United Kingdom) must apply, as established in the Extradition Act, 1989. This requirement is essential and must be carefully and correctly applied.

In examining the principle of double criminality, he sought to resolve a specific aspect of the issue: whether it was necessary that the acts perpetrated be considered criminal in the United Kingdom "at the date of the actual conduct" (the date the act was committed) or whether it was sufficient that they be so considered "at the date of the request for extradition." He concluded by pronouncing in favour of the first of these two options. It should be remembered that this opinion is not uncontested in the English courts. Indeed, on 28 October 1998, when the High Court of Justice in London issued its controversial ruling, Lord Bingham, in his capacity as President, held that in the case of a request for extradition, the date to be considered for determining whether the requirement of double criminality was fulfilled was that "on which the extradition was requested". Subsequently, Lord Lloyd, one of the Justices who participated in the ruling of 25 November, held the same position: it was sufficient that the act was considered criminal on the date on which the extradition was solicited. As we will see later, this is also the position of the ICJ.

The other requirement of the Extradition Act, 1989 did not present difficulties: that the crime for which the extradition was requested be subject to a minimum penalty of 12 months.

Lord Browne-Wilkinson analysed the crimes for which Spain was soliciting the extradition one by one, with a view toward ruling whether they were "extraditable offences" in conformity with the Extradition Act, 1989.

With regard to **the taking of hostages**, he rejected the accusation of the Spanish magistrate concerning this offence, instead arguing that the acts described did not conform with those referred to in the United Kingdom's Taking of Hostages Act, 1982. However, that left three types of crimes which were indeed extraditable: a) torture, b) conspiracy to commit torture, and c) conspiracy to commit crimes on Spanish territory.

With regard to **torture** and **conspiracy to commit torture**, Lord Browne-Wilkinson paid particular attention to these offences, analysing in

depth both the law of the United Kingdom as well as international law, in particular the Convention against Torture. Based on these texts, as well as on the opinions of treaty scholars, he held that torture is a crime in international law and that it had been considered as such even before the approval of applicable written international conventions, ever since its prohibition had achieved "the character of *jus cogens*". He recalled the existence of specific jurisprudence which affirmed that under international law, offences that had attained the category of *jus cogens* could be punished by any individual State, because the perpetrators of such crimes are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution " (*Demjanjuk v. Petrovsky*, 1985, issued by a court in the United States in relation to an Israeli request for extradition of a suspect for murders committed in a concentration camp). Lord Browne-Wilkinson concluded this section of his judgment by stating, "I have no doubt that long before the Torture Convention of 1984 state torture was an international crime in the highest sense."

He rejected the argument advanced by Lord Slynn in the ruling of 25 November to the effect that Pinochet was not covered by the definition given in Article 1.1 of the Convention against Torture, which specifies commission by "a public official or other person acting in an official capacity", and that therefore the treaty could not be invoked in his case. According to Lord Browne-Wilkinson, any person having fulfilled the functions which Pinochet had, was clearly protected by the definition in Article 1, in any of the roles in which he found himself: as Head of State, President of the Republic, or Commander-in-Chief of the Army.

With regard to the offence of **conspiracy to commit murder** on Spanish territory and the attempt to commit it, he affirmed that the fact of organising and of ordering his subordinates to commit the killing of political opponents both within the borders of Chile and outside the country could be covered under the immunity *ratione materiae*, since "at the time the acts were done the acts were not criminal under the law of the United Kingdom." Later in this report we will present the reasons for our disagreement with this opinion.

**Immunity**

The President of the Committee accepted that a current Head of State is protected both in the criminal and civil areas by an absolute and complete immunity, a practice deriving from the historic immunity accorded to the monarch. By virtue of this immunity, the person can neither be

arrested, tried nor extradited. This special status is based on Article 20 of the Diplomatic Privileges Act of 1964, which put into effect in the United Kingdom the provisions of the Vienna Convention on Diplomatic Relations, 1961 and affords a Head of State the same type of immunity foreseen for heads of diplomatic missions, with "the necessary modifications" corresponding to different situations.

This immunity protects the person as long as he exercises the functions of Head of State (*ratione personae*) with respect to acts carried out in the performance of his official duties as well as in the private sphere, whether those acts are committed within the country or abroad. The immunity continues to protect him once he no longer discharges the functions of Head of State, but to a lesser degree: he only remains covered "with respect to past acts undertaken in the exercise of his official functions" (*ratione materiae*), but not *vis-à-vis* those carried out in a private capacity, outside the framework of his official functions. Both forms of immunity apply in civil, criminal and administrative proceedings.

Lord Browne-Wilkinson held that Mr. Pinochet enjoys immunity with respect to actions undertaken as part of his official functions when he was Head of State. But as it is inadmissible that torture, or the organising, authorising or tolerating of torture could be considered official functions of State, Pinochet does not enjoy immunity with respect to such acts. These acts are of the type that offend and affront the conscience of humanity as a whole and for this very reason are considered international crimes. It is not possible to accept as an official function acts which international law prohibits and criminalises. Moreover, Lord Browne-Wilkinson affirmed, it would be equally unacceptable that subordinate public officials could be judged for the crime of torture, while those who had issued the order to torture remained exempt from prosecution – an exemption that such an interpretation of immunity would afford them.

In concluding, he maintained that Pinochet only lost his immunity when the Criminal Justice Act, which entered into force on 29 September 1988, permitted the United Kingdom to ratify the Convention against Torture, which it did on 8 December 1988. Before this date, the Convention had come into force in Spain through the country's ratification of the treaty on 21 October 1987 and in Chile through its ratification on 30 September 1988. In his opinion, therefore, acts of torture or the conspiracy to commit them carried out before 8 December 1988 in other countries could not be the subject of prosecution in the United Kingdom.

From this he concluded that in accordance with the Extradition Act, 1989, Mr. Pinochet could be extradited, but only to face charges for offences of torture and conspiracy to torture committed in another country *after 8 December 1988.*

*Lord Hope*

With respect to the crimes of which Pinochet is accused, Lord Hope noted that the Appellate Committee was not undertaking an assessment and consideration of the allegations made by Spain against Pinochet. Rather, it was limiting itself to summarising the content of the alleged acts said to have been committed in Chile as well as in other countries of South America, Europe and the United States as part of a single overall conspiracy. Lord Hope recalled that Spain's accusation had specified that each one of the acts of torture, committed on various dates, formed part of said conspiracy, aimed first at seizing state power and later at maintaining it.

He then reviewed the specific crimes for which the extradition had been solicited and their compatibility with the provisions of national and international law. He rejected the accusation of **hostage taking**, as he did not believe that the alleged acts conformed with the definition provided in the UK's Taking of Hostages Act, 1992.

With regard to **conspiracy** and **attempted homicide** against a Chilean political leader in Spain (Mr. Altamirano of the Socialist Party) and another leader and his wife in Italy (Mr. Leyton of the Christian Democrat Party), he considered that these acts should form part of the proceedings, provided it could be proven that Mr. Pinochet participated in a conspiracy in Spain to commit murder in Spain. He held that homicide or attempted homicide committed in Spain, whatever the nationality of the victims, were crimes subject to extradition between Spain and the United Kingdom, given that they would constitute offences meriting serious punishment if they had occurred in the latter country. As a result, a person accused of such crimes could be extradited to face such charges, even if the person could not be judged in the United Kingdom for reasons relating to the date of the commission of such crimes. However, this ability to prosecute in England crimes that were committed in another country was only effective once the European Convention for the Repression of Terrorism entered into force in the United Kingdom on 21 August 1978 by way of the Suppression of Terrorism Act, 1978.

Indeed, the Extradition Act, 1989, refers to extradition crimes as:

> conduct in the territory of a foreign state...which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state...is so punishable under that law (Extradition Act, I(2)(1)(a)).

Nevertheless, Lord Hope held that for these crimes Pinochet benefited from *ratione materiae* immunity, and as a result could neither be judged nor extradited.

With respect to **torture** and **conspiracy to torture**, Lord Hope expressly recognised that "torture was already considered a criminal act under the legislation of the United Kingdom" long before the Convention against Torture. Indeed such acts had already been criminalised by common law, and later by statute in the Offences against the Person Act, of 1861. However, it was only in the Criminal Justice Act, 1988 that torture committed in any other country outside the United Kingdom was accorded the status of an "extraterritorial" offence, pursuant to the definitions in the Extradition Act, 1989.

Lord Hope did recognise, however, that the purpose of the Convention against Torture was to establish mechanisms for increasing the efficacy of the struggle against this crime throughout the world. He recalled that in a judgment by the 9th Circuit Appeals Court in the United States (*Siderman de Blake v. Republic of Argentina*, (1992), for torture inflicted during the military dictatorship), acts that had been committed in 1976 (i.e., prior to the existence of the Convention against Torture) were deemed to have violated international law since the prohibition against torture had already acquired the status of *"jus cogens"* and was applicable *"erga omnes"*.

**Immunity**

Lord Hope affirmed that in order for the acts of a former Head of State to remain protected by *ratione materiae* immunity, they do not always have to be "legitimate" or even "lawful". However, he stated that it is clear that such immunity is not absolute; there do exist some limits. These limits include those cited by Lord Steyn in the previous ruling of the Appellate Committee, such as: if a Head of State in a moment of madness killed his gardener; or if a Head of State ordered that somebody be tortured in his presence with the sole objective of enjoying the spectacle of the terrible

suffering of his victim. As Lord Steyn pointed out and with which Lord Hope concurred, such clearly criminal acts could never form part of the official functions of a Head of State, and thus could never be covered by immunity when the person had ceased being Head of State.

Lord Hope continued that a former Head of State also could not be covered by *ratione materiae* immunity when sufficient evidence exists for believing that he had authorised or committed acts in such a systematic or extensive manner so as to amount to international crimes. He observed that Pinochet was accused by the Spanish judicial authorities not for isolated acts of torture, but for having practised, established, organised and protected "a policy to commit systematic torture within Chile and elsewhere as an instrument of government." Therefore, the acts of which Spain is accusing Pinochet are considered by international customary law as international crimes.

Lord Hope held that Pinochet only lost his immunity on 30 October 1988 when Chile's ratification of the Convention against Torture entered into force, since from that date onward Chile did not have the right to object to the international jurisdiction assumed by the United Kingdom. Before this date, the Convention had entered into effect in Spain, with that country's ratification on 21 October 1987. However, Lord Hope decided to accept the argument of his colleagues: namely, that Pinochet retained his immunity until 8 December 1988, when the Criminal Justice Act permitted the United Kingdom to ratify the Convention against Torture

In conclusion, Lord Hope held that Pinochet could be extradited, but only to face charges concerning crimes of torture and conspiracy to commit torture in another country, if these acts had taken place *after 8 December 1988*, the date on which the Convention against Torture entered into force in the United Kingdom.

*Lord Hutton*

With regard to the charges of **conspiracy** and **attempt to commit homicide** on Spanish territory, Lord Hutton stated that he shared the position articulated by Lords Browne-Wilkinson and Hope. For this reason he also agreed with the argument that Mr. Pinochet benefited from *ratione materiae* immunity in relation to conspiracy and the attempt to commit homicide against Chileans on Spanish territory.

In articulating his position, Lord Hutton reviewed a series of judicial decisions by national tribunals in various States that analysed the ques-

tion of immunity from prosecution for representatives of the State (including former Heads of State or ambassadors). He then recalled various steps in the evolution of international law aimed at preventing the perpetrators of crimes in international law – including those qualified as crimes against humanity – from going unpunished. He mentioned as part of this evolution: the principles contained in the Charter of the International Military Tribunal of Nuremberg (1945), the Statute of the International Criminal Tribunal for the Former Yugoslavia (1993); the Statute of the International Criminal Tribunal for Rwanda (1994); and the Statute of the International Criminal Court (1998).

He concluded that international law has been advancing in such a way that it is now accepted that

> certain crimes are so grave and so inhuman that they constitute crimes against international law and that the international community is under a duty to bring to justice a person who commits such crimes.

He also held that the official functions that such a person might have exercised, do not *per se* constitute a sufficient motive for exempting that person from justice or even reducing the corresponding penalty. This obligation to prosecute constitutes an essential factor in effectively dissuading potential human rights violators.

Lord Hutton noted that torture had been classified as a crime against international law long before approval of the Convention against Torture and that prohibition of torture had acquired the status of *jus cogens* prior to 29 September 1988, the date on which the Criminal Justice Act entered into force in the United Kingdom. He further stated that this qualification of torture as a crime against international law is not only applicable to those States who are party to the Convention, but is obligatory *"erga omnes"*. He likewise concluded that no act of torture could be considered as forming part of the functions of a Head of State, and that therefore Mr. Pinochet could not benefit from immunity.

Lord Hutton referred to texts such as the Statute of the International Criminal Court, which provides that torture is a "crime against humanity"... "when committed as part of a wide spread or systematic attack directed against a civilian population, with knowledge of the attack", though he recalled that this definition had been thus defined for the purposes of establishing the jurisdiction of the Court. By contrast, the Convention against Torture makes clear that even a single act of torture

constitutes an international crime, and that torture does not become an international crime only when it is committed on a massive or systematic scale. For this reason, Mr. Pinochet's defence could not argue that "a sole act of torture or even a few such acts do not constitute international crimes."

In conclusion, Lord Hutton held that Mr. Pinochet could be extradited to respond to charges of the crimes of torture and conspiracy to commit torture, when these acts had been committed in another country *after 29 September 1988*, the date on which the Criminal Justice Act of the United Kingdom entered into force.

*Lord Saville*

Lord Saville agreed with his colleagues concerning the offences they had determined to be "extraditable", i.e. **torture**, and **conspiracy to commit torture**. As a result he did not refer to that issue.

### Immunity

Lord Saville also shared the position of his colleagues in the majority on the question of immunity and the distinction they had made between immunity which protects a current Head of State and that which protects a former Head of State. The first (*ratione personae*) covers all acts carried out by a Head of State during the period in which he exercises his functions, including acts committed in the private sphere, both within the country and abroad. By contrast, the immunity which protects a former Head of State exempts the person from criminal responsibility only for what he may have done in the exercise of his official functions (*ratione materiae*) in his country or abroad, and not for acts committed in the private sphere.

These forms of immunity have been established with the purpose of benefiting the state rather than the individual. They can of course be modified by treaties or rescinded by the country of which the person is, or was, Head of State. This special status forms part of customary law in the United Kingdom and was confirmed in written law with passage of the State Immunity Act, 1978.

According to Lord Saville, the acts which Mr. Pinochet is accused of do not relate to his conduct in the private sphere, but rather was related to the exercise of his functions as Head of State (supposedly torture and conspiracy to torture are included in these official functions). In light of this, Lord Saville carefully examined the Criminal Justice Act, 1988 and the Convention against Torture, whose ratification by the United

Kingdom on 8 December 1988 was made possible by the approval of the aforementioned Act.

He came to the conclusion that the alleged acts of torture and conspiracy to commit torture with which Mr. Pinochet is charged would have been carried out in his official capacity. He concluded that the absolute immunity which a current Head of State enjoys does not disappear in the face of charges of torture, and even less so in the face of charges of conspiracy to commit torture with others. This is because such immunity has been established to benefit the state rather than the individual. By contrast, the immunity of a former Head of State refers exclusively to any activity undertaken during the period he was in office, but only those activities which formed part of his official functions.

The Convention against Torture requires that every State Party exercise jurisdiction (if it chooses not to extradite the subject ) over an alleged torturer found on its territory. It must also permit other States in the same situation to do so. This obligation does not change if the alleged perpetrator is a national of a signatory State different from that in which he is found. It is precisely this which Lord Saville considered to be an exception to the general rule of *ratione materiae* immunity, arising from the very wording of the treaty.

He did not share the argument of one of his colleagues that it would have been expressly stated in the Convention if the intention had been that former Heads of State would not enjoy immunity in cases of torture. He also disagreed with the suggestion that discussion of this point would have occurred when the Convention was being drafted if that was the intent. Lord Saville felt that no conclusion could be drawn from the absence of specific words to this effect or the lack of evidence of such discussions which would counter the clear sense given by the words of the Convention.

In conclusion, Lord Saville held that Mr. Pinochet could be extradited to respond to the charges of the crimes of torture and conspiracy to torture, when these acts had been committed in another country *after 8 December 1988*, the date when the Convention against Torture came into force in the United Kingdom.

### *Lord Millett*

Lord Millett shared the position expressed by his colleague Lord Browne-Wilkinson with regard to the crimes identified as "extraditable",

i.e. **torture** and **conspiracy to torture**, as well as his analysis of the principle of "double criminality" as established in the law of the United Kingdom, and therefore did not refer to these points. He limited his considerations to the issue on which he differed with his colleagues: the question of immunity.

**Immunity**

Lord Millett explained that immunity is not a personal right, but rather belongs to the state as an attribute of its sovereignty. From this derives the practice that the action of a State can not be judged in the courts of another State. Such a peculiar rule has its origins in a time when international law considered States to be the only actors in the international sphere, and when international law did not intervene in how a state treated the persons living within its territory. Lord Millett maintained, however, that times have changed and with them international law.

Lord Millett analysed the meaning of both *ratione personae* and *ratione materiae* immunity, reaffirming that under the terms of the former the beneficiary could not be arrested, tried or condemned in a civil or criminal action, neither for acts undertaken in the exercise of his official functions nor for purely private acts, and regardless of whether such acts had been carried out in the country he represented or abroad. But this did not apply here: Mr. Pinochet was not an acting Head of State.

*Ratione materiae* immunity is very different, and one of the defining differences is that the immunity accorded is much narrower. The beneficiary – in this case a former Head of State – still cannot be arrested, judged or condemned in a civil or criminal action, for acts carried out in the exercise of his official functions when he was Head of State, regardless of whether such acts were committed in the country of which he was head or outside of the country. However, the immunity accorded in this instance does not protect him in relation to any private criminal acts he may have committed.

Jointly interpreting international law and national law, both written and customary, Lord Millett held that a former Head of State is accorded the same immunity as that accorded to a former diplomat, "subject to all the necessary modifications" deriving from his different functions. Such immunity is limited to "acts performed in his capacity as head of state." Immunity in these circumstances cannot be questioned, regardless of whether the impugned acts were in conformity with domestic law, illegal or even unconstitutional. Sovereign states are the only authority qualified

to determine domestically what is, or is not, legal or constitutional. This situation changes however when the acts of which the beneficiary is accused constitute crimes against international law.

Lord Millett cited article 7 of the Charter of the International Military Tribunal of Nuremberg and its judgment which stated:

> The principle of international law, which under certain circumstances protects the representatives of a s tate, can not be applied to acts condemned as criminal by international law.

It should be remembered that both the principles contained in that Charter and those applied in the judgment of the Nuremberg Tribunal are recognised as international law by Resolution 95 (1) of the United Nations General Assembly, adopted in December 1946.

Lord Millett noted that as a result of this evolution in international law, it is now accepted that "the way in which a state treat[s] its own citizens within its own borders [has] become a matter of legitimate concern to the international community."

Lord Millett cited a recent decision of the International Tribunal for the Former Yugoslavia (*Prosecutor v. Anto Furundzija,* 10 December 1998), which affirmed that

> one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute, and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction.

Lord Millett then added that now

> every state has jurisdiction under customary international law to exercise extra-territorial jurisdiction in respect of international crimes which satisfy the relevant criteria.

He recalled that two of the drafters of the Convention against Torture affirmed in their book on the subject [11] that

> the Convention is based upon the recognition that the above-mentioned practices [torture and other cruel, inhuman or degrading treatment or punishment ] are already

11 "Handbook on the Convention against Torture", 1984, by Burgers and Danelius, page 1.

> outlawed under international law. The principal aim of the Convention is to strengthen the existing prohibition of such practices by a number of supportive measures.

For Lord Millett, the systematic use of torture as an instrument of state policy constitutes an international crime subject to universal jurisdiction long before 1984; in his view, this was already the case in 1973. Therefore, he concluded that the British courts already had the power of extraterritorial criminal jurisdiction for judging crimes of universal jurisdiction, through customary law, which constitutes a part of common law . He held that the existence of a statute to this effect ( such as the Cri minal Justice Act, 1988) is not required in order to exercise this jurisdiction. The Convention against Torture did not create a new international crime; it simply redefined the definition of torture, extending it to individual and isolated cases.

He considered the impact of the Convention to be mainly that

> previously states were entitled to take jurisdiction in respect of the offence wherever it was committed, they were now placed under an obligation to do so.

Without compromising his view that the English courts have extraterrritorial jurisdiction with regard to cases of torture and conspiracy to commit torture, he agreed with Lord Hope that they also have jurisdiction with regard to alleged acts of **attempted homicide** and **conspiracy** in Spain to commit murder in Spain.

With regard to the allegations of **torture** and **conspiracy** to commit torture, he concluded that the claim to *ratione materiae* immunity is completely inconsistent both with the Convention against Torture and with the Criminal Justice Act, 1988. He held that to allow such immunity would be equivalent to converting both texts into "dead letter" documents. If the act was committed in the exercise of official function , nothing distinguishes it from that carried out by any other agent acting in this capacity; if, on the other hand, it was a private act not connected to official functions, we are not faced with cases of torture as this is defined in those texts.

Another argument advanced by Mr. Pinochet's defence team was rejected by Lord Millett. He held that it was not necessary for the State of Chile to remove Pinochet's immunity, since there was no immunity to remove. Pinochet is not accused of having been Head of State when various of his subordinates applied torture; he is accused of having "incu-

rred direct criminal responsibility for his own acts in ordering and directing a campaign of terror involving the use of torture."

In conclusion, Lord Millett held that Mr. Pinochet could be extradited to respond to charges of the crimes of **torture** and **conspiracy to torture**, regardless of where or when such crimes were committed, but also for the crime of **attempted homicide and conspiracy to commit homicide** in Spain. As Pinochet was never protected by *ratione materiae* immunity, he can be judged in Spain for such acts, independent of the dates on which such acts were committed.

*Lord Phillips*

Lord Phillips agreed with the position expressed by his colleagues Lords Browne-Wilkinson and Hope with respect to the offences identified as "extraditable" (**torture** and **conspiracy to commit torture**) and their analysis of the principle of "double criminality", and for that reason did not address these points. He limited his considerations to the theme of possible immunity.

He began by stating that if Mr. Pinochet were an acting Head of State, his person would be inviolable (he would enjoy *ratione personae* immunity) while visiting the United Kingdom. However, this was not the case and so Lord Phillips held that Pinochet should receive the treatment accorded a former Head of State.

In referring to British law (the State Immunity Act, 1978, which incorporated into domestic law the provisions of the European Convention on State Immunity of 1972), he considered that if said law recognises state immunity, it refers to civil (not criminal) judicial proceedings, also leaving outside the scope of the immunity commercial acts involving the intervention of States.

Lord Phillips analysed various sources of international law (which are identified in Article 38 of the Statute of the International Court of Justice), including customary law, judicial decisions, the writings of authors and "the general principles of law recognised by all civilised nations", in an attempt to identify the sources upon which immunity for criminal proceedings against a former Head of State might be based.

An acting Head of State benefits from *ratione personae* immunity which protects him against any civil or criminal action. By contrast, a former Head of State does not benefit from this type of immunity, but rather from

the more limited *ratione materiae* immunity. In the case of a former Head of State, the jurisprudence analysed by Lord Phillips (he cited various cases) makes the distinction between acts carried out in the exercise of his official functions and those undertaken in his private capacity, limiting immunity to covering the former only.

Lord Phillips recalled that in recent decades the evolution of international law in this area has been considerable, and that this has been the case as the result of the express will of States who have encouraged this evolution by signing numerous international judicial instruments to this effect. This evolution has excluded from the protection of immunity "some categories of crime of such gravity that they shock the consciousness of mankind and cannot be tolerated by the international community." The judgment of these crimes can not be left solely to the legislation and tribunals of the territory in which they were committed, since such acts violate international law.

Lord Phillips cited several different instruments which, using similar language, have established the following idea: that the official duties of a person, whether he be a Head of State or Government, a member of a government or parliament, an elected representative or a government official, in no case exempt that person from criminal responsibility nor constitute a reason for reducing the penalty applied in criminal cases (Charter of the Nuremberg International Military Tribunal, 1945; Charter of the Tokyo Military Tribunal, 1946; Convention for the Prevention and Punishment of the Crime of Genocide, 1948; Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993; Statute of the International Criminal Tribunal for Rwanda, 1994; Statute of the International Criminal Court, 1998).

Lord Phillips held that there exists no recognised standard in international law which protects former Heads of State or former high-level government officials from being prosecuted by the application of a "*ratione materiae*" immunity with respect to specific crimes. He added that the crime of torture, with which Mr. Pinochet is accused, is clearly "prohibited by international law, and the prohibition of torture has the character of *jus cogens* and or obligation *erga omnes* ."

With the entry into force of the Convention against Torture and the Criminal Justice Act, 1988, the United Kingdom undertook the obligation to investigate, judge and, where the case so warrants , punish any person found on its territory who has been accused on the basis of well-founded

evidence of having committed acts of torture in a territory under the jurisdiction of another State. This obligation applies unless the State Party prefers to extradite the accused to another State having the right to claim such extradition. The text of the Convention is thus incompatible with *ratione materiae* immunity; to apply such immunity would be to nullify the very meaning of the Convention.

Lord Phillips stated that in no way did the acts for which the extradition of Mr. Pinochet was being sought fall within the provision of "carrying out his functions as Head of State". Article 3 of the Vienna Convention on Diplomatic Relations (1961), in defining the functions of a diplomatic mission, adds the words "within the limits permitted by international law". Lord Phillips did not believe that the functions of a Head of State could include "criminal actions prohibited by international law".

In conclusion, he affirmed that not only was Pinochet accused of committing torture as Head of State, but of unleashing a campaign of **kidnapping, torture** and **murder** which extended beyond the borders of Chile. He held that it would not be correct to analyse individually the different crimes that made up this brutal campaign in order to identify some as international crimes and others as not. All of Pinochet's conduct – if the charges against him are proven – would be a violation of international law. For this reason Lord Phillips held that Pinochet "can have no immunity against prosecution for any crime that formed part of that campaign", and so can be extradited to appear in court to answer the charges against him. Lord Phillips **did not make reference to any specific date** starting from which cases of torture could be pursued, and therefore, like Lord Millett, he would allow that the dates mentioned by his colleagues (29 September and 8 December 1988) should not be taken into account as a basis for rejecting prosecution of cases of torture prior to these dates.

### *In favour of recognising immunity*

#### *Lord Goff*

Lord Goff was the only one of the seven Law Lords to maintain that neither the nature of torture as an international crime, nor the Convention against Torture itself deprived Pinochet of the right which he had enjoyed, and continues to enjoy as a former Head of State, of benefiting from immunity (*ratione materiae*) for criminal acts undertaken in the period that he functioned as Head of State.

In support of this position, he shared the opinion of Lord Slynn in the ruling of 25 November 1998, in the sense that no written international treaty nor any customary law or practice removed the "long established immunity of former Heads of State".

Lord Goff affirmed that a Head of State benefits from *ratione personae* immunity (which covers *ratione materiae*) as long as he is a Head of State , for acts committed both within and outside the country of which he was head. When his functions as Head of State cease, he only benefits from *ratione materiae* immunity, which is limited to actions that were carried out in the exercise of his functions as Head of State. In Lord Goff's opinion, only certain international texts (he cited the Charter of the Nuremberg International Military Tribunal, 1945; the Charter of the Tokyo Military Tribunal, 1946; the Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993; the Statute of the International Criminal Tribunal for Rwanda, 1994; and the Statute of the International Criminal Court, 1998) allow a Head of State to be held personally responsible for his actions. However, he held that such denial of immunity only occurs in the context of a specially formed international tribunal which specifically provides for such a measure, and does not apply to criminal proceedings before national courts.

Lord Goff further argued that the fact that the Convention against Torture does not specifically refer to Heads of State means that the traditional immunity which protects such persons and prevents their arrest and prosecution is not excluded by the Convention. As a consequence of which, Mr. Pinochet must continue to benefit from *ratione materiae* immunity in his capacity as a former Head of State.

Lord Goff considered it difficult to conclude that any isolated case of torture, committed after September 1988, could constitute a "crime against humanity" since such a label is applicable to a crime only when "it could be said that there was [a] systematic or widespread campaign of torture, constituting an attack on the civilian population." According to Lord Goff, this would be the only condition that would rule out the *ratione materiae* immunity from which Mr. Pinochet should benefit, and he did not find any proof of such in the facts of the Pinochet Case. In support of this argument he mentioned Article 7 of the Statute of the International Criminal Court adopted in Rome in 1998. We will comment in more detail on this opinion (with which we do not agree) below.

Regarding the other aspects of the case, it would be useful to note that in analysing the rule of "double criminality", a rule included in the Extradition

Act of 1989, Lord Goff differed with some of his colleagues by maintaining that the accusation of **conspiracy to commit homicide** in Spain fulfilled the terms of this rule, and as a result could form a basis for extradition, if the subject of the extradition request did not benefit from immunity.

In conclusion, Lord Goff held that by virtue of his status as former Head of State in Chile, Mr. Pinochet is protected by *ratione materiae* immunity in the face of criminal allegations for the acts of which he is accused, including torture and conspiracy to torture, committed in Chile or elsewhere during the period in which he exercis ed the functions of Head of State. For these reasons, Lord Goff held that Pinochet **could not be extradited**.

### Our opinion of the judgment of 24 March 1999

As we have seen, six of the Law Lords held that Mr. Pinochet could not benefit from immunity exempting him from appearing before the Spanish criminal justice system. The seventh declared himself in favour of recognising absolute immunity for Pinochet, which would render impossible his arrest, trial or extradition. With regard to immunity, this ruling thus strongly confirmed the sentence issued by the other Appellate Committee of the House of Lords in November 1998.

In this respect, the ruling is gratifying, as it conforms both with the law and with the demands of justice, taking into account as it does the evolution of international law and its application to this case in particular. It recognises the principle – by a majority of six to one – that the manner in which a State treats its own citizens within its own borders has become a matter of legitimate concern to the international community. It also recognises that a certain category of crimes, such as those dealt with in this case, are of such gravity that they strike at the conscience of humanity. If an individual commits crimes against international law, he may and must be held responsible for his actions, before both civil and criminal courts, whether by the courts of the State in which the crimes were committed or by the courts of other States or by international tribunals.

An aspect of this judgment which we do not find satisfactory, and of which we have already made mention above, is that it went beyond the legal issue which the Appellate Committee was supposed to rule on, namely whether Mr. Pinochet did or did not enjoy immunity preventing his detention, trial or extradition. The Lords of the Committee added additional issues which in our view did not correspond with their mandate, such as an analysis of the crimes for which the extradition was solicited

and the examination of the dates starting from which such extradition was possible according to the law of the United Kingdom. In our opinion, these aspects should have been determined by the competent English courts during the course of the "extradition process" proper. By choosing instead to proceed in this fashion, the central aspects of the judgment became the type of crimes alleged to have been committed by Mr. Pinochet and the dates on which such crimes had occurred. These questions were thus treated as essential in determining the extent of the charges for which Mr. Pinochet could be extradited, with the result that this "additional" ruling ended up limiting and even drastically reducing his future prosecution.

Let us examine the principal aspects that emerged from the ruling:

### *Crimes for which Pinochet can be extradited, and which limit his prosecution in Spain*

Our dissatisfaction with the ruling relates to the type of crimes for which extradition is accepted and the dates starting from which such crimes were subject to prosecution (in the United Kingdom and Spain).

For four of the Lord Justices who formed the majority (Lords Browne-Wilkinson, Hope, Saville and Hutton), Mr. Pinochet can be extradited, but only to answer for the crimes of **torture** and **conspiracy to torture**, since these are the sole offences among the crimes with which he is charged that are liable for extradition according to the Extradition Act, 1989 of the United Kingdom. Two of the other Lords (Lords Millett and Phillips) also gave their approval for prosecution of these crimes, but added that Pinochet had to respond to the charges of **attempted homicide** and **conspiracy to commit homicide** in Spain, regardless of the nationalities of the victims. In their view, the crimes of which Pinochet was accused (torture, homicide and conspiracy to commit both of these offences) could never be covered by immunity.

### *The question of dates*

Three of the Lords (Lords Browne-Wilkinson, Hope and Saville) held that Mr. Pinochet could not be extradited to face charges of torture or conspiracy to torture committed before 8 December 1988, as it was only on that date that the Convention against Torture entered into force in the United Kingdom. Therefore, they held, only acts committed since that date would qualify as extraditable or prosecutable in the UK. They referred to the Criminal Justice Act which had come into effect in the United Kingdom on

29 September 1988, and which permitted the country to ratify the Convention against Torture. According to these Law Lords, only from this date onward could the requirement of "double criminality" be fulfilled (the fact of an act being considered criminal both in the State which was requesting the extradition as well as in the United Kingdom) as required by the Extradition Act, 1989. Lord Hutton chose the date of 29 September 1988 but for another reason. He held that it was on this date that torture committed outside the territory of the United Kingdom became a criminal act in Britain under its Criminal Justice Act.

The two remaining Law Lords (Millett and Phillips) understood that these types of crimes have never been covered by immunity and so concluded that Pinochet may be judged in Spain irrespective of the dates on which the crimes were committed, whether before or after December 1988.

In our opinion, the correct position is that maintained by Lords Millett and Phillips. They held that the principle of "double criminality" only requires that the action constituting the offence for which the extradition is solicited be considered criminal in the country receiving the request "on the date on which the action or omission was committed." If this requirement is met, the problem of dates disappears. This point applies above and beyond what we say later about the permanent character of the crime of "forced disappearance".

It is clear that the Convention against Torture was not drafted and approved by the States Parties in order to establish a specific category of crime against international law, given that torture was already considered a crime against international law long before written international treaties to this effect were signed. Customary law had already acknowledged that this offence is now considered to have the status of *jus cogens* and had maintained that it was applicable *"erga omnes"*. With specific reference to the United Kingdom, one of the Law Lords affirmed that torture had already been criminalised under common law and later by the written law of the Offences against the Person Act of 1861.

With the ratification of the Convention against Torture and enactment of the Criminal Justice Act, 1988, the United Kingdom took on new obligations that before it had only been empowered (rather than required) to do. Among other things, the UK is now required to investigate, prosecute and, in the event of a guilty verdict, to punish any person found within its territory who had been credibly accused on the basis of well-founded evidence of having committed torture in the territory under the jurisdiction of another State. Of course, this is only the case if they choose not to extradite the accused to another State who requests extradition.

### *Ratification of or accession to the Convention against Torture by Chile, Spain and the United Kingdom*

We do not understand the importance for the purposes of this case of analysing whether or not the Convention against Torture was in force in Chile and specifically from what date. One of the Law Lords (Lord Hope) insisted that it was in effect as of 30 October 1988, and that extradition could only be considered for crimes committed from this date onward. In our opinion, the date on which this Convention entered into force in Chile does not affect, nor could it, the interpretation of the legal system of a third country such as the United Kingdom. By the same argument, this date would also be irrelevant with respect to Spain, which had not solicited the extradition of Mr. Pinochet from Chile, but rather from the United Kingdom. Furthermore, actions constituting torture were categorised as criminal offences (even if they were not specifically termed "torture") even before the *coup d'état* of 1973, and such laws were never repealed by any regime, which on the contrary expressly maintained them.

### *Immunity*

*Ratione materiae* immunity signifies that the beneficiary (in this case a former Head of State) can neither be arrested, judged nor condemned under civil or criminal law, in connection with acts carried out in the exercise of his official functions as Head of State, and regardless of whether such acts were committed in the country of which he was head or outside that country. However, once he is no longer Head of State, such immunity does not protect him with respect to private actions he may have undertaken during the time he exercised his official functions. International and national law, both written and customary, recognise immunity for a former Head of State, but such immunity is limited to "acts committed in the exercise of official functions as Head of State" and does not cover private acts.

We cannot accept the argument that Pinochet would in any case have committed the acts of which he stands accused as part of his official functions rather than in a private capacity, and therefore that he should benefit from *ratione materiae* immunity. We emphatically maintain that it is unacceptable to admit that torture, or the organising, authorising or tolerating of torture could constitute official functions of state, since these are acts which offend and assault the conscience of humanity as a whole, which is why they are prohibited and criminalised under international law.

International law is advancing in the direction of stipulating that when a person, whatever his or her function or position,

> commits crimes of such gravity and inhumanity as to constitute crimes against international law, the international community has the obligation to bring that person to justice...

The official functions which such a person may have exercised would not *per se* constitute a sufficient motive for interrupting the process of justice nor even for reducing the penalty corresponding to such crimes.

We agree with what was said by Lord Phillips: not only is Pinochet accused of imposing the practice of torture as Head of State, but of unleashing a campaign of kidnapping, torture and murder which extended even beyond the borders of Chile. It would thus not be correct to analyse one by one the different crimes that comprised the regime's campaign so as to identify some as constituting international crimes and others as not. All of this conduct was in violation of international law.

As the Law Lords held, the claim to *ratione materiae* immunity is totally inconsistent both with the Convention against Torture and the UK's Criminal Justice Act. To accept such a claim of immunity would be tantamount to converting both texts into dead letter documents.

### *Does the definition of torture in the Convention against Torture apply to a Head of State?*

Along with the Law Lords, we reject the allegation that a Head of State does not enter into the definition found in Article 1.1 of the Convention against Torture, which specifically defines torture as acts committed by "a public official or other person acting in an official capacity." In each of the various positions which Pinochet occupied, indeed in all of the situations in which he found himself – as Head of State, President of the Republic or Commander-in-Chief of the Army – he was clearly included in this definition.

It is also not possible to deduce, as does Lord Goff, that because the Convention does not specifically mention Heads of State, they continue to be covered by the traditional immunity that prevents their arrest and prosecution. A general principle of law states that every exception or privilege – and immunity is such a privilege – must be interpreted restrictively and cannot be extended by analogy.

Later in this report we will refer to what was expressed in November 1998 with respect to the United Kingdom, by the United Nations

Committee against, which is charged with supervising compliance by States Parties of the Convention against Torture.

### *Massive and systematic torture*

We do not share the argument of Pinochet's lawyers, accepted by Lord Goff, that immunity may only be interrupted if torture had been applied "massively or systematically" but not in the face of what they called "isolated cases".

The requirement that torture be massive or systematic derives from the Statute of the International Criminal Court approved in Rome in 1998 (article 7 (i)). But this requirement was incorporated only in order to delineate the jurisdiction of the Court through the notion of "crimes against humanity", so that the future Court would not be submerged by thousands of individual complaints of torture, which would render its efficient functioning impossible. The Convention against Torture makes it clear that even a single act of torture constitutes a crime against international law, and that torture does not become a crime against international law only when it is committed in a massive or systematic manner.

### *Other offences*

We cannot agree with the assertion of Lord Browne-Wilkinson that organising or ordering subordinates from a position of state power to murder defenceless prisoners and peaceful opponents both in Chile and abroad could be covered by *ratione materiae* immunity if, in Lord Browne-Wilkinson's words, "at the moment at which they were committed these crimes were not considered extraditable according to the legislation of the United Kingdom." In our opinion, these kinds of crimes also constitute "crimes against humanity", and with respect to this category, it should be enough that such crimes are considered an offence in the United Kingdom as well as in the country soliciting the extradition (in this case Spain) and that they are punished in both countries with a sentence of more than 12 months' imprisonment. Both of these conditions are fulfilled in the case of Pinochet. We recall in this respect section 2(a) of the Extradition Act, 1989 which specifically refers to this point.[12]

12 s.2(a): "...conduct in the territory of a foreign state...which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months...and which, however described in the law of the foreign state...is so punishable under that law."

### *Forced disappearance of persons*

The judgment ignores cases of the forced disappearance of persons, which are of far-reaching legal importance not only because they constitute "crimes against humanity" but also because they are ongoing, **permanent** crimes whose commission remains in effect "until such time as the fate and location of the disappeared person is established with certainty." This implies that in many of the more than 1,000 cases of forced disappearance that occurred in the Chile led and directed by Mr. Pinochet, this aberrant and inhuman crime is still being committed.[13]

Furthermore, "forced disappearance" is almost always associated with torture, both physical and psychological. If, as the ruling held, only those cases committed after 8 December 1988 may be judged by the Spanish courts, then the crimes of forced disappearance (including their element of torture), and specifically those in which "the location or fate of the disappeared person has not been established with certainty", continue in their commission today.

## Extension of the extradition request

On 24 December 1998, the Kingdom of Spain invoked Article 13 of the European Convention on Extradition, which authorises expansion of an extradition petition, by bringing forward additional facts and information They sent additional data to the British judicial authorities concerning eight cases of torture which had figured in the material presented in the original request. Later, on 26 March 1999, the Spanish authorities again relayed information and testimony concerning 31 additional cases of torture committed in Chile subsequent to 8 December 1988 and before March 1990 (the date after which Pinochet was no longer Head of State). At the end of May 1999, the Spanish authorities delivered to the British Public Prosecutor's Office further information gathered by Spanish High Court Judge Baltasar Garzón concerning the above-mentioned newly added cases of torture and conspiracy to torture.

13 The report of the National Commission of Truth and Reconciliation (the Rettig Commission), gave an account of 957 cases of persons who had disappeared after having been arrested. Subsequently, when the National Corporation of Reparation and Reconciliation continued the investigation of cases which remained pending, several hundred additional cases of disappeared persons were added to this number.

## Second "authority to proceed", issued 14 April 1999 by the Home Secretary, Jack Straw

The ruling having come down from the House of Lords on 24 March 1999, the Secretary of State authorised both parties – the Government of Spain and Mr. Pinochet's defence lawyers – as well as the "intervenors " in the proceedings before the House of Lords (the Government of Chile and the organisations Amnesty International and Human Rights Watch), to present their respective arguments in writing. All of them did so.

On 14 April 1999, the Minister announced his decision. The Law Lords had expressed the view that in light of the significant reduction in the number of crimes Pinochet was charged with which were liable for extradition, the Home Secretary should reconsider his original decision of 9 December 1998 granting "authority to proceed".

Mr. Straw affirmed that he had paid particular attention to the Law Lords' recommendation. He also stated that he had examined the specific roles which both he and the courts were expected to perform in a case of extradition. Mr. Straw said he had analysed the cases of torture that had occurred prior to 8 December 1988 in order to determine

> whether acts of torture after that date were done in the course of a conspiracy begun before, such as to amount to an accusation of a conspiracy to torture continuing after that date for the purposes of section 7(5) of the Act [Extradition Act, 1989].

The Minister explained that he had not considered the additional documentation sent by Spain subsequent to its submission of December 1998 (facts, locations, dates, names of witnesses, victims and governmental agents involved) as constituting the kind of "supplementary material" referred to in article 13 of the European Convention on Extradition, since he himself had not solicited it. Nevertheless, it had proved useful for the purposes of considering whether (as asserted by Mr. Pinochet's defence lawyers) "the Spanish accusations [were] not made and maintained in good faith".

He rejected the argument of Pinochet's lawyers (which, incidentally, had been accepted by one of the Lords) that his immunity would only be interrupted if the torture had been applied "massively or systematically".

Mr. Straw considered that the offences of which Pinochet was accused were crimes of a common law character rather than of a political nature,

and that the extradition had also not been requested for political ends. Furthermore, it had not been alleged by the defence that criminal action was now proscribed in the case of the crimes for which judgment was being sought due to the time that had elapsed since their commission.

Despite the significant reduction in the number of offences liable for extradition following the judgment of 24 March 1999, the Minister maintained that after a careful assessment of the decision, he considered that

> the remaining offences for which return has been sought are serious, and in the nature of those for which, domestically, passage of time would not be regarded as restricting prosecution.

Furthermore, he did not believe that the passing of time impeded or rendered unjust the continuation of the extradition process, nor that Mr. Pinochet by reason of age and health was not in a condition to face these charges in court. The credibility of the witnesses' memories would be assessed in the court proceedings. He had also considered other alleged factors such as "the stability of Chile and its future democracy", as well as the "possible effect of extradition proceedings on the UK national interest." However, these considerations did not lead him to modify his decision.

Both Mr. Pinochet's defence team as well as the Government of Chile had maintained that the accused should be returned to Chile where he could be submitted to a trial. Referring to this petition, the Minister affirmed that, "there exists no extradition request from the Chilean Government ", and more importantly that he

> d[id] not consider the possibility of a trial in Chile to be a factor that outweighs the UK's obligations under the ECE to extradite Senator Pinochet to Spain.

We wish to point out here that from the very beginning, the Home Secretary had left aside the accusation of the crime of genocide, judging that the facts presented "do not satisfy the definition of an extradition crime (according to the law of the United Kingdom)". The charge of genocide was thus not included in the extradition process. On this occasion, acting in accordance with the powers accorded to him by section 7 of the domestic Extradition Act, the Minister concluded that the ruling of the House of Lords led him to affirm that Mr. Pinochet could also not be extradited to face charges of **attempted homicide and conspiracy to commit homicide** on Spanish territory.

He concluded that the only offences for which Mr. Pinochet could be extradited in conformity with the law of the United Kingdom were those of **torture** and **conspiracy to torture** committed after 8 December 1988. Thus, if the British courts decided to carry out the extradition, the Spanish justice system could then proceed with his trial, but only for the above-mentioned categories of crimes, and only so long as these had been committed subsequent to the relevant date. However, it was the Minister's opinion that at this point in the analysis of the issue it was appropriate to continue with the process of extradition.

The Minister recalled that other aspects of the question had to be examined by the magistrate in charge of the proceedings (section 9 of the Extradition Act). Then when the case returned to him again after completion of the extradition process, he would be able to re-examine the issue in light of what had transpired during these proceedings and consider any further arguments raised by the parties, including those of the age and health of the accused, before presenting his final decision (section 12 of the Act).

For the second time, on 14 April 1999, the Home Secretary accorded an "authority to proceed" in conformity with the provisions of Part III of the Extradition Act, 1989, which brought the European Convention on Extradition into force in the United Kingdom. In other words, he authorised the appropriate British court to examine the Spanish petition for the extradition of Mr. Pinochet.

In response to the Minister's decision, Pinochet's defence lawyers mounted a challenge before the High Court, alleging that the accusations against Pinochet did not fall within the definition of "extraditable crimes". Magistrate Harry Ognall, who examined the appeal, rejected the request of the defence, affirming that it would "unnecessarily protract the case", and as a result he ordered that the proceedings continue.

## Proceedings of the extradition request before the British courts

With the theme of immunity resolved and the "authority to proceed" again accorded by the Home Secretary, the process of extradition *per se* will now begin. The judge under whose jurisdiction the extradition process proper (the "committal hearing") falls is Mr. Graham Parkinson of the Bow Street criminal division. He will act as an examining magistrate, examining the crimes for which the extradition has been requested,

the dates on which they were committed, the clues, evidence and proof collected to date, etc., and on the basis of this material will reach a decision on whether the extradition of Mr. Pinochet to Spain may proceed. At this point, the subject of the extradition can argue that formal defects exist or establish lack of proof supporting the request, and he will continue to have access to the various routes of appeal authorised by the justice system in the United Kingdom, among them (in the event of an unwelcome decision) the right to appeal to the High Court of Justice.

When the judicial stage of the extradition process concludes, in conformity with article 12 of the Extradition Law of the United Kingdom the case will return once again to the Home Secretary, who will be called upon to exercise his "definitive authority" in deciding whether or not to let the extradition proceed.

## International law applicable in cases similar to that of Mr. Pinochet: a person presumed guilty who will be judged in a third country for crimes against humanity (and possibly for grave infractions of international humanitarian law) committed in a territory under the jurisdiction of a State other than the one seeking to judge him

The various international legal documents we have cited in this report which refer to human rights mark an evolution in international law. So also do specific jurisdictional rulings that consolidate standards which over time have been integrated into customary law.

### *a) –Let us first look at those referring to genocide*

The International Court of Justice, in issuing a consultative opinion in May 1951 (case of Southeast Africa) accorded the Genocide Convention the category of *jus cogens*. It maintained that the Convention is applicable even to States which have not ratified it, since the principles embodied in it are binding on all States, independent of contractual obligations.

In the case of Pinochet, we have to take into account the difficulties of interpretation posed by the Genocide Convention (specifically the absence in the wording of the definition of any specific mention of an intention to destroy a given group because of its political opinions). We must also take into account that the Home Secretary, Mr. Straw, in his first "authority to proceed" with the extradition, on 9 December 1998, left out

the charge of genocide, considering that the facts presented "do not satisfy the definition of a crime liable for extradition" according to the laws of the United Kingdom. He ordered therefore that the crime of genocide not be included in the process of extradition. This exclusion was maintained in the second "authority to proceed" issued by the Home Secretary on 14 April 1999.

We have already expressed our opinion concerning this issue (see the section entitled "**Extradition claim by the Kingdom of Spain for the crimes of genocide, terrorism and torture and conspiracy to commit them**"): the ICJ believes that acts perpetrated with the intention of destroying a group totally or partially because of their political opinion are not included in the definition of genocide contained in the Convention. Such acts would certainly constitute horrible crimes, but would not be genocide. We have also affirmed that, leaving aside the accusation of genocide, the actions attributed to Mr. Pinochet constitute crimes against humanity and as such can and should be curbed on a global scale.

Where a wider definition of genocide is accepted, as is the case with the ruling by the Spanish High Court detailed above (genocide understood socially), the applicable articles would be the following:

*Convention on the Prevention and Punishment of the Crime of Genocide, (1948):*

Article I – The High Contracting Parties confirm that Genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II – In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:a) killing members of the group;b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; [...]

Article III – The following acts shall be punishable:

a) Genocide;
b) Conspiracy to commit genocide;
c) Direct and public incitement to commit genocide;
d) Attempt to commit genocide;
e) Complicity in genocide.

Article IV – Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article VI – Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction.[...]

### *b) – Infractions of international humanitarian law*

Experts have different approaches to this issue. Some maintain that even if every State has the obligation to respect international humanitarian law, that obligation is limited. That is, a State other than the one in whose territory the crimes were committed must pursue the perpetrator, by either extraditing or judging those who, for whatever reason, are found to be present in its territory, only in cases where the conduct is a "grave infraction" according to the definitions in the Geneva Conventions. Such experts maintain that this qualification refers exclusively to the case of "persons or property protected" by the respective Convention, from which they deduce that such obligations apply only in cases of "declared war or any other armed conflict that might arise between two or several of the High Contracting Parties" (Articles 2, 129, 130 of Convention III; articles 2, 146, 147 of Convention IV).

By contrast, other experts adopt a broader and more evolutionary position. They maintain that in the case of Pinochet, the Geneva Conventions III and IV are applicable in their entirety. This includes the obligation of every State Party to seek out and extradite or judge the presumed perpetrators of crimes against international humanitarian law committed in a situation of internal armed conflict such as that experienced in Chile, when such persons are found to be present in their territory. We also take this position based on the following arguments.

The four Geneva Conventions (of 1949) and their Additional Protocols (of 1977) represent to a certain extent a development of, and at the same time constitute the written expression of, general principles of customary international humanitarian law. These general principles derive from "the usages established among civilised peoples, from the laws of humanity and the dictates of the public conscience." So it was expressed in Article 63 of the I Convention; Article 62 of the II Convention; Article 142 of the III Convention; and Article 158 of the IV

Convention, to ensure that renunciation of one of the Conventions would not have any effect on the obligations that the parties in conflict have .

We agree with this second option and related to it we cite the UN General Assembly Resolution of 16 December 1982 (just one of many similar resolutions by this body) reaffirming the "binding character for all parties" of the Geneva Conventions .

Furthermore, in today's world things have changed considerably since the adoption of the Geneva Conventions in 1949. "International wars" *per se* are almost non-existent, though on the other hand regrettably almost every day an armed conflict erupts somewhere in the world opposing one or more groups within the territory of a single State – what are termed "internal armed conflicts". It would therefore be unacceptable, under an evolutionary conception of the law, that authors of crimes against international humanitarian law be pursued throughout the world only if their acts were committed during a confrontation between two or more States in a war, while others would not be pursued because they had acted during an internal armed conflict. The crime is the same and the horrors are the same in both cases.

In a similar vein, the International Court of Justice in its ruling on Case No. 33 in June 1986 *Nicaragua v. USA, Concerning military and paramilitary activities in and against Nicaragua*[14], indicates how we should interpret the Geneva Conventions and other principles of international humanitarian law. In its ruling, the International Court of Justice says that Article 3, common to all four of the Geneva Conventions, is compulsory for all States, whether or not they have ratified or adhered to these Conventions.

The International Court also stated that the obligation to "respect and ensure respect of" the Geneva Conventions, which figure in these agreements (Article 1, common to all four of the Conventions and to the Additional Protocol No. 1), also applies to the situation described in common Article 3, thus to every "armed conflict not of an international character occuring in the territory of one of the High Contracting Parties [i.e., internal armed conflict]".

International legal doctrine has likewise frequently affirmed that the obligation to "respect and ensure respect for" humanitarian law, contained in Article 1, common to all four of the Geneva Conventions, does not derive solely from the texts of the 1949 Conventions but also, prior to

14 Recueil de la Court, 1986, in particular paragraphs 175, 218, 219 and 220 of the decision.

this date, from the general principles of humanitarian law of which the Conventions constitute a written expression.

If doubts persist about whether there existed in Chile, at least during the initial period of the military regime, an ***internal armed conflict***, what the Geneva Conventions call "armed conflict not of an international character", in order to dispel them we need only refer to the legislation and practice of the military regime itself. And although it is not an issue here, since the military regime never pretended to apply the rules of Additional Protocol No. 2 to the Conventions (among other reasons because this text was only approved by the international community of States in 1977), it would be useful to review this text with regard to how it distinguishes an internal armed conflict from other situations, such as "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts" (Article 1(2) of Additional Protocol II).

Indeed, beginning on 11 September 1973 itself, a "state of siege" was declared in Chile, which was subsequently modified over the course of the years, resulting in the establishment of four distinct varieties or possibilities of "emergency regime", involving greater or lesser limitation of rights and liberties.

Decree Law No. 640 which systematised the states of emergency, declared that a state of siege could be imposed "in case of internal disturbance caused by rebel or seditious forces, organised or attempting to organise themselves, either openly or clandestinely." Already Decree Law No. 5 in interpreting Article 418 of the Code of Military Justice, had declared that "the state of siege decreed as the result of internal disturbance, ***in the circumstances which the country is currently experiencing, should be understood as 'a state or time of war'*** with regard to the application of the penalties established for such times by the Code of Military Justice and other criminal laws, and, in general with regard to all the other effects of such legislation." The practical result of this policy was the removal from ordinary jurisdiction and the transfer to "military jurisdiction in time of war" (as it was termed) of the trial and sentencing of persons infringing the prohibitions established by the state of siege. In the context of a state of war, Decree Law No. 5 also increased the list of crimes punishable with the death penalty by military courts.

It would not be reasonable to admit that a State, by declaring itself to be at war (internal armed conflict), can avail itself of a military justice which is expeditious and offers scant rights to defendants, while at the

same time it refuses to recognise the internationally guaranteed rights that derive from such a declaration for persons subject to that system of justice.

The articles applicable to the present case would include the following:

*Geneva Convention relative to the Treatment of Prisoners of War (III Convention):*

Article 1 – The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Article 3- In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, [...]

1. [...] shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

b) Taking of hostages;

c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

d) The passing of sentences and the carrying out of executions without previous judgment [...]"

Article 129 – [...] "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also ... hand such persons over for trial to another High Contracting Party..."

Article 130 – "Grave breaches to which the preceding Article relates shall be...any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment...serious injury to body or health..."

*Geneva Convention relative to the Protection of Civilian Persons in Time of War (IV Convention)*

Article 1- "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."

Article 3 – "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum [...]"

1. .... shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

b) Taking of hostages;

c) Outrages upon personal dignity, in particular humiliating and degrading treatment;d) The passing of sentences and the carrying out of executions without previous judgment..."

Article 146 – "[...]Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also ... hand such persons over for trial to another High Contracting Party..."

Article 147- "Grave breaches to which the preceding Article relates shall be ... any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, ... serious injury to body or health, ... unlawful confinement..."

### *c) – If necessary, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, of 1968, could also be applied:*

Article I – "No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

a) War crimes as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nuremberg ..., and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

Article II – If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State

authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.

Article III – The State Parties to the present Convention undertake to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition, in accordance with international law, of the persons referred to in article II of this Convention.

### *d) – In the specific case of Spain and Chile, it would be useful to analyse the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents*

The Convention which is applicable in the Soria case[15] imposes by articles 3 and 7, the obligation (for States who have ratified or adhered to it) of extraditing or judging the suspect if he is found in their territory.

### *e) – Concerning relations between the United Kingdom and Spain or any other country applying for extradition, it would be appropriate to take into account the provisions established in the Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity (UN General Assembly Resolution, December 1973)*

Principle 1 – War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation, and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.

Principle 3 – States shall cooperate 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.

Principle 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.

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15 Mr. Carmelo Soria, of duo Chilean-Spanish nationality, a representative of CEPAL (the UN Economic Commission for Latin America and the Caribbean) was abducted and later killed in Chile in July 1976 by agents of the DINA.

***f) – With regard to terrorism and extradition for such crimes, various obligations for European States arise from the European Convention for the Repression of Terrorism of 1977. This Convention governs extradition and judgment of presumed perpetrators of terrorism.***

Article 1 of the Convention makes clear that for the purposes of extradition between States Parties, certain acts will not be considered as political offences, nor as offences connected with a political offence, nor as offences inspired by political motives. Among such acts it mentions:

> illicit seizure of an airplane; illicit acts directed against civilian aviation; attacks against the life, physical integrity or liberty of persons benefiting from international protection; the use of bombs, grenades, automatic firearms, explosive letters and packages etc., the taking of hostages...

Under Article 6(1), States Parties accept the obligation of applying their jurisdiction to (i.e. investigating, judging and where appropriate convicting) presumed authors of the terrorist acts mentioned in the Convention, when such persons are found to be present in their territory, and when the authorities have decided not to extradite the person to a State which has requested his extradition in accordance with the requirements of the law. For its part, clause 2 of the same Article 6 states that "the present Convention does not exclude criminal jurisdiction exercised in conformity with domestic law."

By virtue of Article 7, the State in whose territory the presumed author of one of the acts of terrorism mentioned in the Convention is found to be present is obliged, in case it does not proceed with the extradition, to submit the case, without exception and with no undue delay, to its own competent judicial authorities for prosecution.

Under Article 8(1), the States are obliged to furnish one another with aid and assistance in matters of criminal prosecution and in any procedure undertaken in connection with acts of terrorism covered by the Convention.

***g) – The accusation could also be based on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.***

This Convention represents a new step forward in the codification of international law which seeks to provide for the prevention and prosecution of torture as an international crime by establishing forms of *"international*

*jurisdiction*". It involves the application of the principle of "*aut dedere aut judicare*". In the event that extradition of the person presumed guilty is not pursued, he is to be judged by the national tribunals of the State in whose territory he was found, even when the crime or crimes of which he is accused were committed in a territory under the jurisdiction of another State.

The articles applicable in this case would include:

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 accidental 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 4 – Each State Party shall ensure that all acts of torture are offences under its criminal law...

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 [...];
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.

Article 5(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.

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.

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.

### *h) – European Convention on Extradition, 1989*

This Convention regulates everything pertaining to the process of extradition between the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland, and which was analysed comprehensively by the Appellate Committee of the House of Lords in its ruling of 24 March 1999.

### *Other documents of international law*

Other documents, the most relevant extracts of which are included below, have the merit of demonstrating the directions in which international law has developed over the years. These include the Inter-American Convention to Prevent and Punish Torture (OAS, 1985), the Declaration on the Protection of All Persons from Enforced Disappearance (UN General Assembly, 1992), the Inter-American Convention on the Forced Disappearance of Persons (OAS, 1994) and the Statute of the International Criminal Court (UN, July 1998). Even if the legal importance of some of these texts is not equal to that of treaties, and if some others restrict the scope of their application to the Americas, they nevertheless constitute valuable precedents and guidelines for action to be followed by States.

Perhaps the highest point to date in the evolution of international law is that constituted by the Statute of the International Criminal Court, approved in Rome in July 1998. If this treaty were already in effect today, the majority of the aspects of the Pinochet Case that have given rise to legal battles in the courts would have been resolved by the text of the Statute . Specifically: the question of admissibility of jurisdiction to prosecute (Article 5,1); the classification of Crimes against Humanity (Article 7 (f),(h); the indefeasibility of

the offences involved (Article 27); whether Heads of State or Government can be judged or instead enjoy immunity (Article 24), etc.

### *i) – Inter-American Convention to Prevent and Punish Torture (OAS, 1985)*

This regional C onvention also establishes forms of *"universal jurisdiction"* relating to the nature of torture as an international crime. In the event that extradition of the person presumed guilty is not pursued, he is to be judged by the national tribunals of the State in whose territory he was found, even when the crime or crimes of which he is accused were committed in a territory under the jurisdiction of another State.

Article 3 – The following shall be held guilty of the crime of torture:

a) A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.[...]

Article 6 – In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offences under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.[...]

Article 11 – The States Parties shall take necessary steps to extradite anyone accused of having committed the crime of torture or sentenced for commission of that crime, in accordance with their respective national laws on extradition and their international commitments on this matter.

Article 12 – Every State Party shall take the necessary measures to establish its jurisdiction over the crime described in this Convention in the following cases:

a) When torture has been committed within its jurisdiction;
b) When the alleged criminal is a national of that State; or
c) When the victim is a national of that State, and it so deems appropriate.

Every State Party shall also take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within the area under its jurisdiction and it is not appropriate to extradite him in accordance with Article 11.

This Convention does not exclude criminal jurisdiction exercised in accordance with domestic law.

Article 14 – When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the crime had been committed within its jurisdiction, for the purposes of investigation, and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State that has requested extradition.

### *j) – Declaration on the Protection of All Persons from Enforced Disappearance – UN General Assembly, 1992*

This Declaration also establishes forms of *"universal jurisdiction"* to address the crime of forced disappearance of persons.

Preamble – [...]*Considering* that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity [...]

Article 1.1 – Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.[...]

Article 4.1 – All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness. [...]

Article 14 – 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 within their jurisdiction or under their control. [....]

Article 16.3 – No privileges, immunities or special exemptions shall be admitted in such trials, without prejudice to the provisions contained on the Vienna Convention on Diplomatic Relations. [...]

Article 17.1 – Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified. [...]

Article 18.1 – Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.[...]

### *k) – Inter-American Convention on the Forced Disappearance of Persons, 1994*

Similarly, at the regional level this Convention establishes forms of *"universal jurisdiction"* to address forced disappearances.

Preamble – [...] *Considering* that the forced disappearance of persons is an affront to the conscience of the Hemisphere and a grave and abominable offence against the inherent dignity of the human being, and one that contradicts the principles and purposes enshrined in the Charter of the Organization of American States;[...]

Preamble – [...] *Reaffirming* that the systematic practice of the forced disappearance of persons constitutes a crime against humanity; [...]

Article III – The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offence and to impose an appropriate punishment commensurate with its extreme gravity. This offence shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined.

Article IV – The acts constituting the forced disappearance of persons shall be considered offences in every State Party. Consequently, each State Party shall take measures to establish its jurisdiction over such cases in the following instances:

a) when the forced disappearance of persons or any act constituting such offence was committed within its jurisdiction;

b) when the accused is a national of that State;

c) when the victim is a national of that State and that State sees fit to do so.

Every State Party shall, moreover, take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within its territory and it does not proceed to extradite him.[...]

Article VI – When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the offence had been committed within its jurisdiction, for the purposes of investigation and, when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State that has requested the extradition.

Article VII – Criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations. [...]

Article IX – [..] Privileges, immunities, or special dispensations shall not be admitted in such trials, without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations. [...]

### *l) – Statute of the International Criminal Court – Rome, July 1998*

Article 5 – **Crimes within the jurisdiction of the Court**

1- The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

a) the crime of genocide;

b) crimes against humanity[...];

c) war crimes [...]

Article 7 – **Crimes against humanity**

1 – For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

a) murder;

b) extermination;

c) enslavement; [...]

e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law:

f) torture;[...]

h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

i) enforced disappearance of persons;[...]

k) other inhumane act of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[..].

## Lessons to be learned from the Pinochet Case

The Pinochet Case as it stands today: his arrest in London; the requests for his extradition issued by countries such as Spain, France and Switzerland in order that he be tried by tribunals in those countries; the numerous additional proceedings that have been opened in the courts of Germany, Austria, Italy, Luxembourg and Sweden, and which could also lead to requests for his extradition; the international orders for the arrest of Pinochet dispatched to INTERPOL by Spain and France, all of these developments have had a considerable academic value and effect and have contributed in themselves to the promotion of human rights.

Since the trials in Nuremberg and Tokyo at the end of the Second World War, indivídual perpetrators of massive human rights violations have been brought to trial. Such individuals include, for example, the ex-dictator and President-for-Life of Equatorial Guinea, Macías Nguema; the Colonels of the Junta in Greece; the Argentine Generals; the former Head of State of Bolivia, General García Meza; and the former Head of State of the Central African Republic, Jean Bedel Bokassa. However, these have been isolated cases, few and far between compared with the impunity enjoyed by the many other persons responsible for crimes against humanity and related barbarities against the dignity of the human person.

The Pinochet Case is a milestone in the history of international law. It demonstrates the extent to which states must respect and fulfil their international obligations in the matter of human rights, particularly when these involve politically sensitive cases for one or more of the States involved.

Nuremberg and Tokyo led one to believe that if the criminal was or had been a Head of State or Government, he too – and perhaps even with more justification – should have to appear before the courts for committing certain crimes which shock the very conscience of humanity as a whole. This expectation was justified due not only to the greater level of responsibility of a Head of State, but also due to the nature of the crime(s). When committed on a massive and systematic scale, such crimes necessarily require the action and involvement, or at least the approval and complicity, of whoever who holds the reins of power. This is clearly the case when the government is actually an authoritarian regime which places itself above the law and above justice.

Fifty-three years after Nuremberg, the Pinochet Case has demonstrated to the world the pressing need for an international criminal court capable of punishing crimes of such gravity. The establishment of such a court started to take shape at the July 1998 Diplomatic Conference of Plenipotentiaries of the United Nations in Rome which provided for the creation of the permanent International Criminal Court, agreed to by an overwhelming majority of participating states (120 States in favour; 7 against; 21 abstentions).

The Statute of the International Criminal Court contains provisions for judging anyone who commits crimes that fall under its jurisdiction (genocide, crimes against humanity, war crimes, aggression), whatever the position of power occupied by the perpetrator, his accomplices or abettors. The Statute also provides that if in a State in whose territory grave violations of human rights or international humanitarian law have occurred (i.e., crimes which figure among those for which the Court has jurisdiction), and political conditions do not exist for the national courts to freely investigate and prosecute the perpetrators, the International Criminal Court is authorised to take action.

A number of lessons can be drawn from the long indictment process in Spain and the subsequent application for extradition from the United Kingdom.

### *1) Immunity is not applicable*

Mr. Pinochet will not benefit from immunity simply as the result of having been Head of State. This issue was carefully and broadly analysed in the first decision of the Appellate Committee of the House of Lords of 25 November 1998, and even more extensively in the second ruling on 24 March 1999 by another Appellate Committee. It is therefore not necessary

to reiterate here the arguments addressed in these rulings, including those advanced by the lawyers for the defence and by the representatives of Spain and Chile. Moreover, we have already expressed our viewpoint concerning this question (see the section entitled "Our opinion concerning the ruling of 24 March 1999").

The final conclusion of the House of Lords was that Mr. Pinochet does not enjoy immunity which would protect him from having to answer for the crimes of "torture and conspiracy to torture".

In our opinion, he should also enjoy no immunity with respect to other "crimes against humanity", such as the killing of defenceless prisoners and non-violent opponents, extralegal executions, kidnapping of opposition members and their permanent disappearance, etc., regardless of whether these crimes were committed in Chile or abroad, and irrespective of the dates on which such actions occurred. This conviction applies to both the English and Spanish courts, as well as to any other country that wishes to judge him.

We find it essential that *immunity*, which is perfectly justifiable in certain determined cases and within specific limits, not be confused with *impunity*. Clearly, immunity seeks to protect the function exercised by a given person; its objective is not to accord the individual impunity because to do so would imply a profound and illegitimate distortion of the law. In this respect, the community of nations once again demonstrated its concern regarding the phenomenon of impunity at the World Conference on Human Rights held in Vienna in June 1993. In approving the "Declaration and Action Plan of Vienna", the conference declared that it "views with concern the question of impunity for the authors of human rights violations", since this impunity presents a clear obstacle to the enjoyment of basic human rights. The participants also "emphasised that one of the most atrocious violations of human dignity is the act of torture, which destroys the dignity of the victims." It concluded with an appeal to governments around the world:

> Governments should repeal legislation which favours impunity for those responsible for grave violations of human rights, such as torture, and should punish these violations, thereby consolidating the basis for the Rule of Law. [16] [17] [18]

16 United Nations doc. – A/CONF.157/23; Part II, No.91.

17 United Nations doc. – A/CONF.157/23, Part II, No.55.

18 United Nations doc. – A/CONF.157/23, Part II, No.60.

We would add that impunity is like a gangrene that infects our societies, constitutes an offence to justice and undermines the principle of equality before the law. The opposite of impunity is the functioning of justice, and this is what should happen in the case of Mr. Pinochet.

### *2) Amnesty*

Mr. Pinochet cannot avail himself of the Amnesty Law of 1978 (in Chile) in order to avoid confronting justice for the multiple crimes of which he is accused.

On 19 April 1978, the military government led by Mr. Pinochet approved Decree Law 2191, which established a broad amnesty for:

> ...all persons...who in their capacity as perpetrators, accomplices or accessories before or after the fact committed criminal acts during the operative period of the State of Siege, extending from 11 September 1973 until 10 March 1978.

Various common crimes were excluded from the amnesty, but murder, kidnapping, forced disappearance and torture were all specifically included, since this was the real purpose of the self-amnesty. It has been accurately suggested that Decree Law 2191 of April 1978 was adopted precisely because acts such as torturing political opponents, and making such persons disappear and then killing them could not be considered legitimate official acts, even if they had been committed by a legitimate authority. The law itself made no effort to deny this.

As previously stated, and for the reasons given above (see the section "ICJ commentary concerning the Amnesty Law"), the Chilean Amnesty Law of 1978 cannot be used before the Spanish, English or any other national judicial authorities to argue against Mr. Pinochet's prosecution. It was a unilateral act of the Chilean military regime, directed by Pinochet himself, in violation of international human rights law. In the present case, there is no violation whatsoever of the principle non bis in idem, since Mr. Pinochet was never judged in Chile and, as a result, neither convicted, acquitted nor pardoned.

### *3) Neither the political nor the legal conditions exist for ensuring that Mr. Pinochet be adequately judged by the criminal justice courts in Chile*

It is disappointing that it is not Chile's justice system, the country where Mr. Pinochet committed most of his crimes, that is bringing him to trial now. That country should have judged him long ago.

In its written presentation to the Appellate Committee of the House of Lords, and reiterated by its lawyer Lawrence Collins in his oral arguments, the Government of Chile expressed its desire that Pinochet be investigated and judged by Chilean courts for any crime he may have committed during his tenure as Head of State. Chile's strategy in this respect was to invoke the "principle of territoriality", thereby barring any foreign tribunal from judging Pinochet. It is interesting to note that as a result of its position, the democratic government of Chile frequently found itself agreeing with the arguments of Pinochet's lawyers. Indeed, it was often difficult to tell which party was making more effort to avoid prosecution of the ex-General in Spain (or in the United Kingdom).

To support our viewpoint, we refer here to a report prepared by the Chilean lawyer, Mr. Roberto Garretón Merino, a United Nations expert on human rights and former Chilean ambassador during the Aylwin Government, with whose arguments we agree. This report was presented by the organisation Human Rights Watch to the Appellate Committee of the House of Lords on 12 January 1999.

Mr. Garretón's conclusion was that "there exists practically no probability that Mr. Pinochet could be judged or condemned by a Chilean tribunal." In supporting this assertion, he cited three obstacles:

**First obstacle**: By Decree Law 2191, the military government accorded itself (i.e. accorded military and police personnel) a broad amnesty which included among its principle beneficiaries the authors of and other participants in the crimes of assassination, kidnapping, forced disappearance and torture committed between 11 September 1973 and 10 March 1978 (see the extract of the Decree Law text in the "Amnesty" section above).

The Chilean Supreme Court has repeatedly confirmed, during both the dictatorship and the democracy, the constitutional validity of Decree Law 2191. Even if the Amnesty Law itself were to be repealed, the Court would maintain that it had already conferred benefits on those it was designed to protect. Moreover, in Chile the decree law was accepted more or less peacefully and has been applied during 10 years of democratic life (1990 – 1999). The possibility of declaring the amnesty decree "null and void" by law is not realistic, says Mr. Garretón, since the Senators for Life, together with those who support Mr. Pinochet, would oppose such a law in the Senate, blocking its adoption.

**Second obstacle:** Pinochet has procedural immunity before the courts in Chile by virtue of his status as a "Senator for Life". In theory, the Chilean

tribunals could divest him of this protection, "authorising judgment (stripping him of his immunity)", but politically the likelihood of this happening is extremely low.

**Third obstacle:** If a way emerged to judge Mr. Pinochet in Chile, such proceedings would be handled by a military tribunal (he was Commander-in-Chief of the army when these acts occurred) which would prevent a negative outcome against Pinochet. Throughout the last twenty-five years, military courts have invariably decided in favour of acquittal of members of the armed forces accused of criminal human rights violations. In cases of contention between the civil and military authorities about jurisdiction in a case (when the military tribunals have claimed jurisdiction in human rights cases), the Supreme Court has applied a very broad interpretation of the concept of "act of service" in analysing the conduct of military and police force members, and Garretón says "it would certainly resolve a dispute such as this in favour of the military tribunals".

**Finally**, as regards the conduct of the judicial authorities in Chile, Garretón points out that the September 1973 Decree Law No. 1 of the Military Junta declared that the junta would only respect judicial decisions and the Constitution to the extent that they conformed with its own objectives. The Supreme Court accepted this criterion, "and in an official declaration on 13 September 1973 expressed its deep satisfaction with the attitude of the military regime toward the judiciary." In the years of the military regime during which the Amnesty Law was not in force (1978 – 1990), the judiciary refrained from controlling the activities of the Military Junta and the security forces. Garretón affirmed that of some "five thousand judicial actions related to human rights violations...only 12 cases resulted in guilty verdicts". The rest involved acquittals or the cases were archived.[19] The expert attached to his report a list of relevant cases confirming his assertion.

Moreover, as indicated above (see the section "Second 'authority to proceed', issued 14 April 1999 ..." above), the Home Secretary Jack Straw stated that he

> [did] not consider the possibility of a trial in Chile to be a factor that outweighs the UK's obligations under the ECE [European Convention on Extradition] to extradite Senator Pinochet to Chile.

19 For further information see the study concerning the functioning of the judiciary during the military regime published by the International Commission of Jurists and its Centre for the Independence of Judges and Lawyers, "Chile: A Time of Reckoning. Human Rights and the Judiciary" Geneva, September 1992.

This is also the position of the ICJ: Chile has never asked for the extradition of Mr. Pinochet (undoubtedly for political reasons), but even if it did tomorrow, that would not change the situation of Spain and the United Kingdom nor free them from their international obligations.

With regard to our assertion concerning the absence of political conditions in Chile for a trial of Pinochet, we believe that this is a result of factors that marked both the "Chilean transition" and the resulting weakness of that transition from dictatorship to democracy. Following the assumption of power by the democratically elected President, Mr. Patricio Aylwin, in March 1990, there was an enormous change in the political institutions and the restoration of a democratic political culture. The Aylwin government put an end to the military regime but did not succeed in removing significant limitations on the exercise of democracy. The succeeding government led by President Eduardo Frei has also failed to do so.

The limits placed on the transition to democracy were imposed by the armed forces against the will of Chilean democrats and against all reason. Those in power effectively offered a deal: "democracy in exchange for impunity and supervision by the armed forces of certain institutions". Today the behaviour and personal actions of Pinochet are being examined by the domestic courts of Spain, the United Kingdom, France, Switzerland and other countries. All are demanding that the former dictator appear before their courts of justice, with all of his rights guaranteed, to be held accountable for the crimes which he directly or indirectly committed, or allowed to be committed, in Chile during the seventeen years of his rule (1973-1990).

In commenting on the Rettig Report in 1991, the International Commission of Jurists stated:

> Certainly, it must be recognised that the current transitional regime faces clear limitations, two of the most worrying of which include: the impunity that the armed forces enjoy and probably will continue to enjoy, and the fact that they have succeeded in imposing the presence of Augusto Pinochet as Commander-in-Chief of the Army. From this position he will continue to be able to threaten the democracy.[20]

20 ICJ Review, No. 46, June 1991.22 Doc. NU-CAT/C/44/Add.1 of 20 /July/ 1998.

To these two limitations was later added the investiture of Mr. Pinochet as "Senator-for-Life", and the procedural immunity that this status conferred on him.

### *Authority of the United Kingdom of Great Britain and Northern Ireland*

With regard to the arrest and detention of Mr. Pinochet, the British authorities proceeded in accordance with the law in ordering his provisional detention in response to a formal request from a Spanish judge. They acted completely within their legal authority in doing so. Moreover, in analysing these issues it is important that we not only take into account what a State is obligated to do, but also what a State is authorised to do, i.e. what it is able to do in accordance with the law.

Concerning a trial, the United Kingdom has the authority and jurisdiction to try a presumed criminal such as Pinochet, should the person be found present, for whatever reason, in its territory. It is empowered and indeed even obligated to do so by international treaties on human rights as well as by customary international law, as the acts referred to here include the killing of detained persons, their forced and permanent disappearance, extrajudicial or arbitrary executions, torture of detainees, the taking of hostages, etc. This type of act, practised moreover on a massive and systematic scale, merits the qualification of crimes against humanity, with all the consequences that go with such a classification.

Assuming that Mr. Pinochet is directly implicated in such crimes against humanity (see the various elements of proof mentioned throughout this report), and being found to be physically present in London, the British judicial system is empowered to initiate procedures against him. All it has to do is apply the mechanism of *universal jurisdiction*.

By way of example, and in relation to the crime of torture, a periodic report by the United Kingdom of Great Britain and Northern Ireland presented 1 April 1998 to the Committee Against Torture of the United Nations22 states that:

> [...]under section 134 of the Criminal Justice Act of 1988, the criminal offence of torture is committed whether the conduct takes place in the United Kingdom or elsewhere, and irrespective of the nationality of the victim...Acts of torture are also "grave breaches" of the Geneva

> Conventions, and the Geneva Conventions Act of 1957 (modified in 1995) provides that such breaches are offences under United Kingdom law.

On 19 November 1998, the above-mentioned Committee against Torture completed its examination in Geneva of the report by the United Kingdom, approving various conclusions and recommendations. This Committee, composed of ten experts of various nationalities, observed that Articles 1 to 14 of the 1978 State Immunity Act in Great Britain "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." (The latter articles cited are those that oblige a signatory State to try or extradite someone presumed guilty of torture who is found to be present within territory under its jurisdiction.) The Committee recommended to the United Kingdom, among other things, that "it reform ... the State Immunity Act, 1978 to ensure that its provisions conform to the obligations contained in the Convention." Another recommendation was that

> in the case of Senator Pinochet of Chile, 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 obligations under articles 4 to 7 of the Convention and article 27 of the Vienna Convention on the Law of Treaties of 1969.

## *Authority of the Kingdom of Spain*

Throughout this publication we have presented arguments as to why we believe the Spanish judges have jurisdiction and authority to judge a presumed criminal such as Pinochet. These powers are recognised in both substantive and procedural law, and are recorded in the Spanish Criminal Code; in international treaties, which in accordance with Article 96.1 of the Spanish Constitution, take precedence over domestic law; and in the Constitutional Law of the Judiciary *(Ley Orgánica del Poder Judicial – LOPJ)*.

# Final Conclusions

At the risk of repeating statements already elaborated on, we will now briefly synthesise our opinion about the salient points of this case.

## Concerning universal jurisdiction

One of the very positive developments resulting from this case has been the way it has emphasised and highlighted the important progress made in the practical application of the mechanism of *universal jurisdiction*. We say its "practical application", because the principle of *universal jurisdiction* has been incorporated into written international law since August 1949 when the international community approved the four Geneva Conventions on International Humanitarian Law. The objective of this mechanism is to secure the prosecution of certain particularly serious offences which, because of their gravity and regardless of where they were committed, not only affect the victims and those around them but also strike deeply at the conscience of humanity. Pursuant to the Geneva Conventions, universal jurisdiction represents the application of the principle of *aut dedere aut judicare* (extradite or judge). If extradition of the suspect is not carried out – because existing juridical norms prevent it or because of lack of a will to do so – the person must be judged by the national tribunals of the State in which he was found, even if the crime or crimes of which he was accused were committed in a territory under the jurisdiction of another State.

The ICJ has maintained, in a variety of international and national fora, that when specific violations of human rights or humanitarian law take place which constitute crimes against humanity and/or grave infractions against the Geneva Conventions on International Humanitarian Law, the States Parties to specific international treaties are both legally and ethically obliged (at least when the suspect is found to be present on their territory) to take the necessary measures to extradite the person or submit him to its national courts for the purpose of trying him. If he is found guilty they must punish him, whatever his nationality or that of the victim and wherever the crime he is accused of has taken place.

The underlying motivation behind the concept of *universal jurisdiction*, as well as behind the international criminal tribunals of Rwanda and the former Yugoslavia, and the International Criminal Court, has been the conviction that there are certain crimes (genocide, war crimes and crimes

against humanity) that cannot be left solely to the legislation and courts of the territory in which the crimes were committed, since such actions violate not only national but also international law. When the International Criminal Court begins to function, universal jurisdiction will be one of its complementary mechanisms and in some specific situations will be substituted for the functioning of the Court itself, as provided for in the Rome Statute.

In Spain, a plenary session of the Criminal Division of the Spanish High Court, by the unanimous vote of its 11 magistrates, turned down the objection filed by the Public Prosecutor's Office. The Public Prosecutor objected to the application of *universal jurisdiction* to acts committed prior to the existence of the Convention against Torture, asserting that doing so would be disregarding the principle of "non-retroactivity of the more unfavourable law in criminal matters". The magistrates of the Criminal Division said that article 23, paragraph 4(a) of the Constitutional Law of the Judiciary (LOPJ) of 1985, "is not a set of criminal, but rather procedural guidelines". That is, the LOPJ deals only with jurisdictional issues. The only criterion stipulated by the LOPJ is that the acts with which the person is charged must have been considered an offence in Spain when they occurred (the principle of *nullum crimen sin lege*), which is what had happened in this case.

The *universal jurisdiction* mechanism has been incorporated into a number of international treaties, of which the most pertinent in the case of Pinochet include (cited in chronological order):

- the Convention on the Prevention and Punishment of the Crime of Genocide (1948);
- the III and IV Geneva Conventions on International Humanitarian Law (August 1949);
- the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (1973);
- European Convention for the Repression of Terrorism; (1977);- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984);
- (At the regional level of the Americas): Convention for the prevention and punishment of acts of terrorism in the form of acts against persons and related extortion, when these are of an international character (Organization of American States, February 1971).

## Immunity – with respect to torture and other crimes

In their ruling of 24 March 1999, six of the seven Law Lords held that Mr. Pinochet could not benefit from immunity exempting him from having to answer to the charges filed against him in criminal court, but at the same time they stipulated that he could only be judged in Spain for the crimes of **torture** and **conspiracy to torture**, since these were the only offences liable for extradition pursuant to the Extradition Act of the United Kingdom. The seventh Law Lord pronounced in favour of recognising absolute immunity for Mr. Pinochet, which would remove the possibility of arresting, judging or extraditing him.

Various participants in this case have indicated and asserted that the Convention against Torture was not drafted and approved by the States Parties in order to define a particular offence under international law, since torture already constituted a crime against international law, even before the approval of relevant written international treaties to this effect. Customary law had already recognised the *jus cogens* character of this offence and had held that *erga omnes* was applicable to it. Valuable jurisprudence was cited which affirmed that for international law, crimes which have attained the category of *jus cogens* may be punished by any State because the guilty parties "are common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution" *(Demjanjuk v. Petrovsky, USA, 1985)*. The Convention was seeking to create a system by which torturers could be legally subjected to criminal prosecution wherever they might be found.

In the particular case of the United Kingdom, where the discussion has been more controversial, both the Convention against Torture and the Criminal Justice Act, 1988 oblige the country, among other things (and only if it cannot or prefers not to extradite the accused person to another State entitled to request it), to investigate, judge and, if the person is convicted, to punish any person found to be present in its territory who has been credibly accused, on the basis of well-founded evidence, of having committed acts of torture in a territory under the jurisdiction of another State.

In our opinion, Mr. Pinochet does not enjoy immunity with respect to the offences of torture and conspiracy to torture, nor should he be entitled to it vis-à-vis **crimes against humanity**, such as the murder of prisoners and political opponents, real or potential, extralegal executions by government agents, or kidnapping of opponents, followed by their enforced disappearance. In our view, this lack of immunity is not affected by whether

such acts were committed in Chile or outside the country. In the Pinochet Case, the impugned acts were committed both in Chile and in other countries in South and North America and in Europe, as part of the same conspiracy, with the same design, directed first at obtaining state power and then consolidating it.

We also disagree that the dates on which such crimes took place should have any relevance. Their only significance is in relation to criminal law, which requires that the action has to have been defined as criminal when it was committed. In other words, a law only applies once it is put into force, and cannot be applied retroactively (see also article 2 of the International Covenant on Civil and Political Rights). However, by the same token, there is no statute of limitation if the crime is ongoing (as is the case with forced disappearance). Furthermore, it is worth noting that in holding that crimes of this sort can never be covered by immunity, two of the Law Lords (Millett and Phillips) concluded that Pinochet may be tried in Spain regardless of the dates on which the alleged crimes occurred.

In our opinion, the principle of "double criminality" only requires that the action constituting the offence for which extradition is requested be considered criminal in the country to which the extradition application is directed on the date on which *extradition is requested* and not on the date on which the *act or omission was committed*. By adopting this interpretation, the problem posed by the date of 8 December 1988 – so restrictive and contrary to common sense – disappears.

Pinochet should therefore be judged for the murder of prisoners and opponents, for extralegal executions, for kidnappings followed by the permanent disappearance of the victims, and for torture and conspiracy to torture or conspiracy to commit any of the other aforementioned offences. Thus in our opinion, as we have already indicated, the second ruling of the Appellate Committee of the House of Lords drastically reduces and restricts the prosecution of Mr. Pinochet on no legally valid basis.

## Perpetrators of and participants in the crime of torture

We have repeated throughout this report that in our opinion the official functions that a person may have exercised does not protect him ad eternum from being tried in court for actions as aberrant as crimes against humanity.

We have also said we reject the argument that the list of potential perpetrators of torture provided in the Convention against Torture does not include former Heads of State. We maintain that someone who has occupied the position that Pinochet occupied would have been included in the definition given by the Convention, in any of the situations in which he found himself: as Head of State, President of the Republic or Commander-in-Chief of the Army.

We also emphatically maintain that neither national nor international law, nor any other authority for that matter, may admit that the committing, organising, authorising or tolerating of torture can be considered official functions of state. These are acts which offend and strike at the conscience of humanity as a whole. It is not possible to accept as official functions actions which international law prohibits and criminalises. It would also be unacceptable that subordinate government employees could be tried for the crime of torture, while those that had ordered the torture would be considered immune from prosecution.

## Massive or systematic torture – Isolated cases of torture

The set of charges amassed by the Spanish courts against Pinochet– which include hundreds of cases involving the murder of prisoners and opponents, forced disappearances, torture often ending in death and concealment of corpses – reveal a common criminal design, a plan organised and directed from within the highest echelons of power, extending continuously from 1973 to 1990 with the greatest intensity between 1973 and 1980. As maintained by one of the Law Lords in the ruling of 24 March, it would not be correct to analyse the different offences individually and then to identify some as constituting international crimes and others as not. All of the conduct of the accused is in violation of international law.

Without dismissing the fact that torture was applied in Chile in a systematic and massive manner, it would be useful to clarify that even if there had been only a single case of torture, this is sufficient pursuant to the definition of torture in international law (the Convention against Torture) for using the mechanism of universal jurisdiction and bringing the case to trial.

## Forced disappearance

This aspect of the case merits its own discussion. As we have seen, the ruling of the House of Lords of 24 March 1999 ignored the crime of forced

disappearance, which when practised in a systematic manner or on a massive scale, constitutes a *crime against humanity* (Declaration of 19 November 1983 by the General Assembly of the Organization of American States (OAS); paragraph 4 of the Preamble of the Declaration on the Protection of All Persons from Enforced Disappearance, United Nations, 1992; paragraph 6 of the Preamble of the Inter-American Convention Concerning the Forced Disappearance of Persons, OAS, 1994; Article 7(i) of the Statute of the International Criminal Court, Rome 1998).Forced disappearance is an aberrant and inhuman act comprising a number of major human rights violations. It has been defined as deprivation of a person's liberty committed by agents of the state or by persons or groups acting with the authorisation, support or acquiescence of the state. This is then followed by a failure to provide information or the refusal to recognise that the deprivation of liberty has taken place, or by a denial of information or the concealment of the fate or whereabouts of the disappeared person.

Involving as it does an illegitimate deprivation of individual liberty, we are faced here with a **permanent** (or continuing) offence whose execution continues to be committed as long as the fate or whereabouts of the disappeared person is not established with any certainty. (This was indicated in similar words by: article 17(1) of the Declaration on the Protection of All Persons from Enforced Disappearance, United Nations; Article 3 of the Inter-American Convention on the Forced Disappearance of Persons, OAS; the definitive ruling of the Inter-American Court of Human Rights, of 29 June 1988 in the case of *Velásquez Rodríguez v. Honduras*, Series C, No. 4, paragraph 155.)

In practice, this type of crime is almost always associated with forms of torture, whether physical or psychological. Therefore if, as the ruling of the Lords has established, Mr. Pinochet can only be judged for crimes committed after 8 December 1988, cases of forced disappearance (at least those which involve torture and where the fate or whereabouts of the disappeared person has not been established) must also be subject to prosecution, since, given the nature of the crime, they are ongoing.

This point has important consequences: it should be remembered that according to the Rettig Commission, almost 900 cases of disappeared persons remain to be accounted for.

## Guarantees of a fair trial

In the two countries currently involved in the case (Spain and the United Kingdom), norms exist and are applied granting defendants guarantees that

protect them against abuses and ill-treatment in jails and detention centres. These protections ensure them a fair and equitable trial and the right to engage the services of a defence lawyer of their choice. They are also entitled to file appeals to the higher judicial authorities if they are not satisfied with a decision. Moreover, both States are parties to international treaties such as the International Covenant on Civil and Political Rights (UN 1966) and the European Convention for the Protection of Human Rights and Fundamental Liberties (Rome 1950 and its modifications) which establish a series of guarantees for defendants. In short, conditions exist in both Spain and the United Kingdom for a proper functioning of the administration of justice.

* * * *

Regardless of the final result, the Pinochet Case constitutes an important step in the struggle against impunity. It has made progress in the ongoing task of demanding that those who have committed crimes against international law be made to take responsibility for their actions. From now on, the perpetrators of serious human rights violations such as genocide, crimes against humanity, war crimes, as well as those tempted to commit such offences, should take note: they will no longer benefit from impunity.

Another facet of the story has been the admirable perseverance throughout the evolution of this case (initiated in Spain in 1996) of the Chilean victims and their families, who have never stopped demanding justice. Also worthy of commendation are the efforts of those who have supported the victims, both human rights activists and regular citizens, in countries both close to and far away from Chile, who have expressed their concern over what has been happening since 1973 to people they have never met. Equally admirable is the commitment and courage demonstrated by the Spanish judges Baltasar Garzón and Manuel García Castellón, who have been successful thus far on a path strewn with difficulties. Finally, we would like to commend the impressive coverage given this case by the media, day after day and hour after hour.

Now all that remains is for justice to take its course, and for the courts to decide in accordance with the law what is fitting for Augusto Pinochet Ugarte. When this judicial process gets underway, the memory of the victims and the commitment of their families will finally be given their due. For it is in the name of the victims that their families have laboriously struggled for justice, a simple request that has eluded them for twenty-five years. It will also contribute to the consolidation of democracy in Chile and the elimination of harmful, threatening and destabilising regimes.

The International Commission of Jurists fervently hopes that in the near future governments will take the necessary steps for putting into motion the functioning of the permanent International Criminal Court. It is clear that if there had been an International Criminal Court, most of the legal battles that have emerged in the Pinochet case would have been resolved by the text of the Court's Statute (authorised jurisdiction to judge: Article 5(1); classification of crimes against humanity: Article 7(f), (h) and (i); absence of a statute of limitations: Article 27; the fact that Heads of State or government can be judged and do not enjoy immunity for their crimes: Article 24).

The ICJ further calls on international public opinion to remain vigilant, as it has thus far in the Pinochet case, in order to permanently break the circle of impunity that has protected the main violators of human rights and international humanitarian law. It is the desire of the ICJ that they may be subject to justice wherever they may find themselves, whatever the country in which they committed their crimes, and whatever their nationalities.

In this task and struggle the International Commission of Jurists will always be present, and wishes to adopt the title of the final report of the Argentine National Commission on the Disappearance of Persons (CONADEP), created in 1983 by President Raúl Alfonsín in order to establish the truth about what had happened to the disappeared in Argentina: "Nunca Mas" – never again. In repeating these words here, we hope that the developments in the Pinochet case will ensure that one day the atrocities committed in the Republic of Chile will never again be committed in any part of the world.

International Commission of Jurists
July 1999

# ANNEXES

## Excerpts from the Ruling Issued by the Criminal Division of the Spanish High Court 28 October 1998

**Genocide.** The Convention on the Prevention and Punishment of the Crime of Genocide was approved on 9 December 1948. Spain adhered to this Convention on 13 September 1968, subject to a reservation concerning the totality of Article 9. Article 6 of the Convention reads:

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

For the appellants, the aforementioned (which was integrated into our internal legislation in accordance with Article 96 of the Spanish Constitution and Article 1, paragraph 5 of the Civil Code) would exclude the jurisdiction of Spain for the crime of genocide, if the offence were not committed within Spanish national territory.

The Criminal Division of the Court disagrees with this opinion. Article 6 of the Convention does not exclude the existence of judicial organs with jurisdiction distinct from those of the territory in which the offence was committed or from an international court. Article 6 of the Convention announces the possibility of an international criminal court and imposes on State parties the obligation that crimes of genocide be judged by the State in whose territory such crimes have been committed.

But it would be contrary to the spirit of the Convention – which seeks a commitment by the contracting parties through application of their respective criminal codes to prosecute genocide as a crime against international law and thus avoid impunity for such a serious offence – to take the cited Article 6 as a standard limiting the exercise of jurisdiction, thereby excluding any jurisdiction other than that specifically foreseen by the regulation. That the contracting parties did not establish universal prosecution of the crime by each of their national jurisdictions does not prevent a given State party from establishing this kind of jurisdiction for a crime understood by the Convention itself as being of worldwide

importance and which affects the international community and humanity as a whole.

In no sense could we construe cited Article 6 to hinder signatory States in applying the principle of prosecution of the actuating person contained in their respective domestic legislations. The terms of Article 6 of the Convention of 1984 do not exclude jurisdiction for the punishment of genocide by a State party, such as Spain, whose legal system provides for extraterritoriality with regard to judgment of such a crime, as specified in Article 23, paragraph 4 of the Constitutional Law of the Judiciary, which is in no way incompatible with the Convention.

What must be recognized, given the prevalence of international treaties over national domestic law (Article 96 of the Spanish Constitution and Article 27 of the Vienna Convention on the Law of Treaties, of 1969), is that Article 6 of the Convention for the Prevention and Punishment of the Crime of Genocide imposes subordination of other jurisdictions to those foreseen in this article, so that States must abstain from exercising jurisdiction over acts which constitute genocide, if these acts have been, or are being considered by tribunals of the country in which they were committed or by an international criminal court.

**Article 23 of the LOPJ.** Article 23, paragraph 4 of the Organic Law of the Judiciary (Ley Orgánica del Poder Judicial - LOPJ) – inasmuch as it asserts the jurisdiction of Spain in case of trial of specific acts committed by Spanish or foreign citizens outside the Spanish national territory and which may be classified according to Spanish criminal law as being one of a number of offences enumerated by the Article – is not considered to be applied retroactively if the jurisdiction proclaimed is exercised within the timeframe of the operation of the law – which is the case here – independent of the time of the crimes which are being judged.

Article 23, paragraph 4 of the Organic Law of the Judiciary does not regulate sentencing but, rather, provides a procedural framework. It neither classifies nor assigns sentencing in relation to any act or omission, but, rather, limits itself to proclaiming the jurisdiction of Spain in case of the trial of offences defined and sanctioned by other laws. The procedural norm in question is neither unfavourable with regard to sentencing nor restrictive of individual rights, and therefore its application with a view to criminal judgment of acts committed before it came into operation does not contravene Article 9, paragraph 3 of the Spanish Constitution. The principle of legality (Article 25 of the Spanish Constitution) provides that

specific acts constitute offences – as defined in Spanish laws, according to Article 23, paragraph 4 as previously mentioned – if at the time of their occurrence the sentence which can be applied was already determined by law prior to the commission of the crime.

Thus, in seeking to establish the jurisdiction of Spain for judging crimes of genocide committed outside its borders by Spanish or foreign nationals in the years 1976 to 1983, it is inaccurate to refer to the provisions of Article 336 of the Provisional Law on the Organization of the Judiciary of 15 September 1970 – later replaced by the Constitutional Law of the Judiciary of 1985 – which attributed jurisdiction to Spanish judicial organs for judging Spanish citizens or foreigners who had committed crimes of genocide outside Spanish territory subsequent to the inclusion of this crime in the Criminal Code in force via Law 47/71 of 15 November, within the exclusive framework of crimes against the external security of the State, without any juridical relevance being found in the real or protective principle for attributing jurisdiction for extraterritorial persecution of other crimes against the external security of the State.

**Acts alleged to have been committed.** The motion for appeal demands confirmation that the acts alleged to have been committed in the summary can be classified according to Spanish criminal law as acts of genocide and terrorism. No verdict is required on the credibility, probability or rationality of the facts alleged to have been committed in this case. The parties to the appeal did not dispute that the acts alleged to have been committed consisted of killings, illegal detentions, abduction of minors and torture perpetrated in Argentina during the period 24 March 1976 to 1983 for reasons of ideological purification, acts attributed to members of the government and the armed forces and security services, in conjunction with intervention by organized groups, all operating clandestinely.

**What is genocide?** This involves the requirement of Article 23, paragraph 4 of our Organic Law of the Judiciary, in accordance with which Spanish jurisdiction will be competent to judge acts committed by Spanish citizens or foreigners outside of the national territory which can be classified according to Spanish criminal law as one of the crimes enumerated by the Article, beginning with genocide (letter a), followed by terrorism (letter b) and including finally any other crime which "according to international treaties and conventions, must be prosecuted in Spain" (letter g).

Genocide is a crime which consists of the total or partial extermination of a race or human group by means of the killing or neutralization of its members. It is in this way that the term is understood by society - notwithstanding the requirement for a more specific classificatory formulation. Genocide has been inflicted throughout history upon numerous collective groups, and the technology used to accurately retrieve [elements from] the past has enabled humanity to confront, in the years that followed the conflict, the evident horrors of the persecution and holocaust [endured by] the Jewish people during the Second World War. In 1964, the General Assembly of the United Nations (Resolution No.96) accepted the recommendation of the VI Commission, recognizing that genocide is a crime against the rights of peoples.

What characterizes genocide, according to the aforementioned Resolution No. 96, is the extermination of a group for racial, religious, political or other reasons. Considered a crime against humanity is the perpetration of actions aimed at exterminating a human group, whatever the differentiating characteristics of the group. In the same line as the Statutes of the Nuremberg Tribunal it refers to "crimes against humanity, i.e. killings, extermination, subjection to slavery, deportation and other inhuman acts committed against any civilian population before or during a war, or persecution for political, racial or religious motives..." (Article 6).

In 1948, the Convention on the Prevention and Punishment of the Crime of Genocide came into effect following approval by the Member States of the United Nations. The Convention considers genocide as a crime under international law which is contrary to the spirit and aims of the United Nations and is condemned by the civilized world.

The new Criminal Code, in Article 607, includes genocide among international crimes, defining it in accordance with the Convention of 1948 as characterized by the "aim of totally or partially destroying a national, ethnic, racial or religious group".

The appellants maintain that the acts alleged to have been committed in the summary can not constitute genocide, given that the persecution was not carried out against any national, ethnic, racial or religious group and that the repression in Argentina during the dictatorship from 1976-1983, was politically motivated. Joint and individual action, in the terms in which it is described in the summary, involved operations against a group of Argentine nationals or residents [who were] susceptible of being differentiated, and who were unquestionably differentiated by the archi-

tects of the persecution and harassment. Acts of persecution and harassment included killings, illegal prolonged detentions – of which, in many cases, it has been impossible to determine the fate suffered by the detained, thus giving rise to the uncertain concept of "the disappeared" – torture, incarceration in clandestine detention centres without consideration for the rights accorded under every national legislation to detainees, prisoners or penitentiary convicts, and without the families of the detainees knowing their whereabouts, abduction of the children of detainees and their transfer to other families – the transfer by force of children of the persecuted group to members of another group.

In the acts alleged to have been committed in the summary, which constitute the subject of investigation, the idea of extermination of a group of the Argentine population, not excluding its [non national] residents, is present. It was an act of extermination which was not carried out by chance or in an indiscriminate manner, but which instead responded to the intention of destroying a specific sector of the population, a group [which was] highly heterogeneous though singled out. The persecuted group was made up of those citizens who did not correspond to a type determined in advance by the promoters of the repression as conforming to the new order to be instituted in the country. The group was made up of citizens opposed to the regime, but also of persons indifferent to it. The repression did not seek to change the attitude of the group, but only to destroy it.

The acts alleged to have been committed constitute the crime of genocide. We are aware of the reason why, in the Convention of 1948, the term "political" or the words "and others" do not appear in Article 2 when the article lists the characteristics of groups who are subjected to the form of destruction involved in genocide. However, remaining silent on these points is not equivalent to excluding them. Whatever might have been the intentions of the drafters of the text, the Convention has acquired validity through the successive signatures and adhesions it has garnered from Members of the United Nations who share the idea that genocide is an odious scourge which they have committed themselves to prevent and provide sanction for. Article 137 bis of the former Spanish Criminal Code and Article 607 of the current Criminal Code, [which are] borne out of the worldwide concern [which is] at the basis of the 1948 Convention, cannot exclude [...] acts such as those alleged in this case.

The narrow interpretation of genocide defended by the appellants would prevent the qualification as genocide of acts as odious as the sys-

tematic elimination by the authorities, or by another group, of persons suffering from AIDS - should they be singled out as a category. The social conception of genocide [as considered above] would not allow such exclusions.

**Terrorism**. Qualification of the alleged acts as constituting terrorism will not contribute anything new to the resolution of the case, given that the alleged facts have already been considered as susceptible of constituting the crime of genocide and are the same acts as those which constitute the object of study in terms of juridical subsumption. Terrorism also figures as a crime under international law in Article 23, paragraph 4 of our Organic Law of the Judiciary. The Criminal Division of the Court nevertheless must state that the acts alleged to have been committed in the summary, [and which are] susceptible of being classified as constituting the crime of genocide, may also be qualified as terrorism.

The Tribunal does not consider that the inclusion of these acts within the category of the crime of terrorism should not be considered because our law requires for this inclusion, in one form or another, the intention of subverting [in Spain] the constitutional order or seriously altering public peace, and no such tendency whatsoever against the Spanish constitutional order is to be found in these acts. The element of subversion must occur in relation to the legal or social order of the country in which the crime of terrorism [has been] committed or of that which is directly affected as the object of the attack, and this necessary transfer of an actual element does not prevent the possibility of its being classified as terrorism, according to Spanish criminal law, as required by Article 23, paragraph 4 of the Organic Law of the Judiciary.

Furthermore, we find in the murders, brutal acts, acts of coercion and illegal detentions, which constitute the object of these proceedings, the characteristic feature of their having been carried out by individuals organized in armed bands, independently of the official functions which these persons exercised, since it should be remembered that the murders, brutal acts, acts of coercion and illegal detentions referred to were perpetrated in secret, and not within the framework of the regular exercise of the official functions which [the perpetrators] held, although [they] are availing themselves of such functions. The association that was maintained with a view to perpetrate the illegal acts aimed at the destruction of a specific group of persons was conceived in secrecy, [was run in] parallel to the institutions in which the authors of these acts were employed,

but were not interlinked. Moreover, various other features of an armed band are also evident in this case, including structural characteristics (a stable organization), the effects produced (generation of insecurity, confusion or fear among a specific group or among the entire population) and objectives (construed as the rejection of the internal order, including the legal order in force in the country at the time).

**Torture.** The acts of torture denounced in the accusation are comprised in the larger charges of genocide or terrorism. For this reason it would be unproductive to examine if under our law the crime of torture is an offence subject to universal prosecution in accordance with Article 23, paragraph 4, letter g, of the Organic Law of the Judiciary, considered in relation to Article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 10 December 1984. If Spain has jurisdiction to prosecute genocide committed abroad, the investigation and judgment of this crime will necessarily involve covering instances of the crime of torture that form part of this genocide and not only in the cases of victims of Spanish nationality. The same result would stem from Article 5, paragraph 1, letter c of the aforementioned Convention, which is not an inescapable obligation of the signatory States.

**Already judged cases.** The Argentine laws 23.492 and 23.521 – the so-called "full stop" (punto final) and "due obedience" (obediencia debida) laws – have been repealed, although from the document presented to the Court by the appellant Adolfo Francisco Scilingo, with an accompanying letter dated 17 July 1998 (the document consists of Resolution No. 0598 of the Supreme Council of the Armed Forces of Argentina, dated 2 July 1998 - see folios 18.559 and following in the summary – which declares as extinguished any actions that may be connected with said appellant as the result of his presumed participation in the crimes specified in Article 10 of Law 23.049) it emerges that these laws of "full stop" and "due obedience" are applicable and determine the immunity from responsibility declared by the Resolution, the argument given being that even though repealed, these laws have already worked their effects and thus maintain virtuality by the principle of the ultra-activity of the most benign or favourable criminal law.

Independently of the fact that the aforementioned laws can be held to be contrary to international jus cogens and to have contravened international treaties signed by Argentina, these laws amount to depenalizing

standards, by virtue of the non-exercise of criminal action in connection with certain acts as from a specified date, or due to the fact that the active subject in the case was submitted to the military or functional hierarchy. These laws basically depenalize specific actions in such a way that their application could not be included in the assumption of alleged offence acquitted or pardoned in a foreign country (Article 23, paragraph 2, letter c of the Organic Law of the Judiciary), but rather in the category of conduct not subject to sanction – by virtue of a subsequent depenalizing regulation – in the country in which the crime was committed (Article 23, paragraph 2, letter a, of the same law). The latter has no virtuality in cases of extraterritoriality of jurisdiction by Spain for application of the principle of protection or universal jurisdiction, given the provisions of Article 23, paragraph 5 of the Constitutional Law of the Judiciary.

**Final conclusions.** Spain has jurisdiction for considering the alleged acts, a jurisdiction deriving from the principle of universal jurisdiction in relation to specified crimes – a category of international law [which is] integrated into our national legislation. It also has a legitimate interest in the exercise of this jurisdiction, given that more than 500 Spanish citizens died or disappeared in Argentina, victims of the repression denounced in the legal documents.

For all of the reasons expounded above:

The full session of the Criminal Division of the Spanish High Court hereby rejects the appeals and confirms the authority and jurisdiction of Spain over the acts covered in the proceedings. No further appeal of this ruling is possible.

P R E S S R E L E A S E

# INTERNATIONAL COMMISSION OF JURISTS

COMMUNIQUÉ DE PRESSE - COMUNICADO DE PRENSA

19 October 1998 IMMEDIATE

## ICJ CONSIDERS THAT THE ARREST OF PINOCHET IS AN IMPORTANT STEP IN THE COMBAT AGAINST IMPUNITY

Today, the International Commission of Jurists (ICJ) made the following statement concerning the arrest in London, and subsequent detention, of the former Dictator of Chile, General Augusto Pinochet Ugarte.

The ICJ wholeheartedly welcomes the arrest and detention of Mr. Pinochet and the possibility that he may have to face criminal proceedings. This turn of events constitutes a severe blow against the solid edifice of impunity which protects those who have committed gross violations of human rights.

Impunity represents an obstacle to the enjoyment of human rights and allows authors of gross violations of human rights to escape from justice. Impunity is a gangrene that corrodes the very core of our societies. It constitutes an affront to justice and affects equality under the law. The opposite of impunity is justice - and that is what seems to have prevailed with the arrest of Pinochet.

It seems that, since 1973, former General Pinochet, who is today a Senator-for-life in Chile, has accumulated more than enough reasons that would warrant his having to face trial in a criminal court. The court could investigate his acts and hand down a sentence in accordance with the law, taking into account his role as commander in chief of the Chilean army, as President of Chile, and as head of the DINA (the Chilean intelligence service), an organ that undertook illegitimate political repression. The actions of the DINA, which functioned directly under the orders of Pinochet, were not limited by the borders of Chile, but extended to other countries, as for example the assassinations of the former Chancellor of Chile, Mr. Orlando Letellier in Washington D.C., and of the former Head of the Army of Chile, General Carlos Prats, in Argentina.

The ICJ will observe with great interest the path followed by England's system of justice, recalling that the United Kingdom has the right and obligation to prosecute suspects such as Mr. Pinochet when they find themselves within the territory of the UK. International treaties as well as customary international law on human rights allow and even obligate States to do so, in cases of mass assassination of detained persons, enforced disappearances, extrajudicial or arbitrary executions, torture of detainees and hostage taking. Such acts constitute crimes against humanity and have legal consequences.

According to hundreds of corroborating testimonies - and also according to his own words - the former General is directly implicated in such crimes against humanity. On this basis and whilst in London, the English judicial system could initiate proceedings against him. In cases of particularly serious crimes, what is known in international law as "universal jurisdiction" applies. This provides that a perpetrator can be brought to justice not only in the State in which a crime was committed, but also before another jurisdiction in any other State in which the alleged perpetrator happens to be.

The British authorities also have the option to extradite the suspect to another jurisdiction should any other State claim this right. Two judges in Spain have asked the English judicial system to provisionally order the detention of Mr. Pinochet for the requirements of their own investigation, pending possible extradition. The legal basis and arguments of the Spanish judges will be known in the coming days. In any case, the English legal system has acted within the set legal framework. However, should doubts emerge concerning the extradition of Pinochet to Spain, then remedy could be sought in English courts.

The ICJ considers that, although Mr. Pinochet was travelling with a diplomatic passport delivered by Chilean authorities by virtue of his being a Senator-for-life, this cannot prevent him from being prosecuted and possibly sentenced for crimes against humanity - if proven guilty. The transition of Chile to democracy constitutes a huge step forward for that country and its people, even though the process has been limited by the pervasive influence of the armed forces and by Mr. Pinochet himself as Commander in Chief. The army was the leading force behind the self-attribution of amnesty in 1978 for all military personnel. It is also due to their control of the transition period that the military were able to include into the constitution the institution of senators-for-life who are granted

diplomatic passports for travelling. These all amount to unilateral actions, imposed by the military upon democratic Chile, which are null under international law. Hence, the granting of diplomatic immunity to Mr. Pinochet cannot prevent a criminal procedure from being instituted against him, as an alleged perpetrator of crimes against humanity.

It is precisely cases such as that of Mr. Pinochet, as well as the impunity which has been granted to such perpetrators of human rights violations, which have led the international community of States to establish, in July 1998, a permanent International Criminal Court.

The ICJ takes this opportunity to call on all States to take this case as a model and bring all alleged perpetrators of gross violations of human rights and grave breaches of international humanitarian law before their national courts, thus exercising the principle of universal jurisdiction.

The International Commission of Jurists (ICJ), headquartered in Geneva, is a non-governmental organization in consultative status with the United Nations Economic and Social Council, UNESCO, the Council of Europe and the OAU. Founded in 1952, its task is to defend the Rule of Law throughout the world and to work towards the full observance of the provisions in the Universal Declaration of Human Rights. It is composed of a maximum of 45 jurists from around the globe and has 82 national sections and affiliated organizations.

# INTERNATIONAL COMMISSION OF JURISTS

COMMUNIQUÉ DE PRESSE - COMUNICADO DE PRENSA

PRESS RELEASE

10 November 1998

## JURISTS FIND THAT GENERAL PINOCHET IS NOT IMMUNE FROM PROSECUTION FOR CRIMES AGAINST HUMANITY

Today, the International Commission of Jurists (ICJ) issued the following statement to deny General Pinochet's claim to immunity from prosecution in England or any other country in the world.

On 29 October 1998, the High Court of Justice in London ruled that Augusto Pinochet Ugarte of Chile was eligible for immunity from prosecution under English law. Composed on this occasion of three senior judges, the Court decided that by virtue of his status and functions as Head of State of Chile during the period in which the acts with which he is charged were committed, Mr. Pinochet was not subject to judgment in English courts. According to the ruling, what the Court termed "sovereign immunity" protected and continues to protect Mr. Pinochet from arrest and detention, and hence he was being "illegally detained" by the British authorities.

The decision has provoked many reactions. The ICJ will restrict itself solely to the legal aspects of the case. Its focus in this statement is to explain that, in neglecting to take international law into account, the High Court of Justice was mistaken in its judgment.

In the present case, the "immunity" in question is recognized only by the Government of Chile and by the High Court of Justice in London. The alleged immunity stems from abusive measures imposed by a powerful military establishment on the nascent democratic State of Chile, namely, that of granting Senator-for-Life Pinochet a diplomatic passport for use on his personal travels. In this context it is worth recalling that General Pinochet, his family and supporters, initially declared that he had travelled to London for medical reasons. General Pinochet was previously denied a visa by France to enter its territory.

Let us consider the various aspects of the claim to "diplomatic immunity":

The High Court in London maintains that Mr. Pinochet is entitled to such immunity by virtue of having been Head of State. In fact, Pinochet attacked the government and usurped the power of State on 11 September 1973, through a bloody coup that cost the lives of hundreds of Chileans, among whom that of the duly elected President of Chile, Dr. Salvador Allende. His status of "Head of State" was granted to him by the military junta which he himself commanded, in a decree issued 26 June 1974.

Thus, during an initial period, in which governmental forces committed numerous crimes, Pinochet was not Head of State, but only the leading member of the military junta which had usurped the government. When this status was converted to that of Head of State, it was not carried out according to regular constitutional procedures, but was imposed exclusively by the armed forces under his control.

Even if the illegality of Mr. Pinochet's access to the "presidency" is ignored, it is impossible to recognize any claim by Mr. Pinochet to "diplomatic immunity" as President and Head of State. In a constitutional reform imposed on the population through fear of a return to the past, and approved in a referendum conducted during a "state of exception" which involved serious restrictions on civil rights, Augusto Pinochet was designated under the new text of the Constitution as President of Chile for a period of eight years. At the same time, the legislative power also remained in the hands of the Junta of Commanders-in-Chief (the Commanders of the three armed forces and the Director-General of the Police).

The above-mentioned referendum, held in 1980, was discredited both by the United Nations and the Organization of American States as incapable of representing the genuine and free expression of the will of the people of Chile. This means Pinochet was never elected by the body of Chilean electorate, nor designated as President in conformity with the legal order, but merely assumed office within the framework of a "new order" illegitimately imposed by the armed forces and by himself. He thus cannot benefit anywhere in the world - except in Chile, and there only in a de facto sense imposed by power - from immunity from prosecution.

The immunity which is conceded to Heads of State - both current and past - is of the same kind as that which States governed by the rule of law

accord, for example, to Members of Parliament and Judges of the Supreme Court. It involves an immunity of the "function" rather than of the individual person involved, with the consequence that such persons can not be detained or arrested without an established process for removing this immunity having first been followed. The object of such preferential treatment is to allow such persons to exercise their high functions with independence and to protect them from undue fear and pressure. But naturally this immunity does not signify that such persons can not be held responsible in court for crimes which they may commit. It protects them in connection with the high responsibilities of their function, but at the same time it requires increased responsibility on their part.

The reason why Mr. Pinochet has not had to appear before a Chilean court is directly and exclusively a question of a rapport de force - the joint armed forces and the followers of the ex-dictator have wrested this protection from the democratic State. This demonstrates once again the limits of the Chilean transition from dictatorship to democracy. In any case, such impunity (rather than immunity) guaranteed to Mr. Pinochet is a unilateral act by the State of Chile and cannot be imposed on the international community or on other individual States. In sum, such immunity cannot be asserted in contradiction to international law.

Even if immunity were to be interpreted as something attached to the person rather than to the function - an interpretation which would run counter to both the law and to the logic of things - never, under any circumstances, would this immunity protect someone pursued with good reason for crimes against humanity. No one has ever maintained, nor could any one ever do so, that among the tasks assigned to the function of President and Head of State are included those of detaining persons arbitrarily; torturing them - sometimes to death; assassinating members of the opposition, detainees and prisoners; or making such persons "disappear" - definitively vanishing without ever providing an account of their fate or their whereabouts to the families or to judicial authorities. Therefore, immunity by virtue of function - no other kind exists - could not and should not ever have protected Pinochet against detention and prosecution in England, or against his extradition to a State which has lawfully demanded it.

It is for all these reasons that the ICJ affirmed today that the High Court of Justice in London was profoundly mistaken and disregarded the very meaning of international law. No interpretation such as that which

the ICJ is criticising here could have ever emerged from the norms contained in the Vienna Convention on Diplomatic Relations (1961), or from analysis of this Convention in conjunction with numerous other standards of international law. The High Court in London also neglected to take into account that the organized community of nations decided long ago to pursue and prosecute the authors of crimes against humanity, wherever they may be found, whatever their nationality, whatever the territory in which they committed such offenses or whatever the date when such events occurred.

The International Commission of Jurists (ICJ), headquartered in Geneva, is a non-governmental organization in consultative status with the United Nations Economic and Social Council, UNESCO, the Council of Europe and the OAU. Founded in 1952, its task is to defend the Rule of Law throughout the world and to work towards the full observance of the provisions in the Universal Declaration of Human Rights. It is composed of a maximum of 45 jurists from around the globe and has 82 national sections and affiliated organizations.

# INTERNATIONAL COMMISSION OF JURISTS
## COMMUNIQUÉ DE PRESSE - COMUNICADO DE PRENSA

P R E S S R E L E A S E

25 November 1998 IMMEDIATE

## ICJ WELCOMES HOUSE OF LORDS DECISION TO UPHOLD INTERNATIONAL LAW IN PINOCHET CASE AND DEMANDS EX-DICTATOR'S PROMPT JUDGMENT

The International Commission of Jurists (ICJ) stated today that it wholeheartedly welcomes the landmark ruling made by the Judicial Committee of the House of Lords in London not to grant immunity to the former dictator of Chile, General Augusto Pinochet Ugarte, for human rights violations which constitute international crimes.

This ruling reaffirms international law as it has developed over the last 50 years. Today's ruling by the highest court in England is a very important victory in the fight for accountability of perpetrators of crimes against humanity and other international crimes.

The ruling of the House of Lords is in line with the decision of the international community to set up ad hoc tribunals for the former Yugoslavia and for Rwanda as well as the International Criminal Court.

"This decision should remind all those who have committed gross violations of human rights and grave breaches of international humanitarian law - or who would be tempted to commit such crimes - that they will no longer go unpunished. Moreover, the ruling protects future potential victims of human rights violations and constitutes a most welcome recognition for the plight of victims. The ICJ is confident that the Home Office will not choose to depart from this ruling and will ensure that Mr. Pinochet faces a fair trial", declared Mr. Adama Dieng, Secretary-General of the ICJ.

This decision is a major source of encouragement for human rights defenders and their organisations all around the world. The ICJ appeals to all States, and all judges, prosecutors and lawyers not to let this historic precedent remain an isolated one.

The ICJ plans to issue a publication on the Pinochet affair shortly and will further comment on the ruling once it receives it in written form.