

Welcome Ex-Dictators, Torturers and Tyrants: Comparative Approaches to Handling Ex-Dictators and Past Human Rights Abuses

Jodi Thorp**

TABLE OF CONTENTS

I. INTRODUCTION	168
II. THE PATCHWORK SYSTEM	171
A. <i>The Home State</i>	171
B. <i>Other States' Courts</i>	174
1. Universality Principle	174
2. The Passive Personality Principle	174
3. Treaties	175
4. Domestic Legislation	176
C. <i>Truth Commissions</i>	177
D. <i>Ad hoc Tribunals</i>	178
III. THE PATCHWORK SYSTEM IN PRACTICE	183
A. <i>The Pinochet Precedent</i>	183
1. 1973 to 1990	183
2. The House of Lords	185
3. The Chilean System	188
4. The Future of Pinochet	190
B. <i>Milosevic Awaiting Trial</i>	191
1. 1986 to 1999	191
2. Milosevic and the U.N. System	192
3. The Future of Milosevic	194

*. Sheema Khan, Editorial, *Arms Open Too Wide*, NAT'L POST (Canada), Aug. 30, 2000, at A15, available at 2000 WL 25885422 (criticizing Canada's recent Federal Court decision to overturn the deportation of two ex-secret police members under Pinochet who admitted involvement in political executions and torture).

** J.D., *summa cum laude*, Gonzaga University School of Law, 2002; B.A., *summa cum laude*, Brigham Young University Hawaii, 1996. The author gratefully acknowledges the review and comments of the members of the Gonzaga Law Review, especially Rondi Thorp for her review and Jennifer Rains for her additions and assistance in locating international documents. The author also expresses thanks to Mario Lopez for his initial idea, to Professor Jared Levinson for his guidance during the initial stages of this Comment and to her family and friends for their continual support. Finally, the author would like to recognize the efforts of those working in the international human rights community and the bravery of those who have spoken out or taken action against human rights abuses.

C. *The Broader Implications of the Pinochet and Milosevic Cases* 195

IV. BEYOND THE PATCHWORK SYSTEM 196

V. CONCLUSION 198

“The first purpose of law is to protect the powerless from the powerful.”
 -unknown-

I. INTRODUCTION

“Welcome ex-dictators, torturers, secret police members”¹ This statement has different connotations depending upon the country extending the gesture. For some countries, the welcome may be accompanied by an arrest warrant.² In other countries, ex-dictators and others involved in massive human rights violations are guaranteed a safe haven.³

The idea that a state actor should and may be held accountable for human rights violations is relatively new, stemming from “the twentieth century, the era of total war and genocidal atrocities.”⁴ Before World War II, international law was virtually silent regarding government-sponsored human rights abuses

1. Khan, *supra* note *, at A15.

2. Since Augusto Pinochet was arrested while visiting England in 1998, the following human rights violators have faced similar proceedings: Ely Ould Dah, a Mauritanian colonel, was arrested in France in July 1999 based on allegations of torture; Ezzat Ibrahim al-Douri, aide to Iraqi President Saddam Hussein, was the subject of a criminal complaint filed against him on a visit to Austria; and Soeharto, former Indonesian ruler, cancelled a trip to Germany for medical treatment after learning Portuguese lawyers wanted to try him for murdering civilians. Human Rights Watch, *International Justice*, at <http://www.hrw.org/wr2k/Issues-10.htm> (last visited Feb. 27, 2002).

3. In April 1999, Human Rights Watch went before the U.N. Commission on Human Rights asking the following governments either to bring criminals harbored in their lands to justice or to extradite them to countries where they would receive fair trials: Saudi Arabia, for former Ugandan dictator Idi Amin—responsible for expelling the Asian community and killing approximately 100,000 to 300,000 persons; Zimbabwe, for Mengistu Haile Miriam—responsible for crimes of genocide in Ethiopia resulting in 200,000 deaths; France, for Jean-Claude “Baby Doc” Duvalier—responsible for thousands of political assassinations and arbitrary arrests; Senegal, for former president of Chad, Hissene Habre—responsible for approximately 40,000 deaths; the United States, for Haitian death squad leader Emmanuel “Toto” Constant—responsible for torture and murder; Panama, for Haitian military coup leader Raoul Cedras—responsible for 3,000 deaths and several hundred thousand displacements; and Brazil, for former Paraguayan ruler Alfredo Stroessner—responsible for torture, disappearances, and assassinations during the “dirty war” in South America. *Id.*

4. HOWARD BALL, *PROSECUTING WAR CRIMES AND GENOCIDE* 11 (1999). “During the twentieth century, four times as many civilians have been victims of war crimes and crimes against humanity than the number of soldiers killed in all the international wars combined.” MICHAEL P. SCHARF, *BALKAN JUSTICE* xiii (1997) (emphasis omitted). One estimate is “as many as 170 million persons have been murdered by their own governments.” *Id.* n.* (citing R. J. RUMMEL, *DEATH BY GOVERNMENT* 9 (1994)).

against a state's own citizens.⁵ The aftermath of World War II removed this silence, implementing in international law the notion of individual accountability for war crimes and crimes against humanity.⁶ "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁷ The post-World War II International Military Tribunal Charter further recognized, at least theoretically,⁸ the notion that heads of state are subject to criminal liability and may be prosecuted.⁹ "The official position of defendants . . . as Heads of State . . . shall not be considered as freeing them from responsibility"¹⁰

5. STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW* 5 (1997). The World War I Allies found the Central Powers had committed acts in violation of the customs of war and laws of humanity; however, the Allies did not hold any trials outside those held by the German government, which did not significantly change accountability under international law. *Id.*

6. Article 6(c) of the Charter of the International Military Tribunal names murder, extermination, enslavement, deportation, and persecution as crimes against humanity, regardless of whether those acts are in violation of the domestic law of the country where they were committed. Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 280, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> [hereinafter IMT Charter]; Christopher Keith Hall, *The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 91 AM. J. INT'L L. 177, 180 n.12 (1997).

Article 18 of the 1996 International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind defines crimes against humanity to include murder, extermination, torture, enslavement, forced disappearance, political and religious persecution, and racial discrimination, when these crimes are systematic or on a large scale and when directed by a government or group. *Report of the International Law Commission to the General Assembly on the Work of Its Forty-Eighth Session*, 51 U.N. GAOR Supp. (No. 10), U.N. Doc. A/51/10 (1996), reprinted in [1996] 2 Y.B. Int'l L. Comm'n, art. 18, at 47, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), available at <http://www.un.org/law/ilc/texts/dcode.htm>.

7. RATNER & ABRAMS, *supra* note 5, at 291 (quoting 22 IMT Trials at 466). The International Military Tribunal was established at Nuremberg, Germany, by the United States, France, the United Kingdom, and the Union of Soviet Socialist Republics to try war crimes committed by Germans under the Nazi regime during World War II. IMT Charter, *supra* note 6, art. 1.

8. Because Hitler committed suicide, it is not certain whether he would have been tried for crimes against humanity and war crimes.

9. RATNER & ABRAMS, *supra* note 5, at 6. The Charter of the International Military Tribunal at Nuremberg and the Charter of the Tokyo Tribunal eliminated the chain of command and state immunity defenses. *Id.*

10. IMT Charter, *supra* note 6, art. 7.

This principle has since been repeated in Article 7.2 of the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia, S.C.

Since Nuremberg, war crimes and crimes against humanity have been codified in multi-lateral treaties and domestic law so as to provide more concrete methods for achieving accountability.¹¹ In practice, however, states have taken different approaches and varying levels of zeal when dealing with the prosecution of crimes against humanity. In general, states have been criticized for their reluctance to use domestic and international fora to hold persons accountable.¹² The result is a patchwork system.¹³ This patchwork system includes domestic courts, courts of other states not involved in the conflict, truth commissions, and ad hoc tribunals. Where dictators are concerned, state reluctance to prosecute is even stronger. This usually results in no trial or ineffective trials, although this trend is slowly changing.

This Comment provides a comparison of state actions against ex-dictators involved in the planning and implementation of large-scale human rights atrocities. This Comment also reviews the current fora and methods available for achieving accountability. The cases of Senator Augusto Pinochet Ugarte of Chile and Socialist Party Leader Slobodan Milosevic of the former Yugoslavia provide insight into the extent to which dictators will be deterred in the future and how states will deal with subsequent violations. Finally, this Comment explores the role the International Criminal Court could play in bringing ex-dictators to justice.

Res. 827, U.N. SCOR, 48th Sess., Annex, 3217th mtg., U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203, available at <http://www.un.org/icty/basic/statut/statute.htm> [hereinafter ICTY Statute]; Article 6.2 of the Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, available at <http://www.ictt.org/ENGLISH/basicdocs/statute.html> [hereinafter ICTR Statute]; and Article 27.1 of the Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999, available at <http://www.iccnw.org/html/icc19990712.html> [hereinafter ICC Statute].

11. Matthew Lippman, *Nuremberg: Forty-Five Years Later*, 7 CONN. J. INT'L L. 1, 47-52 (1991). The Universal Declaration of Human Rights was among the agreements that stemmed from World War II. G.A. Res. 217A (III), GAOR, 3d Sess., U.N. Doc. A/810 (1948), available at <http://www.un.org/Overview/rights.html>. The Geneva Conventions were also signed following World War II. The conventions signed at Geneva on August 12, 1949 consist of the following: Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

12. Human Rights Watch, *supra* note 2.

13. RATNER & ABRAMS, *supra* note 5, at 291 (making the analogy to a patchwork system).

II. THE PATCHWORK SYSTEM

Different fora and methods have been used by states and organizations to hold persons, who would not otherwise fall under their jurisdiction, accountable for crimes against humanity.¹⁴ Although some fora are available for all states to implement against persons, others are limited to certain geographic areas, crimes, and time periods.¹⁵ In addition, some states have been more active in creating methods of attaining accountability by creating jurisdiction for crimes against humanity, by becoming a party to treaties that create jurisdiction,¹⁶ or by enacting jurisdiction into their own laws.¹⁷

A. *The Home State*

In determining proper jurisdiction, the state courts where the crime occurred (the territoriality principle) and the offender's state of nationality (nationality principle) are generally considered the favored fora.¹⁸ For crimes against humanity committed by dictators, the state where the acts occurred and the dictator's state of nationality tend to be the same and will be referred to as the home state for purposes of this Comment.¹⁹ The home state is generally favored due to the high regard international law places upon state sovereignty.²⁰ In addition, crimes are easier to prove where they are committed because witnesses and evidence tend to be located there.²¹ Furthermore, witnesses may

14. *See id.* at 291-92.

15. For instance, truth commissions and ad hoc tribunals are generally limited to a specific time period or a specific set of acts. *See infra* Part II.C-D.

16. RATNER & ABRAMS, *supra* note 5, at 141.

17. *Id.*

18. Human Rights Watch, *supra* note 2.

19. Holding dictators and states accountable for crimes against other states or nationals of other states has been embedded in international law since its beginning. A newer concept that is slowly becoming more accepted by the international community is the right and obligation of all states to ensure that dictators and states treat their own citizens in a way consistent with the ideals set forth in the emerging field of international human rights law, including the notion of universal respect for life and human dignity. RATNER & ABRAMS, *supra* note 5, at 3-4.

The Geneva Conventions of 1949 "established the idea of universal jurisdiction for war crimes in international wars." *Online Focus: General Augusto Pinochet* (PBS Online NewsHour broadcast, Oct. 19, 1998), at http://www.pbs.org/newshour/bb/latin_america/july-dec98/pinochet_10-19.html (statement by Ruth Wedgewood). This concept is being applied to civil wars and internal conflicts. *Id.*

20. Father Robert Araujo, *Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law*, 24 FORDHAM INT'L L.J. 1477 (2001); Alison L. Forbes, *Ethics and Authority in International Law*, 22 SUFFOLK TRANSNAT'L L. REV. 335, 338 (1998).

21. Human Rights Watch, *supra* note 2.

have a larger and/or more meaningful role in prosecutions that occur in the home state.²² Most countries and regional courts defer to a home state, requiring domestic remedies be exhausted or unavailable before other options may be utilized.²³

Problems with relying on the jurisdiction of the home state are abundant as evidenced by the few countries trying former dictators.²⁴ Before relinquishing power, dictators often provide amnesty for themselves and those involved in the acts through legislation.²⁵ This creates an environment of impunity that is so embedded in the national law that bringing dictators before the court system is virtually impossible. Additionally, dictators stepping down are in a favorable position to barter away justice as a condition to surrendering office. For instance, before leaving office, Pinochet established himself as a senator for life, which is a position afforded immunity under Chilean law.²⁶ Similarly, Milosevic exchanged a peace agreement for his de-facto immunity.²⁷ These examples show how home states, desperate for a change in government, accept the dictator's conditions in an effort to maintain peace and stability in an already wounded nation.

Dictators also have the ability to maintain power in a home state. Often dictators establish their governments by appointing their supporters to high-ranking positions or allowing supporters to maintain their previous posts. These officials often stay in power even after the dictator has left. Judges and congressional members appointed by a former dictator may lack objectivity due to their personal relationships and commitments to the dictator. In addition, the military established by the dictator often stays in power after the dictator steps

22. *Id.*

23. This is true in the case of regional courts such as the Inter-American Court of Human Rights and the European Court of Human Rights; however, these courts only have jurisdiction over states and not individuals. Peggy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Entities*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 191, 218-20 (2001).

24. See Human Rights Watch, *supra* note 2; see also *supra* note 4 and accompanying note.

25. William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467 (2001). The United Nations has also worked to exchange amnesty for peace in El Salvador, Cambodia, South Africa, and Haiti. SCHARF, *supra* note 4, at 87-88.

26. The 1980 Constitution enacted by the military regime of Pinochet affords a lifetime senate position to past presidents who have served at least six years and provides such senators with immunity. CHILE CONST. ch. V, art. 45 (Const. of the Rep. of Chile, 1980). In March 1998, Pinochet was sworn in as a senator for life. Nehal Bhuta, Note, *Justice Without Borders? Prosecuting General Pinochet*, 23 MELB. U. L. REV. 499, 510 (1999).

27. William Miller, Comment, *Slobodan Milosevic's Prosecution by the International Criminal Tribunal for the Former Yugoslavia: A Harbinger of Things to Come for International Criminal Justice*, 22 LOY. L.A. INT'L & COMP. L. REV. 553, 567 (2000).

down, creating an environment of fear among the victims. For instance, although Pinochet had stepped down, Chile's judicial system was controlled, until recently, by judges appointed by the same military under Pinochet's control.²⁸

Ex-dictators may also maintain popularity in their home state with citizens who were not targets of the regime.²⁹ Thus, for new leaders, the decision to prosecute may be a political question. This is especially true in countries where many of the targeted persons fled the country to avoid persecution, leaving the country with primarily two groups of people—victims and supporters.³⁰ In Chile for example, one group believes Pinochet saved the nation from communism and another believes he terrorized her.³¹ Judge Juan Guzman Tapia, the prosecutor for the Pinochet case in Chile,³² noted that Pinochet is “a person with great charisma who is admired by an important part of society, among which is the Army.”³³

Finally, countries that have been repressed by dictators may not have functioning judicial systems. For instance, Kosovo is currently experiencing a gap in its professional society.³⁴ Many legal professionals were killed or displaced, and the next generation lacks the necessary education due to the years they were unable to study or practice law.³⁵

Due to the problems facing a home state, few dictators have been brought to trial by domestic courts.³⁶ Although Chile eventually began investigating Pinochet for prosecution, this did not happen until after British police arrested

28. Clifford Krauss, *Pinochet's Arrest Ordered by Judge*, N.Y. TIMES, Dec. 2, 2000, at A1.

29. For example, Pinochet still has support in Chile. *Id.* Similarly, Milosevic was re-elected by the Socialist Party of Serbia in November 2000 earning 86.55 percent of votes casted by delegates. Carlotta Gall, *Milosevic Wins Re-election as Leader of Socialist Party*, N.Y. TIMES, Nov. 26, 2000, at A10.

30. Thousands of people fled Chile during the Pinochet era. Stephen Kim Park, *Dictators in the Dock: Retroactive Justice in Consolidating Democracies*, 25 FLETCHER F. WORLD AFF., Winter 2001, at 127, 131.

31. *Online Focus: General Augusto Pinochet*, *supra* note 19 (statement by Arturo Valenzuela).

32. Under the Chilean judicial system, judges play a dual role in investigating and adjudicating cases. *See* Krauss, *supra* note 28.

33. *Pinochet Case Back in Hands of Justice Guzman: The Working Agenda of Chile's Most Famous Judge*, SANTIAGO TIMES, Aug. 16, 2000, available at 2000 WL 7222282.

34. Interview with Kathleen D. Kirwin, American Bar Association, in The Hague, Neth. (Nov. 4, 2000).

35. *Id.*

36. *See* Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS., Autumn 1996, at 153.

and detained him,³⁷ after more than 280 lawsuits were filed against him, and after seventeen years of rule and human rights abuse.³⁸ The next route for achieving accountability usually lies with the courts of other nations, some with a nexus, some without.

B. *Other States' Courts*

Other states have relied on different jurisdictional principles to bring ex-dictators to justice. These principles include the universality principle, the passive personality principle, treaties, and domestic legislation.

1. Universality Principle

Universal jurisdiction is the most wide-reaching method for countries to obtain jurisdiction over dictators for crimes against humanity because it “permits a state to exercise jurisdiction over perpetrators of certain offenses considered particularly heinous or harmful to mankind, regardless of any nexus the state may have with the offense, the offender, or the victim.”³⁹ Universality may be permissive or mandatory depending on its source.⁴⁰ Two methods of obtaining universal jurisdiction that may impose an obligation upon a state are treaties providing jurisdiction and customary international law.⁴¹

2. The Passive Personality Principle

Some states have relied on the passive personality principle to invoke jurisdiction. The passive personality principle provides jurisdiction for a victim's state of nationality.⁴² This principle is generally accepted under international law because nations typically find it in their best interests to protect their own citizens.⁴³ The principle, however, is rarely invoked or acknowledged.⁴⁴ When Spain requested extradition of Pinochet from England,

37. *Britain Says Pinochet Ruling Shows Judicial Independence*, AGENCE FRANCE-PRESSE, Aug. 8, 2000, available at 2000 WL 24686673.

38. *Judge Guzman to Delegate 100 Human Rights Lawsuits: Magistrate Will Assign Cases Against Pinochet to Different Criminal Courts*, SANTIAGO TIMES, Aug. 27, 2001, available at 2001 WL 5995990.

39. RATNER & ABRAMS, *supra* note 5, at 140.

40. *Id.* at 141.

41. *Id.*

42. *Id.* at 140.

43. Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1, 18 (1993).

44. *Id.* at 13.

the complaint in the Spanish court relied on the fact that some of Pinochet's victims were Spanish citizens, even though the acts occurred in Chile and most the victims were Chileans.⁴⁵ The passive personality principle was also one of the jurisdictional principles invoked by Israel to try Adolf Eichmann for crimes against humanity committed during the Holocaust.⁴⁶ There are few instances of the passive personality principle being invoked for crimes against humanity, and when utilized, it is usually accompanied by the universality principle.

3. Treaties

"International law generally gives nations the right to prosecute or extradite persons for crimes against humanity committed in other nations. In treaties outlawing genocide and torture, it *requires* them to do so."⁴⁷ The Convention on the Prevention and Punishment of the Crime of Genocide places an affirmative obligation on state parties to either try persons accused of committing genocide or to extradite them to the state where the crime was committed.⁴⁸ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires states to either punish or extradite

45. Jamison G. White, Note, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State*, 50 CASE W. RES. L. REV. 127, 144 (1999). Spain has also relied on the passive personality principle to try Argentine citizens accused of human rights violations committed during the Dirty War. *Id.* at 145-46.

46. Jonathan M. Wenig, *Enforcing the Lessons of History: Israel Judges the Holocaust*, in THE LAW OF WAR CRIMES 103, 107 (Timothy L.H. McCormack and Gerry J. Simpson eds., 1997). There is controversy within the international community concerning whether Israel should have been able to invoke this principle even though it was not a state at the time of the atrocities and, therefore, not the state of nationality for the victims at that time. *Id.* at 108. Israel became a recognized state by the international community in 1948 after World War II. *Id.* at 104. In addition to the passive personality principle, Israel also invoked the universality principle and the protective principle, which provides jurisdiction where the extraterritorial conduct would have a harmful effect on the interests of the state, such as national security interests. *Id.* at 107-08.

Although not a dictator, Adolf Eichmann was head of the Jewish office of the Nazi Gestapo and was responsible for implementing the final solution, leading to the death of six million persons. *Id.* at 110. Eichmann was abducted from hiding in Argentina and brought to Israel where he was found guilty for crimes against humanity in the District Court of Jerusalem. *Id.* He was sentenced to death and executed after his appeal to the Supreme Court of Israel was rejected. *Id.*

47. Doug Cassel, *Prosecuting Pinochet: Are Spain and Britain Both Right?*, WORLDVIEW COMMENT. NO. 12, Nov. 4, 1998, at <http://www.law.nwu.edu/depts/clinic/ihr/hrcomments/1998/nov4-98.htm>.

48. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 5-7, 78 U.N.T.S. 278, 280, 282.

offenders accused of torture.⁴⁹ During the *Pinochet* case in England, the House of Lords held that the Convention Against Torture required it to either prosecute or extradite where torture was alleged.⁵⁰

4. Domestic Legislation

States have also incorporated treaty provisions and international law into their domestic law, adding another means for achieving accountability. For instance, Israel enacted the Nazis and Nazi Collaborators (Punishment) Law to address crimes committed during the Nazi regime.⁵¹

The United States appears to be one of the more zealous states in trying cases that would normally fall outside its jurisdiction. The United States Alien Tort Claims Act of 1789 ("ATCA")⁵² provides district courts with jurisdiction to try foreign nationals for violating laws or treaties of the United States. Although originally enacted to combat piracy, since 1980,⁵³ the ATCA has been used to provide foreign nationals a civil forum in the United States where they can seek justice against human rights abusers including past leaders.⁵⁴

The Torture Victim Protection Act of 1991 ("TVPA")⁵⁵ expands the ATCA. The TVPA permits jurisdiction for acts of torture and summary executions regardless of where the acts occurred and was intended to codify the

49. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1985), adopted Dec. 10, 1984, entered into force June 26, 1987, *reprinted in* 23 I.L.M. 1027 (1984), substantive changes noted in 24 I.L.M. 535 (1985).

50. *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No 1), [2000] 1 A.C. 61 (H.L. 1998).

51. Wenig, *supra* note 46, at 105. This was one of the laws used to prosecute Adolf Eichmann. *Id.*

52. *See* 28 U.S.C. § 1350 (1994).

53. In 1980, the family of a Paraguayan seventeen-year-old boy brought an action against the inspector general of police for Asunción, Paraguay, alleging he had tortured their son to death. *Filartiga v. Peña-Irala*, 630 F.2d 876, 878-79 (2d Cir. 1980). The Second Circuit reversed a lower court's dismissal for want of subject matter jurisdiction, holding the ATCA established jurisdiction over claims of torture by state officials. *See id.* at 887. On remand, the district court entered a default judgment against the defendant. *Filartiga v. Peña-Irala*, 577 F. Supp. 860, 861 (E.D.N.Y. 1984).

54. Bill Miller & Christine Haughney, *War Crimes Trials Find a U.S. Home*, WASH. POST, Aug. 9, 2000, at A1. Most appellate courts have upheld the use of the Act for crimes against humanity, although the D.C. Circuit Court of Appeals refused to apply the Act to a case involving an attack on an Israeli bus. *Id.*; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (*per curiam*).

55. Pub. L. No. 102-256, 106 Stat. 73 (1992) (*reprinted after* 28 U.S.C. § 1350 (1994)).

interpretation of ATCA in *Filartiga v. Peña*.⁵⁶ The TVPA requires: 1) the act constitute torture or extrajudicial killing; 2) the defendant acted under color of law of a foreign nation; 3) the plaintiff be a victim or a claimant under a wrongful death action; and 4) the exhaustion of domestic remedies.⁵⁷

Based on these two acts, there have been several judgments against leaders for crimes against humanity.⁵⁸ The judgments have been rendered against the following: former Guatemalan defense minister, Hector Gramajo; former Argentine army general, Carlos Suarez Mason; Haitian military leader, Prosper Avril; and former Philippines dictator, Ferdinand Marcos.⁵⁹ In addition, a case has been brought in the United States District Court of New York against Bosnian-Serb leader Radovan Karadzic for his campaign of ethnic cleansing of Bosnian Muslim populations.⁶⁰

Collecting the money for these judgments has proven difficult.⁶¹ For the most part, the defendants did not participate in the trial in the United States and will not likely honor judgments against them.⁶² In addition, foreign states are generally not cooperative in freezing assets for judgment distributions.⁶³ The victims have, nevertheless, found these trials to be healing because some level of accountability is attained.⁶⁴ Although a judgment holds certain individuals directly accountable and gives the victim the opportunity to be heard, judgments that appear to be difficult or impossible to collect may not provide the victim with much more than a truth commission would.

C. Truth Commissions

Governments that wish to maintain peace and stability while establishing some level of state recognition have used truth commissions to provide victims with an opportunity and forum to be heard.⁶⁵ “[T]ruth commissions are bodies

56. RATNER & ABRAMS, *supra* note 5, at 207.

57. *Id.*

58. John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 31 (1999). Opponents of these trials claim they are primarily show trials with large implications for United States citizens abroad. See Miller & Haughney, *supra* note 54.

59. Miller & Haughney, *supra* note 54.

60. See *Doe I v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994), *rev'd sub nom. Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

61. Only the case against Ferdinand Marcos has shown “signs of yielding money” through a \$150 million dollar settlement. Miller & Haughney, *supra* note 54.

62. *Id.*

63. *Id.*

64. See *id.*

65. The most widely known truth commissions were established in Argentina, Chile, South Africa, and El Salvador. RATNER & ABRAMS, *supra* note 5, at 194.

established to research and report on human rights abuses over a certain period of time in a particular country or in relation to a particular conflict.”⁶⁶ The commission collects information and evidence from perpetrators, victims, and their relatives.⁶⁷ “Commissions are usually created at a transition point ‘to demonstrate or underscore a break with a past record of human rights abuses, to promote national reconciliation, and/or to obtain or sustain political legitimacy.’”⁶⁸ Four criteria characterize truth commissions: 1) they center on the past; 2) they paint an overall picture of the violations during the time period as opposed to focusing on individual accounts; 3) they are established for a temporary but definite period of time, and 4) they are sponsored by a government or an international organization and, consequently, have “greater access to information, greater security or greater protection to dig into sensitive issues, and a greater impact.”⁶⁹

The main problem with truth commissions is that they do not provide any individual accountability,⁷⁰ which may leave victims unsatisfied and uncompensated. Furthermore, improperly administered commissions risk further aggravating a situation by causing intensified societal divisions and “a hunger for vengeance.”⁷¹ In addition, economic and human resources are often scarce for states emerging from dictatorships or periods of human rights abuse.⁷² These states have usually been depleted of talented and non-corrupt persons and lack the financial resources to adequately support a commission.⁷³ Finally, some truth commissions are implemented years after the atrocities, leaving the opportunity for time to alter history. This is, however, a potential problem for most the available forums, including ad hoc tribunals.

D. *Ad hoc Tribunals*

The final forum belonging to the patchwork system consists of ad hoc tribunals. Ad hoc tribunals are international criminal courts established to try individuals for war crimes and crimes against humanity.⁷⁴ Ad hoc tribunals

66. U.S. Inst. of Peace, *Truth Commissions*, at <http://www.usip.org/library/truth.html> (last modified June 8, 2001).

67. *Id.*

68. RATNER & ABRAMS, *supra* note 5, at 194 (quoting Priscilla B. Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 604 (1994)).

69. *Id.* at 193-94 (quoting Hayner, *supra* note 68, at 604).

70. *Id.* at 203.

71. *Id.* at 204.

72. *Id.*

73. *Id.*

74. *Id.* at 162.

function under their individual charters⁷⁵ and rely heavily on state cooperation.⁷⁶ Because the International Court of Justice and the permanent regional human rights courts were established to focus on state responsibility and not individual responsibility,⁷⁷ ad hoc tribunals became necessary for individual accountability and prosecution.⁷⁸ These tribunals are set up in response to particular situations and have, thus far, only been established in extreme cases.⁷⁹

The first ad hoc tribunals to address human rights violations were the Nuremberg and the Tokyo Tribunals, both of which were developed shortly after World War II.⁸⁰ Today, there exists two major ad-hoc tribunals, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”)⁸¹ and the International Criminal Tribunal for Rwanda (“ICTR”). Both tribunals were established by the United Nations Security Council under its Chapter VII powers.⁸² The ICTY was established “in response to the torture, incarceration, forced deportation, systematic rape, willful killing, and indiscriminate shelling of civilians in the former Yugoslavia.”⁸³ The ICTY has jurisdiction over all crimes committed in the Former Yugoslavia since 1991.⁸⁴ Consequently, this jurisdiction includes crimes that occurred in Kosovo during that time.⁸⁵ Similarly, the ICTR was established in response to “genocide and other war crimes in Rwanda.”⁸⁶ The ICTR, in an attempt to avoid some of the budgetary and personnel problems facing the ICTY, imposed a time limitation in its charter, providing the ICTR with jurisdiction solely over crimes that occurred

75. *See id.* at 163, 166-69, 174-76.

76. *Id.* at 187.

77. *Id.* at 190.

78. *See id.* at 162.

79. *Id.*

80. *Id.* Although war crimes trials were held after World War I, the German Government insisted that defendants be tried by the German Supreme Court in Leipzig. Timothy L.H. McCormack, *From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime*, in *THE LAW OF WAR CRIMES*, *supra* note 46, at 31, 49.

81. The ICTY is “the first international war crimes tribunal [to be established] since World War II.” BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 1254 (3d ed. 1999).

82. The U.N. Security Council found violations of humanitarian law to be a threat to peace and security and, therefore, was able to invoke its Chapter VII powers to establish the tribunals which have jurisdiction over war crimes and crimes against humanity. *Id.*

83. *Id.* at 1253-54.

84. ICTY Statute, *supra* note 10, art. 1, 32 I.L.M. at 1169.

85. *Accountability for War Crimes: Progress and Prospects Hearing: Before the Comm’n on Sec. and Cooperation in Eur.*, 106th Cong. 1st Sess. 4 (1999) (testimony of Nina Bang-Jensen, Coalition for Int’l Justice) [hereinafter *Hearing*].

86. CARTER & TRIMBLE, *supra* note 81, at 1255.

during 1994.⁸⁷

Although tribunals allow for individual accountability, their reliance on state cooperation makes them vulnerable to state disregard for indictments and requests for evidence.⁸⁸ Notwithstanding provisions of the resolution establishing the ICTY, which require every state to turn over indicted persons,⁸⁹ states have been uncooperative in responding to indictments and requests for information.⁹⁰ Both Serbia and Croatia have refused to surrender key suspects to the ICTY, including former Bosnian Serb president, Radovan Karadzic.⁹¹ Milosevic was not transferred to the ICTY until June 2001 due to Yugoslav President Vojslav Kostunica's opposition to surrendering war crimes suspects.⁹² Even more disturbing than states permitting those indicted to hide within their borders is that many of the accused continue to hold positions of power and influence in their respective states years after they have left their positions as leaders.⁹³ This was the case with Milosevic, who remained in power, despite an outstanding indictment by the ICTY, until shortly before his transfer to the international tribunal.⁹⁴ The ICTR, on the other hand, has been largely successful and currently holds in custody, among other top leaders, the President and the Vice President of the ruling party in Rwanda in 1994.⁹⁵ Leaders are not the only indicted persons evading detainment. For instance, as of November 15, 2001, the ICTY still had twenty-eight outstanding arrest warrants.⁹⁶ Capturing indictees is an extremely difficult proposition despite programs such as the United States "War Crimes Rewards Program," which offers up to \$5 million dollars for information leading to the arrest of persons

87. ICTR Statute, *supra* note 10, art. 1, 33 I.L.M. at 1602.

88. *Hearing*, *supra* note 85, at 5.

89. CARTER & TRIMBLE, *supra* note 81, at 1254.

90. *See id.* at 1255.

91. *Id.* In July 2001, after Yugoslavia transferred Milosevic to the ICTY, Croatia agreed to send two higher ranking generals to the tribunal; however, the indictments remain sealed. Carlotta Gall & Marlise Simons, *Croatia in Turmoil After Agreeing to Send 2 to Tribunal*, N.Y. TIMES, July 9, 2001, at A3.

92. R. Jeffrey Smith, *Extradition Causes Rift in Belgrade: Cabinet Members Quit in Protest*, WASH. POST, June 30, 2001, at A1, available at 2001 WL 23177663.

93. CARTER & TRIMBLE, *supra* note 81, at 1255.

94. Notwithstanding an indictment by the ICTY for Slobodan Milosevic, issued on May 24, 1999, he remained the Yugoslav President until October 6, 2000, and was re-elected as the leader of Serbia's Socialist party on November 25, 2000. Gall, *supra* note 29; *ICTY Indictments and Proceedings*, at <http://www.un.org/icty/ind-e.htm> (last visited Sept. 21, 2001).

95. CARTER & TRIMBLE, *supra* note 81, at 1255.

96. *Fact Sheet on ICTY Proceedings*, at <http://www.un.org/icty/glance/procfact-e.htm> (last modified Nov. 15, 2001). This figure does not include secret indictments made by the ICTY. *Hearing*, *supra* note 85, at 5.

indicted by the ICTY.⁹⁷

Tribunals also face other problems in the quest for justice. The ICTY judges come from fourteen different nations with different legal backgrounds, and the tribunals operate under a hybrid approach combining common law and civil legal systems: the result is a slow pace for operations.⁹⁸ Despite the budget provided by the United Nations and voluntary monetary support from other nations such as the United States, tribunals also suffer budget and personnel shortages.⁹⁹ In addition, tribunals are limited to actual individual cases when creating a historical record, so the record is dependent upon detaining and trying indictees.¹⁰⁰ As of November 15, 2001, in the ICTY there were twenty-five completed cases, eighteen cases in pre-trial stages, seven cases in trial, and ten appeals.¹⁰¹ At the same time, nine cases had been adjudicated by the ICTR, seventeen trials were in progress, and twenty-six were awaiting trial.¹⁰² This creates a minimal record when compared to the vast accounts of genocide and other human rights violations.¹⁰³

Despite problems detaining indictees, functioning within a hybrid system, and working with limited resources, tribunals have made steps toward bringing responsible parties to justice. The tribunals have mostly tried lower-level officials rather than those primarily responsible for the crimes.¹⁰⁴ As of November 7, 2001, the ICTY had publicly indicted fifty-four individuals who have superior responsibility under Article 7(3) of the ICTY statute; eighteen are

97. See Diplomatic Sec. Serv., U.S. Dep't of State, *Persons Indicted for War Crimes*, at <http://www.dssrewards.net/english/warcrimes/warcriminals.html> (last visited Sept. 16, 2001). The Office of War Crimes Issues, which runs the "War Crimes Reward Program," advises the Secretary of State on violations of international humanitarian law and coordinates U.S. support for the ICTY and ICTR. U.S. Dep't of State, *Office of War Crimes Issues*, at <http://www.state.gov/s/wci> (last visited Mar. 9, 2001).

98. *Hearing*, *supra* note 85, at 4-5.

99. In 2000, the U.N. budget for the ICTY was \$106.1 million, and the U.S. contributed an additional \$23.8 million. Office of the Ambassador-at-Large for War Crimes Issues, U.S. Dep't of State, *War Crimes Tribunals: Facts at a Glance*, available at http://www.state.gov/www/global.swci/fs_001101_finances.html (Dec. 8, 2000). The 2000 U.N. budget for the ICTR in 2000 was \$86.2 million to which the U.S. contributed \$21 million. *Id.*

100. *Hearing*, *supra* note 85, at 11, 12 (testimony of Dr. Paul R. Williams, Professor of Law and Int'l Relations, Am. Univ.).

101. *Fact Sheet on ICTY Proceedings*, *supra* note 96.

102. Press Briefing, Kingsley Chiedu Moghalu, Spokesman for the ICTR (Nov. 15, 2001), available at <http://www.ictor.org/ENGLISH/pressbrief/brief9-13-020e.htm> (briefing to the media at The Hague, Neth.).

103. *Hearing*, *supra* note 85, at 11, 12 (testimony of Dr. Paul R. Williams, Professor of Law and Int'l Relations, Am. Univ.).

104. Sam Mueller, Address at the International Criminal Defense Attorneys Association Preparatory Conference for the ICC at the ICTY in The Hague, Netherlands (Nov. 3, 2000).

currently being detained.¹⁰⁵ Similarly, as of November 6, 2001, the ICTR had detained forty-three political, military, government, and religious leaders.¹⁰⁶ However, to date, only two ex-rulers have been detained, Milosevic¹⁰⁷ and Jean Kambanda.¹⁰⁸ Furthermore, some sentences the tribunals have ordered are minuscule in relation to the crimes committed, including sentences of five to seven years for crimes against humanity.¹⁰⁹

The future of international tribunals is uncertain. The possibility of an international tribunal in Cambodia is doubtful. Requests to implement tribunals for crimes against humanity in East Timor and Sierra Leone have failed, leaving some in the international human rights community to question whether ad hoc tribunals are still a viable avenue for bringing dictators to justice.¹¹⁰ Although the existing tribunals are critical because they hold at least some perpetrators accountable, the obstacles and controversies facing tribunals place limitations upon them, rendering them ineffective fora for bringing ex-dictators to justice.

The patchwork system consists of home state courts, foreign courts, truth commissions and ad hoc tribunals. Although each forum provides some closure for the victims as well as a certain amount of accountability, whether individual or collective, none of the fora have proven sufficient for bringing ex-dictators to justice for committing crimes against humanity. This is illustrated by failed attempts to bring to justice Senator Augusto Pinochet Ugarte of Chile and Socialist Party Leader Slobodan Milosevic of the former Yugoslavia, who both continue to have powerful supporters in their countries.

105. ICTY, *Outstanding Public Indictments*, at <http://www.un.org/icty/glance/indictlist-e.htm> (last modified Nov. 7, 2001); ICTY Statute, *supra* note 10, art.7; ICTY, *Detainees and Former Detainees*, at <http://www.un.org/icty/glance/detainees-e.htm> (last modified Nov. 7, 2001).

106. ICTR, *ICTR Detainees*, at <http://www.ictcr.org/english/factsheets/detainee.htm> (Nov. 6, 2001).

107. ICTY, *Detainees and Former Detainees*, *supra* note 105.

108. ICTR, *ICTR Detainees*, *supra* note 106. Jean Kambanda, the former Prime Minister for Rwanda, was sentenced to life imprisonment on Sept. 4, 1998. *Id.*

109. See *Fact Sheet on ICTY Proceedings*, *supra* note 96. The longest sentence handed down by the ICTY is forty-six years imposed on Radislav Krstic for genocide, persecution for murders, cruel and inhumane treatment, terrorizing the civilian population, forcible transfer and destruction of personal property of Bosnian Muslim civilians; murder as a violation of the Laws and Customs of War. *Case Information Sheet: Krstic Case*, at <http://www.un.org/icty/glance/krstic.htm> (Sept. 4, 2001).

110. See Symposium, *Toward an International Criminal Court? A Debate*, 14 EMORY INT'L L. REV. 159, 169-70 (2000).

III. THE PATCHWORK SYSTEM IN PRACTICE

Two leaders have received wide spread attention, not only for committing massive human rights violations, but for their experiences in the patchwork system. This section will examine the failed and ongoing attempts to hold Senator Augusto Pinochet Ugarte and Socialist Party Leader Slobodan Milosevic accountable for crimes committed under their respective regimes.

A. *The Pinochet Precedent*

There have been several attempts to hold Senator Augusto Pinochet Ugarte, the ex-dictator of Chile, accountable. First, in 1990, Chile implemented the National Commission on Truth and Reconciliation to establish a historical account of the events that occurred under Pinochet's rule.¹¹¹ Next, in 1998, two warrants for his arrest in England were issued for his murder of Spanish citizens.¹¹² Finally, the Chilean judicial system addressed one of the many complaints against Pinochet, which resulted in a supreme court decision that lifts Pinochet's senatorial immunity to allow prosecution.¹¹³ However, the failure of the patchwork system to result in individual accountability for Pinochet did not leave international law without precedent. The initial attempt at trying the former dictator alerted the international community to the realization that the current fora are inadequate.

1. 1973 to 1990

On September 11, 1973, armed forces led by army commander, General Augusto Pinochet, attacked the presidential palace, La Moneda, and overthrew the constitutionally elected Popular Unity Government of President Salvador Allende.¹¹⁴ The new regime appointed a new cabinet and dissolved the National

111. One of President Patricio Aylwin's first acts as President was to establish the Chilean National Commission on Truth and Reconciliation in 1990, which would serve to investigate the acts that occurred under the Pinochet regime. Amber Fitzgerald, *The Pinochet Case: Head of State Immunity Within the United States*, 22 WHITTIER L. REV. 987, 993-94 (2001).

112. Diana Woodhouse, *The Extradition of Pinochet: A Calendar of Events*, in THE PINOCHET CASE 1-3 (Diana Woodhouse ed., 2000).

113. Craig Torres, *Chile's Pinochet is Open to Prosecution*, WALL ST. J., Aug. 9, 2000, at A16, available at 2000 WL-WSJ 3039490.

114. MARK FALCOFF, MODERN CHILE, 1970-1989: A CRITICAL HISTORY 295-96 (1989). President Allende did not survive the attack; it is disputed whether he was murdered or committed suicide. PAMELA CONSTABLE & ARTURO VALENZUELA, A NATION OF ENEMIES: CHILE UNDER PINOCHET 17 (1991). Allende's government had proposed a transition to socialism. SIMON COLLIER & WILLIAM F. SATER, A HISTORY OF CHILE, 1808-1994, at 331

Congress.¹¹⁵ The regime left the supreme court intact after receiving a document signed by then supreme court president, Enrique Urrutia Manzano, declaring its support for the coup.¹¹⁶ The regime outlawed all leftist political parties and declared a state of siege that lasted until 1978.¹¹⁷ During the state of siege, cases relating to opponents to the State were transferred to military institutions.¹¹⁸

Soon after taking power, the regime took control over civilian activities and detained 45,000 people for interrogation due to their political beliefs.¹¹⁹ The Pinochet regime engaged in massive human rights violations against “enemies of the State.”¹²⁰ A well-known governmental action was the October 1973 “Caravan of Death,” in which at least fifty-seven people were taken from Chilean jails and executed and eighteen people were kidnapped.¹²¹ By the end of the regime in 1990, thousands of Chileans had fled the country, and at least 2,279 persons had been murdered or disappeared.¹²²

To address these atrocities, one of the first acts of the new president, Patricio Aylwin, was to create the National Truth and Reconciliation Commission by presidential decree.¹²³ The Commission was established to discover the truths about the grave human rights abuses that had occurred during Pinochet’s seventeen year rule.¹²⁴ The eight-member Commission received accounts from survivors, family members of disappeared or murdered persons, political parties, unions, and human rights groups, which resulted in 3,400 cases to investigate.¹²⁵ At the end of its investigations, the Commission prepared a 2,000-page report detailing individual human rights abuses and

(1996).

115. Decree Law No. 27 (Chile).

116. CONSTABLE & VALENZUELA, *supra* note 114, at 29, 117.

117. Decree Law No. 77 (Chile), *Diario Oficial*, Oct. 13, 1973; Edward C. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973-1995*, 2 *TULSA J. COMP. & INT’L L.* 253, 259-60, 265 (1995).

118. Snyder, *supra* note 117, at 262.

119. CONSTABLE & VALENZUELA, *supra* note 114, at 19-20.

120. Snyder, *supra* note 117, at 254.

121. *Judge Guzman Adding New Cases to Caravan Murders*, *SANTIAGO TIMES*, Aug. 30, 2001, available at 2001 WL 5996010.

122. Park, *supra* note 30, at 131-32.

123. Rebecca A. Fleming, Comment, *Holding State Sovereigns Accountable for Human Rights Violations: Applying the Act of State Doctrine Consistently with International Law*, 23 *MD. J. INT’L L. & TRADE* 187, 192 & n.45 (1999). Decree No. 355 of April 24, 1990, established the Commission. Decree Law No. 355 (Chile).

124. Fleming, *supra* note 123, at 192-93; *DerechosChile The National Truth and Reconciliation Commission Report—May 1991*, available at <http://www.derechoschile.com/english/rettig.htm> (last visited Sept. 16, 2001) [hereinafter *Truth Commission*].

125. *Truth Commission*, *supra* note 124.

government practice during the Pinochet regime.¹²⁶ However, the Commission did not have judicial authority to achieve individual accountability in a court of law.¹²⁷ Due to a pressing need for individual accountability and Chile's reluctance to prosecute Pinochet, other states stepped in.

2. The House of Lords

On October 16, 1998, the Central Court of Criminal Proceedings in Madrid, Spain sent an international warrant for the arrest of Senator Augusto Pinochet, who was undergoing surgery in England.¹²⁸ The warrant was based on evidence that Pinochet murdered Spanish citizens in Chile between September 11, 1973, and December 31, 1983.¹²⁹ The English High Court¹³⁰ held the warrant to be defective because it did not list crimes that could be considered extradition crimes under the 1989 English Extradition Act.¹³¹ A second arrest warrant was then issued by Spain on October 22, 1998, on the grounds of infliction of pain or suffering in the performance of official duties, alleging: detaining and conspiring to detain persons; threatening detainees with death, bodily harm, and further detention; and conspiring to commit murder.¹³² These crimes could be tried in England under the Criminal Justice Act of 1988 and the Hostage Taking Act of 1982.¹³³

Pinochet was arrested on October 23, 1998.¹³⁴ As a former head of state,

126. *Truth Commission*, *supra* note 124.

127. Terence S. Coonan, *Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable*, 20 *FORDHAM INT'L L.J.* 512, 540 (1996); see *Truth Commission*, *supra* note 124.

128. Woodhouse, *supra* note 112, at 2; Bhuta, *supra* note 26, at 512-13.

129. Woodhouse, *supra* note 112, at 2. Non-Spanish citizens may be prosecuted in Spain under Spanish law for genocide, terrorism, and other international crimes committed outside Spain. Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 *NEW ENG. L. REV.* 311, 311-12 (2001).

130. The High Court is equivalent to an appeals court but can be overturned by the Law Lords, the highest judicial body in England. *Pinochet to Appeal Extradition Order as Protests Mark One Year Anniversary of His Detention*, *CHIP NEWS*, Oct. 19, 1999, available at 1999 WL 10739164 [hereinafter *Protests*] (Chile Information Project).

131. Woodhouse, *supra* note 112, at 2-3. The Act requires that either: the crimes be committed in the country seeking extradition, the accused be a citizen of the country seeking extradition, or the crimes committed fall under the jurisdiction of the holding country, in this case England. *Id.* at 3; Extradition Act, 1989, c. 33, pt. I, § 2 (Eng.). The provisions of the statute were not satisfied, plus, under English law, England does not have jurisdiction over murder committed outside its territory, unless the murder was committed by British citizens. Woodhouse, *supra* note 112, at 3.

132. Woodhouse, *supra* note 112, at 3.

133. *Id.*

134. *Id.*

Pinochet asserted immunity under the State Immunity Act of 1978.¹³⁵ This defense was successful in the Divisional Court.¹³⁶ On appeal, in a three to two decision, the House of Lords held: 1) that it had an obligation under the U.N. Convention against Torture¹³⁷ either to extradite or prosecute where torture was alleged; 2) that immunity under the State Immunity Act of 1978 did not extend to criminal proceedings; and 3) that torture and hostage taking fell outside of the functions of heads of state recognized by international law.¹³⁸

Once the English Court determined Pinochet could be extradited, the decision rested with the Home Secretary,¹³⁹ British Interior Minister Jack Straw, who elected to extradite after considering many factors.¹⁴⁰ The factors included whether the order was lawfully made, the political ramifications, and the humanitarian factors, including Pinochet's age and health problems.¹⁴¹ Parties against the extradition noted political ramifications such as the effect prosecution outside Chile would have on Chile's rehabilitation as a democratic nation, Britain's national interest and the negative impact on trading relations, "far-reaching national and international implications," and the possible dangerous precedent that extraditing a former head of state could create.¹⁴² Parties seeking extradition argued that the Home Secretary's role is that of a quasi-judicial nature, Britain's moral and legal obligations to the international community required extradition, crimes against humanity should always be prosecuted, and extradition for such crimes is important to Britain's reputation.¹⁴³ The Home Secretary concluded: the offenses charged were not political offenses; the request was made in good faith; there were no time bars to prosecution; the passage of time would not make prosecution unjust or oppressive; and Pinochet was fit to stand trial.¹⁴⁴ He also noted that neither the

135. *Id.* at 3-4.

136. *Ex parte Pinochet No 1*, [1998] 4 All E.R. 897, 936.

137. The U.N. Convention on Torture became effective in the United Kingdom on December 8, 1988. Bow Street Metropolitan Stipendiary Magistrate and others, *ex parte Pinochet Ugarte* (No 3), [1999] 2 All E.R. 97, 111 (H.L. 1999). Chile, Spain, and England are all parties to the convention. *Id.*

138. Woodhouse, *supra* note 112, at 5.

139. The home secretary is responsible for initiating extradition proceedings in the courts and makes the final decision to extradite using his own discretion afforded by the Extradition Act of 1989. *Id.* at 2.

140. United Kingdom Home Secretary: Response of Her Majesty's Government Regarding the Spanish Extradition Request, Dec. 9, 1998, <http://www.parliament.the-stationery-office.co.uk>, reprinted in 38 I.L.M. 489 (1998) [hereinafter Home Secretary].

141. *Id.*

142. Woodhouse, *supra* note 112, at 6.

143. *Id.*

144. Home Secretary, *supra* note 140; Woodhouse, *supra* note 112, at 7.

possibility of a trial in Chile nor the possible effect extradition might have on Chile's stability and democracy, outweighed extradition.¹⁴⁵

Senator Pinochet challenged the House of Lords' decision by alleging bias because Lord Hoffman's ties to Amnesty International gave the appearance of impropriety.¹⁴⁶ A House of Lords Appeal Committee concluded that the failure to disclose his position with Amnesty International, which acted as a party in the litigation, automatically disqualified Lord Hoffman from hearing the appeal, resulting in an improperly constituted panel of the House of Lords.¹⁴⁷ Thus, the first appellate decision was vacated, and the appeal from the Divisional Court had to be reheard.¹⁴⁸ On March 24, 1999, a new panel composed of seven new law lords held, in a six to one vote, that Pinochet could be extradited on the grounds of torture and conspiracy to commit torture.¹⁴⁹ The panel's decision limited the crimes to those committed after the effective date of the Convention of Torture in England,¹⁵⁰ since crimes committed before that time could not have been tried in England.¹⁵¹ The second House of Lords' decision also held that dictators could not claim immunity because allowing an immunity claim would permit heads of states and other officials to engage in acts prohibited and criminalized under international law.¹⁵² Because the opinion reduced the extraditable offenses from thirty-one to three, the House of Lords decided the decision to extradite should be reconsidered by the Home Secretary.¹⁵³ On April 15, 1999, the Home Secretary confirmed his previous decision, stating that although the number of crimes was reduced, the crimes were serious enough to warrant extradition.¹⁵⁴

On October 22, 1999, attorneys for Pinochet challenged the proceeding before the High Court in a habeas corpus petition to free Pinochet.¹⁵⁵ The attorneys argued the decision of the Home Secretary was irrational since the offenses had been reduced to three.¹⁵⁶ In March 2000, those who hoped that England would do what Chilean justice failed to do were once again

145. Home Secretary, *supra* note 140; Woodhouse, *supra* note 112, at 7.

146. Bow Street Metropolitan Stipendiary Magistrate and others, *ex parte* Pinochet Ugarte (No 2), [1999] 1 All E.R. 577, 579 (H.L. 1999); Woodhouse, *supra* note 112, at 8.

147. *Ex parte Pinochet (No 2)*, 1 All E.R. 577; Woodhouse, *supra* note 112, at 8-9.

148. Woodhouse, *supra* note 112, at 9.

149. *Id.*

150. The Criminal Justice Act came into force on September 29, 1988, and gave effect to the International Convention on Torture. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 10-11.

154. *Id.* at 11.

155. *Id.* at 3, 12.

156. *Id.* at 11.

disappointed.¹⁵⁷ After 503 days of house arrest and a formal request from the Chilean government to let Pinochet return to Chile on humanitarian grounds, Jack Straw released the eighty-four year old Pinochet from British custody on compassionate grounds for health reasons.¹⁵⁸ Pinochet, however, was not yet free from prosecution. Upon return to his homeland, Pinochet faced an indictment for his actions in the “Caravan of Death.”¹⁵⁹

3. The Chilean System

After over seventeen years of Chilean courts failing to act on human rights complaints,¹⁶⁰ it appeared Pinochet would have to answer to them.¹⁶¹ In Chile, Pinochet faced 280 criminal complaints, including allegations for his role in the “Caravan of Death.”¹⁶² Judge Juan Guzman Tapia, a lower-court judge who also serves as prosecutor under Chilean law, requested that Pinochet’s legislative immunity¹⁶³ be lifted so his involvement in the “Caravan of Death” could be ascertained.¹⁶⁴ This request was made to the Santiago Appeals Court

157. On the anniversary of the arrest, there were celebrations and demonstrations in Chile and Britain. *Protests*, *supra* note 130.

158. Christopher L. Blakesley, *Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond—Human Rights Clauses Compared to Traditional Derivative Protections Such as Double Criminality*, 91 J. CRIM. L. & CRIMINOLOGY 1, 16 (2000); Gustavo Gonzalez, *Rights—Chile: Pinochet’s 503 Days in Britain*, INTER PRESS SERVICE, Mar. 2, 2000, available at 2000 WL 4090096.

159. *Court Upholds Indictment Against Pinochet: But Reduces Charges to Covering up Crimes*, SANTIAGO TIMES, Mar. 9, 2001, available at 2001 WL 5995317.

160. From 1973 to 1990, the supreme court only acted on two human rights complaints and openly supported the regime since it provided economic stability and protection for the country. *Zurita Admits Supreme Court Backed Military: Responds to Criticism About Court’s Failure to Act on Human Rights Violations*, SANTIAGO TIMES, Aug. 22, 2000, available at 2000 WL 7222308. Former supreme court judge and present-day senator, Enrique Zurita, stated that the court could not investigate the human rights complaints since they were vague and did not name the persons involved in the violations. *Id.*

161. *See Court Upholds Indictment Against Pinochet: But Reduces Charges to Covering up Crimes*, *supra* note 159.

162. Eduardo Gallardo, *Charges Against Pinochet Dropped*, ASSOCIATED PRESS, Dec. 11, 2000, available at 2000 WL 30320967.

163. *See supra* note 27 and accompanying text.

164. *Pinochet to Be Interrogated October 9: Judge Guzman Suspects Foul Play After Secret Document Leaked*, SANTIAGO TIMES, Aug. 23, 2000, available at 2000 WL 7222312. In December 1998, Chile’s Supreme Court ruled that the 1978 law providing amnesty to all persons accused of committing human rights violations between 1973 and 1978 did not apply to disappeared persons because that crime is continuing, and the amnesty only covered crimes committed between those dates. *Supreme Court Ruling Challenges Amnesty Law: Second Decision in Three Months Giving New Interpretation to Pinochet-Era Legislation*, CHIPS, Jan. 4, 1999, available at 1999 WL 10738402 (Chile Information Project).

in March 2000.¹⁶⁵ The request was granted on June 5, 2000.¹⁶⁶ On August 8, 2000, Chile's Supreme Court upheld the Santiago Appeals Court's decision to strip Pinochet of his lifetime immunity, giving Judge Guzman authority to interrogate Pinochet.¹⁶⁷

However, another obstacle under Chilean law delayed Judge Guzman's indictment of Pinochet; medical tests had to be conducted to determine Pinochet's mental state.¹⁶⁸ Under Chilean law, Pinochet could avoid prosecution if he lacked the requisite mental capacity to stand trial.¹⁶⁹

Without awaiting the medical tests, on December 1, 2000, Judge Guzman indicted Pinochet, placed him under house arrest and charged him with homicide for his involvement in the "Caravan of Death."¹⁷⁰ Defense attorneys successfully challenged the indictment because Judge Guzman indicted Pinochet without first interrogating him as required by Chilean law.¹⁷¹ The court rejected Judge Guzman's argument that sending requests for interrogatories to Pinochet while he was under house arrest in London constituted an acceptable substitute.¹⁷² However, the court indicated that it might allow charges against Pinochet if the proper legal requirements were followed.¹⁷³ Accordingly, Judge Guzman indicted Pinochet for the second time on January 29, 2001, and he was placed under house arrest.¹⁷⁴

In March 2001, the Chilean Appeals Court reduced the charges from allegedly planning killings and kidnappings to covering up the crimes.¹⁷⁵ The new charges ignored the fact that Pinochet was indicted for ordering the crimes and implied that he did not have knowledge of the crimes before or while they were being committed.¹⁷⁶ Then, on July 9, 2001, in a two to one ruling, the

165. *Pinochet to Be Interrogated October 9*, *supra* note 164.

166. *Pinochet Immunity Hearing Begins: Human Rights Accord Could Affect Ruling*, SANTIAGO TIMES, July 19, 2000, available at 2000 WL 7222167.

167. *Pinochet to Be Interrogated October 9*, *supra* note 164.

168. *Id.*

169. Blakesley, *supra* note 158, at 25.

170. *Court Will Rule on Indictment: Appeals Court to Examine Pinochet's Request*, SANTIAGO TIMES, Dec. 6, 2000, available at 2000 WL 7222671; *Supreme Court Dismisses Pinochet Indictment: Court Orders Guzman to Interview Pinochet*, SANTIAGO TIMES, Dec. 21, 2000, available at 2000 WL 7222737.

171. *Supreme Court Dismisses Pinochet Indictment*, *supra* note 170.

172. *Id.*

173. *Id.*

174. *Pinochet Indicted: Human Rights Advocates Rejoice as Former Dictator Is Placed Under House Arrest*, SANTIAGO TIMES, Jan. 30, 2001, available at 2001 WL 5995171.

175. *Court Reduces Pinochet Charges*, TORONTO STAR, Mar. 9, 2001, available at 2001 WL 15737829.

176. *See id.*

Chilean Appeals Court ruled that Pinochet was not well enough to stand trial.¹⁷⁷ The prosecution went to the supreme court again, arguing that the ruling was illegal and arbitrary.¹⁷⁸ On August 21, 2001, the supreme court agreed, five to zero, to consider this argument, opening the possibility for a future trial.¹⁷⁹

4. The Future of Pinochet

Ten years after Pinochet stepped down from power, Chileans seeking to prosecute him have been unable to overcome obstacles inherent in the international and Chilean justice systems. The possibility of trying Pinochet is drowning in pre-trial motions and coming to a slow procedural death. With his age, the ex-dictator may very well be able to live out his days in pre-trial motions, relying on the "dictator's disease."¹⁸⁰

Whether Pinochet will ever be held accountable for committing crimes against humanity is yet to be seen. However, with Pinochet's status with the military and the slow pace of the Chilean justice system, it is doubtful that the eighty-five year old will be tried in Chile or in any other forum. Pinochet supporters are asking for Judge Guzman to be taken off the Pinochet case, claiming he has not acted properly.¹⁸¹ In addition, a new law, enacted in June 2000, guarantees the anonymity of any person who provides information about the whereabouts of the 1,000 persons who have yet to be found.¹⁸² Although the law may provide further evidence against the ex-dictator, it may also have limited results in obtaining information from those who were involved in the deaths and disappearances during Pinochet's rule because the law does not protect them from prosecution.¹⁸³

Despite attempts to bring accountability to the Pinochet regime, Chile has failed to provide a large group of its citizens with the justice it needs, and the President has failed his goal of showing that justice and the law apply to

177. Patrice M. Jones, *Chile Court Quashes Trial of Pinochet: Ex-Dictator Ruled Mentally Unfit*, CHI. TRIB., July 10, 2001, available at 2001 WL 4092212.

178. *Pinochet Appeal Will Be Considered by Supreme Court*, SANTIAGO TIMES, Aug. 22, 2001, available at 2001 WL 5995973.

179. *Id.*

180. The "dictator's disease" refers to the trend of past dictators to rely on ailing health in order to escape trial for past crimes. Jim Hoagland, *The Sinking Dictator*, WASH. POST, Sept. 29, 2000, at A33, available at 2000 WL 25418898.

181. Eduardo Gallardo, *Lawyers Seek Removal of Chile Judge*, ASSOCIATED PRESS, Jan. 4, 2001, available at 2001 WL 3649242; Tim Vandennack, *Chile's Moves to Reconcile Its Tortured Past*, CHRISTIAN SCI. MONITOR, Dec. 5, 2000, at 7, available at 2000 WL 4432771.

182. *Allende Statute Inaugurated at La Moneda*, SANTIAGO TIMES, June 27, 2000, available at 2000 WL 7222080.

183. See Roht-Arriaza, *supra* note 129, at 316-17.

everyone in Chile. “[A]s a president, I have to be able to demonstrate to the world that we are living in a society where anybody can be judged in Chile, no matter how important and how humble he is, or she is.”¹⁸⁴

B. *Milosevic Awaiting Trial*

Until recently, Milosevic managed to avoid accountability in the one forum specifically designed to provide such accountability: the International Criminal Tribunal for the Former Yugoslavia.¹⁸⁵ A case against Yugoslavia by Bosnia and Herzegovina is currently pending before the International Court of Justice; however, a decision against Yugoslavia would only provide state responsibility and not individual accountability because Bosnia and Herzegovina are suing the State of Yugoslavia.¹⁸⁶ State responsibility, nevertheless, would recognize a system of genocide implemented by Yugoslavia.

1. 1986 to 1999

In 1986, a wave of Serbian nationalism began to permeate Yugoslavia.¹⁸⁷ The Serbian Academy of Arts and Sciences attacked the Yugoslav Constitution and presented a Manifesto proclaiming former Yugoslav president, Josip Broz Tito,¹⁸⁸ had discriminated against the Serbs who were dominated by Croatia and Slovenia.¹⁸⁹ That same year, Slobodan Milosevic became Serbian Communist Party chief¹⁹⁰ and was elected Serbian president in 1990.¹⁹¹ In 1991, when Croat leader, Stipe Mesic, was supposed to rotate into the federal presidency in accordance with the Yugoslav Constitution,¹⁹² Milosevic used his political

184. *Online Focus: Confronting the Past* (PBS Online NewsHour broadcast, Mar. 2, 2000), at http://www.pbs.org/newshour/bb/latin_america/jan-june00/pinochet_3-2.html (statement by President-elect Ricardo Lagos).

185. ICTY Statute, *supra* note 10.

186. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), 1996 I.C.J. 595 (July 11) (preliminary objections).

187. SCHARF, *supra* note 4, at 25. Yugoslavia consisted of six federal republics: Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia, and Montenegro as well as two autonomous provinces, Kosovo and Vojvodina, located in the Republic of Serbia. *Id.* at 24.

188. Tito was born in Croatia and died in 1980. *Id.* at 24.

189. *Id.* at 25. The Manifesto spoke of the “physical, political, legal and cultural genocide against the Serb population in Kosovo.” *Id.*

190. *Id.*

191. *Boundaries of Peace: The Bosnia Negotiations in Dayton Miami Valley View*, DAYTON DAILY NEWS, Nov. 1, 1995, at 4A, available at 1995 WL 11442409.

192. The constitution provided that the federal presidency rotate annually among the republics. SCHARF, *supra* note 4, at 26.

power to block him.¹⁹³ Milosevic used propaganda to play on Serb fears and "spread ethnic hatred like an epidemic."¹⁹⁴ He began his reign of terror by placing federal troops in Kosovo.¹⁹⁵

The disagreements among the republics regarding the Yugoslav Constitution resulted in a series of declarations of independence by Slovenia and Croatia.¹⁹⁶ Unable to stop secession, the Yugoslav National Army ("JNA"), under Milosevic's direction, began to support opposition groups in the republics.¹⁹⁷ The JNA supported Ethnic Serbs in Croatia, who seized one-third of the country and killed hundreds of Croats.¹⁹⁸ In 1992, Bosnia declared independence, and the Bosnian Serbs, under the leadership of their self-proclaimed president, Radovan Karadzic, declared an independent republic in an enclave in Bosnia, the "Republic Srpska."¹⁹⁹ Aided by the JNA, Bosnian Serbs seized 70 percent of Bosnia, and ethnic cleansing against the Muslim population began.²⁰⁰ Milosevic's reign of terror appears to have ended where it began, with crimes against humanity in Kosovo being reported as late as June 1999.²⁰¹

2. Milosevic and the U.N. System

As was the case in Chile, the first method of obtaining accountability was a commission, this time established by the United Nations.²⁰² U.N. Resolution 780 created an impartial commission consisting of experts who would assess the information provided by states and obtained through the commission's own investigative efforts.²⁰³ In its report of February 1993, the Commission determined that ethnic cleansing was carried out "by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilians in ghetto areas, forcible removal, displacement

193. *Id.*

194. *Id.* at 25 (quoting WARREN ZIMMERMANN, ORIGINS OF A CATASTROPHE: YUGOSLAVIA AND ITS DESTROYERS—AMERICA'S LAST AMBASSADOR TELLS WHAT HAPPENED AND WHY 120 (1996)).

195. *Id.*

196. *Id.* at 26.

197. *Id.*

198. *Id.*

199. *Id.* at 27.

200. *Id.* at 28.

201. U.S. DEP'T OF STATE, ETHNIC CLEANSING IN KOSOVO: AN ACCOUNTING 3 (Dec. ed., 2d report 1999).

202. SCHARF, *supra* note 4, at 40.

203. *Id.* The resolution was adopted on October 6, 1992 by the Security Council. *Id.* at 42.

and deportation of civilians, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property.”²⁰⁴ Although the commission did not provide for any individual accountability, it recommended the Security Council implement a tribunal with the authority to arrest and prosecute individuals.²⁰⁵

On February 22, 1993, the Security Council adopted Resolution 808 establishing the International Criminal Tribunal for the Former Yugoslavia (“ICTY”).²⁰⁶ The ICTY has jurisdiction over all violations of international humanitarian law committed after 1991 in the former Yugoslavia.²⁰⁷ Although the tribunal prosecutorial position has been in operation since 1994, and violence in the region continues, Slobodan Milosevic was not indicted until 1999. He resided in Serbia, where he was re-elected as leader of the Socialist Party, until he was forced to step down October of 2000.²⁰⁸ Despite knowledge of his whereabouts, President Kostunica did not arrest Milosevic and made surrendering Milosevic to the West a very low priority.²⁰⁹

In February 2001, Yugoslav officials began investigating Milosevic for embezzlement and election fraud.²¹⁰ The Yugoslav indictment, however, did not address any war crimes or crimes against humanity,²¹¹ and Serbia cooperated in the arrest of Milosevic only after being threatened with the loss of aid from the United States.²¹² After a two-day standoff and threatening to kill his daughter and his wife, Milosevic surrendered to Serbian authorities on April 1, 2001.²¹³ During a June cabinet session, the Yugoslav government adopted a

204. *Id.* at 45-46 (quoting *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), Annex 1, para. 56, U.N. Doc S/25274 (1993)).

205. *See id.*

206. ICTY Statute, *supra* note 10.

207. *See id.* art. I.

208. Jean-Eudes Barbier, *A Year After Milosevic’s Fall, Yugoslavia Free But Still Faces Challenges*, AGENCE FRANCE-PRESSE, Oct. 4, 2001, available at 2001 WL 25029044. This is partly due to the 1994 Dayton Peace Accords, which afforded Milosevic de-facto immunity. M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 419 (2000).

209. Editorial, *A Test in Serbia*, WASH. POST, Nov. 28, 2000, at A26, available at 2000 WL 29918272; Olivia Ward, *Kostunica Firm on Milosevic Handover*, TORONTO STAR, Apr. 4, 2001, at A10, available at 2001 WL 15741148.

210. Dusan Stojanovic, *Investigation of Milosevic Ordered*, ASSOCIATED PRESS, Feb. 28, 2001, available at 2001 WL 15175272.

211. *See id.*

212. *See U.S. to Continue Aid to Yugoslavia: Secretary of State Colin Powell Qualified the Assistance by Linking It to the Balkan Nation’s Pledge to “Cooperate Fully” with the War Crimes Tribunal*, STAR.-TRIB. (Minneapolis-St. Paul, Minn.), Apr. 3, 2001, at 6A, available at 2001 WL 9620201.

213. Dusan Stojanovic, *Mayhem Marked Hours Before Arrest Guns, Broken Plans Took*

decree of cooperation with the Hague that conflicts with the Yugoslav law forbidding the extradition of Yugoslav citizens.²¹⁴ It was adopted after a bill, which would have allowed extradition, failed in the Yugoslav Parliament and a week before an international donor conference.²¹⁵ In June 2001, over two years after his indictment, Milosevic was transferred to the Hague to face charges for atrocities committed in Kosovo.²¹⁶

3. The Future of Milosevic

Milosevic unsuccessfully challenged jurisdiction of the ICTY in a Dutch court in late August 2001.²¹⁷ Then, in November, the ICTY's chief prosecutor charged Milosevic with twenty-nine counts including genocide and war crimes based on his conduct in the Bosnian War; the tribunal found a trial was warranted based on the indictment.²¹⁸ This would be the first trial of a head of state for genocide charges.²¹⁹ However, the ICTY was taking a risk because genocide allegations are difficult to prove.²²⁰ Milosevic's trial was scheduled for February 2002.²²¹

up Final Hours, AUGUSTA CHRON., Apr. 2, 2001, at A09, available at 2001 WL 19109270.

214. Katarina Kratovac, *Yugoslav Leaders Draft Decree*, ASSOCIATED PRESS, June 22, 2001, available at 2001 WL 24028124; Vesna Peric Zimonjic, *Milosevic's Extradition Procedure Begins*, INTER PRESS SERVICE, June 26, 2001, available at 2001 WL 4804433. Milosevic's lawyer filed a challenge with the Constitutional Court stating the decree was unconstitutional and illegal since it was agreed upon when approximately half the ministers in the cabinet were absent. *Milosevic Lawyer Challenges Extradition: Head of Defence Team Claims Decree Is Unconstitutional*, BELFAST NEWS LETTER, June 26, 2001, at 15, available at 2001 WL 24067970. The Yugoslav Constitutional Court held the decree to be unconstitutional. *Yugoslav Decree on Cooperation with UN Court Unconstitutional*, AGENCE FRANCE-PRESSE, Nov. 7, 2001, available at 2001 WL 25056664.

215. *Belgrade Set to Issue Decree Allowing for Milosevic's Extradition*, AGENCE FRANCE-PRESSE, June 23, 2001, available at 2001 WL 2434867. At the conference donor countries and organizations pledged \$1.28 billion in aid to Yugoslavia. Smith, *supra* note 92.

216. *Bosnian Serbs React with Disbelief to Milosevic Transfer*, AGENCE FRANCE-PRESSE, June 28, 2001, available at 2001 WL 2447536; *UN Rights Chief Urges Prompt Transfer of Milosevic to The Hague*, AGENCE FRANCE-PRESSE, June 26, 2001, available at 2001 WL 2437059.

217. *Milosevic Challenges Tribunal's Jurisdiction in Dutch Court*, AGENCE FRANCE-PRESSE, Aug. 23, 2001, available at 2001 WL 24996679; *Milosevic Loses Legal Challenge to UN Court*, IRISH TIMES, Sept. 1, 2001, at 12, available at 2001 WL 27061790.

218. William Drozdiak, *Milosevic to Face Genocide Trial for Role in the War in Bosnia: Yugoslav Ex-Leader First Head of State to Be so Charged*, WASH. POST, Nov. 25, 2001, at A22, available at 2001 WL 30327865.

219. *Id.*

220. *Id.*

221. *Id.* He faces life imprisonment because the ICTY does not have the death penalty. *Id.*

*C. The Broader Implications of the Pinochet and
Milosevic Cases*

Even if Pinochet and Milosevic are never held accountable for abuses committed while they were in power, the attempts to prosecute them have led to significant advances for international humanitarian law²²² and human rights and provided a precedent for trying ex-dictators.

The House of Lords case established the principle that dictators cannot assume they will be safe in another country after having committed atrocities in their own state.²²³ It also warned other leaders to consider what happens beyond their borders,²²⁴ and “illustrated the pressures of working within a framework in which domestic decisions are tempered by the need to comply with international obligations, withstand international scrutiny and secure international approval.”²²⁵ The decision to remove Pinochet’s immunity in England provides a precedent for limiting claims of immunity by former heads of state and opened the way for future prosecutions.²²⁶ This effect is already apparent in Chile where the House of Lords’ case was affirmed by Judge Guzman’s interpretation of immunity, which was later accepted by the Chilean Supreme Court.²²⁷

Although the outcome of Milosevic’s trial is uncertain, its importance is not. Regardless of the verdict, the fact that an international body is trying an ex-dictator for the first time in history will certainly have implications. The ICTY prosecutor’s indictment of Milosevic established the precedent that leaders who are still in power could be indicted and that no one is above the justice system. The case against Milosevic is also slowly discounting the traditional notion that justice must be sacrificed to attain peace.²²⁸ In addition, lessons learned from the ICTY will provide for more effective tribunals if that forum is utilized in the future. In addition, the trial at the Hague will aid the international community

222. “International humanitarian law is the body of law that governs the manner in which wars and other armed conflicts are conducted and, specifically, attempts to prescribe how combatants must conduct themselves and how unarmed civilians must be treated in such conflicts.” *Hearing, supra* note 85, at 4 (testimony of Nina Bang-Jensen, Coalition for Int’l Justice).

223. PBS, *Online NewsHour Update: Britain Releases Pinochet* (Mar. 2, 2000) (citing British Home Secretary Jack Straw) at http://www.pbs.org/newshour/updates/march00/pinochet_3-2.html.

224. *Id.*

225. Woodhouse, *supra* note 112, at 1.

226. *Id.* at 12.

227. *See supra* notes 153, 168 and accompanying text.

228. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 30 (2001); Kingsley Chiedu Moghalu, *Peace Through Justice*, WASH. POST, July 6, 1999, at A15, available at 1999 WL 17012617.

in determining whether ad-hoc tribunals are adequate for trying ex-dictators. Finally, the case against Milosevic demonstrated to the international community that there are situations where deference to a local government would be inappropriate.

Even though these cases have provided international human rights law with precedent by attempting to bring ex-leaders to justice, a void still remains in international law that can only be filled by an organ capable of bringing ex-dictators to justice.

IV. BEYOND THE PATCHWORK SYSTEM

“[T]here are some crimes—crimes of genocide or of torture or of terrorism—that are so heinous that we need to have some kind of international system, international convention, to be able to go after those crimes, even when national legislatures or judicial systems aren’t capable of doing so.”²²⁹ Problems and obstacles to justice present in the current patchwork system reiterate the need for a system under international law that has the judicial ability and enforcement mechanisms to bring ex-dictators and human rights violators to justice.

The international community has recognized this need and sought to satisfy it through a new International Criminal Court.²³⁰ The International Criminal Court (“ICC”) statute, adopted in 1998 at the Rome conference,²³¹ provides the ICC with jurisdiction over genocide, war crimes, and crimes against humanity where national governments are unable or unwilling to prosecute.²³² Once 60 countries have ratified the convention, it will come into force.²³³ However, some doubt exists as to whether this court will be any more successful in bringing ex-dictators to justice than the present patchwork system.²³⁴

As is the case with both Pinochet and Milosevic, one of the major problems prosecutors face is bringing the defendant into custody. Ex-dictators maintain power in their respective states for various reasons. In addition, many of their

229. *Online Focus: General Augusto Pinochet*, *supra* note 19 (quoting Arturo Valenzuela).

230. ICC Statute, *supra* note 10, 37 I.L.M. at 1002-03.

231. The vote was 120 in favor, 7 opposed and 21 abstentions. Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 22 (1999).

232. ICC Statute, *supra* note 10, art. 5, 37 I.L.M. at 1003-04.

233. ICC Statute, *supra* note 10, art. 126, 37 I.L.M. at 1068. As of August 13, 2001, 37 countries have ratified the Rome Statute. Rome Statute of the ICC, Ratification Status, <http://www.un.org/law/icc/statute/status.htm> (Aug. 31, 2001).

234. Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT’L L. 337, 354-56 (1999).

supporters are persons in power who benefit from not extraditing or not placing the ex-dictator into custody, the fewer the trials, the less information obtained about the involvement of other persons. Thus, by protecting the dictator, culpable people indirectly protect themselves. In the case of Milosevic, it was not until the United States threatened to hold back aid that Milosevic was taken into custody. The House of Lords was only able to place Pinochet under house arrest once he was in England. Until defendants are taken into custody without deference to political or economic considerations, human rights supporters should be wary of the current patchwork system and an international criminal court that depends on state compliance for extraditions. If Milosevic had not begun to lose power within his country in October or if the prime minister and the economic minister had not pushed the transfer of Milosevic for financial reasons, due in no small part to the United States threatening to withhold monetary aid, he may not be before the ICTY today.

The role economics and politics played in bringing Milosevic to the Hague is disconcerting for it suggests that popular ex-dictators may still avoid accountability. It also suggests that wealthy states that are not dependant upon financial aid may continue to harbor ex-dictators and persons accused of crimes against humanity. In addition, the possibility remains that countries of lesser importance to wealthier countries or violations that are noticed less by the international community may go unchecked.²³⁵

The gravest problem facing the international community is not the lack of judicial bodies, but rather the inefficiency of those currently in existence. Creating an ICC provides the international community with an existing and capable forum for bringing ex-dictators to justice. Countries that are unwilling to try a dictator but are willing to extradite will have a permanent forum in which to do so. It also allows the court to establish itself and work out its kinks while remaining a permanent entity.

However, the limitations of the ICC do not guarantee jurisdiction over dictators who commit atrocities. Without the United Nations taking a stronger role in ensuring that persons indicted by the ICTY and other bodies are detained, ex-dictators will continue to live out their days in safe havens. In order for the ICC to be successful, the international community must realize that the limitations placed on the ICC cannot be the same limitations currently prohibiting other fora from bringing ex-dictators to justice. A mechanism for detaining ex-dictators and persons accused of international human rights violations needs to be put into place. The mechanism must be strong and able

235. The atrocities in Kosovo pale in number to those in Cambodia, yet Cambodia has received less international attention and no one has been held accountable. See *Cambodia: Brother Number One Remembered with Hatred*, CAMBODIA TIMES, June 9, 1996, available at 1996 WL 11707048.

to detain persons regardless of their popularity or the political situation. In addition, states need to support the ICC so individuals can be held accountable. States need to live up to their international obligations to extradite persons accused of grave human rights violations. Until the international community and the United Nations strongly support a forum and take measures to ensure its success, the implementation of additional adjudicatory bodies will not fill the void in bringing perpetrators of human rights violations to justice.

V. CONCLUSION

“Until recently, it seemed that if you killed one person, you went to jail, but if you had the power to murder thousands, you also had the power to arrange or impose your immunity.”²³⁶ Nuremberg sought to change this, recognizing that committing crimes against humanity is an international offense. Nuremberg reflected the ideal that crimes against humanity must be recognized and punished, lest we repeat the past. “The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.”²³⁷ Fears of repeating genocide and crimes against humanity have been vindicated by post-Nuremberg atrocities.

[T]he pledge of “never again” quickly became the reality of “again and again” as the world community failed to take action to bring those responsible to justice when 4 million people were murdered in Stalin’s purges (1937-1953), 5 million were annihilated in China’s Cultural Revolution (1966-1976), 2 million were butchered in Cambodia’s killing fields (1975-1979), 30,000 disappeared in Argentina’s Dirty War (1976-1983), 200,000 were massacred in East Timor (1975-1985), 750,000 were exterminated in Uganda (1971-1987), 100,000 Kurds were gassed in Iraq (1987-1988), and 75,000 peasants were slaughtered by death squads in El Salvador (1980-1992).²³⁸

The violence continues, yet the international community has failed to implement a forum capable of efficiently and effectively holding ex-leaders accountable for crimes against humanity. With the present system unable to

236. Human Rights Watch, *supra* note 2.

237. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98-99 (1947), available at <http://www.yale.edu/lawweb/avalon/imt/proc/11-21-45.htm> (Justice Robert H. Jackson, Opening Speech for the Prosecution); Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 YALE L.J. 449, 449 (1995).

238. SCHARF, *supra* note 4, at xiii-xiv.

adequately prosecute ex-dictators such as Pinochet and Milosevic, it is apparent that an international system with a focus on preventing and prosecuting international human rights abuses is necessary. The International Criminal Court may be this forum, but it needs the support of states to overcome the obstacles present in the fora currently available. Without an efficient and effective system to combat crimes against humanity by leaders, we may find ourselves repeating the words characteristic of this century, one hundred years from now:

This has been a good century for tyrants. Stalin killed millions but was never even charged. Pol Pot slaughtered well over one million but never saw the inside of a prison cell. Idi Amin and Raoul Cedras are comfortably retired. . . . Chile's General Augusto Pinochet, too, will probably escape trial.²³⁹

Only through an effective forum and by bringing ex-dictators to justice will we be able to say that the 21st century was a bad century for tyrants and a good one for human rights.

239. Douglass Cassel, *Why We Need the International Criminal Court*, CHRISTIAN CENTURY, May 12, 1999, at 532, available at 1999 WL 10269261.

