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The Politics of Prosecutions under the Convention Against Torture
Aaron Solomon*

Recent incidents suggest that prosecutions under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Convention Against Torture") are highly vulnerable to political pressures brought to bear by the potential defendant and his state. The dismissal of charges against former Chadian dictator Hissene Habre in Senegal and the detention and release of Peruvian Major Tomas Ricardo Anderson Kohatsu in the United States indicate that the successful prosecution of Augusto Pinochet under the Convention Against Torture was essentially an anomaly rather than the beginning of a new trend.

The prosecution of Pinochet established the precedent that former-Head-of-State immunity, and by extension all diplomatic immunities, do not apply to acts of torture. The decision was a concrete application of Article 5 of the Convention Against Torture, which requires nations to extradite or prosecute alleged torturers within their boundaries regardless of where the alleged crimes took place. The decision was widely hailed as one that would put fear into dictators around the world; however, it has done little to influence countries to prosecute individuals under the Convention Against Torture. Subsequent prosecutions that were begun ended in failure as the result of political interference in the judicial process.

Hissene Habre, dictator of Chad from 1982 to 1990, has been implicated in 40,000 murders and a large-scale pattern of torture. He was indicted in Senegal in

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1. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment as modified, UN Doc A/139/51 (1984).
4. See, for example, Editorial, Justice Denied in Senegal, NY Times A18 (July 21, 2000).
5. For example, in 1999 Austria allowed a top aid of Saddam Hussein to flee the country after a criminal complaint had been filed against him regarding the murder of Iraqi Kurds. See Colum Lynch, Iraqi Official Flee Austria: Alleged Role in Kurd Slayings Spurs Criminal Complaint, Wash Post A18 (Aug 19, 1999).
February 2000 on charges of torture. Far from advocating on Habre’s behalf, Chad (now ruled by Habre’s former army chief of staff) lent its support to the prosecution of other members of Habre’s regime still in Chad. Although Senegal had been known for its independent judiciary, the charges against Habre were dismissed in July 2000, and journalists generally agree that the dismissal was due to high-level tampering. While the case was under consideration, a panel headed by the president of Senegal removed the investigating judge. The President then promoted the head of the Indicting Chamber, the body that issues the actual indictments, and it was this judge who soon after dismissed the case against Habre. Moreover, the President appointed Habre’s lawyer as a paid consultant to the government. Commentators have suggested that this interference may have been due to Habre’s connections within Senegal’s wealthy elite, and the well-financed lobbying and media campaign he ran while under investigation that characterized him as an African who was being persecuted by “reactionary and neocolonial French circles.”

Senegal dismissed the charges against Habre on the grounds that his crimes were not committed in Senegal and that the applicable statute of limitations had run. However, Senegal signed and ratified the Convention Against Torture in 1986. This treaty clearly grants jurisdiction under Article 5 for “offences in cases where the alleged offender is present in any territory” under the jurisdiction of the prosecuting state, regardless of where the criminal acts took place. Moreover, under Senegalese law, the ten-year statute of limitations only began to run in 1990, when Habre was deposed and prosecutions became possible; the charges against Habre were filed within this period.

Although of dubious value as precedent because it ignored rather than interpreted the Convention Against Torture, the decision on its face did not challenge the Pinochet holding. The Senegalese court did not reach the questions of Head-of-
Prosecutions under the Convention Against Torture

State immunity or dual criminality which were so central to the Pinochet prosecution, but rested instead on issues of territorial jurisdiction and the statute of limitations. The flimsy nature of the pretexts relied upon to dismiss the charges against Habre might suggest that the court did not avoid explicitly overruling Pinochet because it considered it too powerful to change. If it feared scrutiny, surely the court could have developed a more compelling rationale for setting Habre free. However, it is more likely the court considered the Pinochet decision too weak to restrain it and simply found it easier to ignore rather than challenge.

Major Tomas Ricardo Anderson Kohatsu flew to the United States in March 2000 to take part in a hearing of the Inter-American Commission on Human Rights. He was detained in transit by the Federal Bureau of Investigation ("FBI"), which questioned him regarding acts of torture he was alleged to have committed as an intelligence officer in Peru. After several hours of interrogation the FBI was prepared to arrest him. It seems likely that the Justice Department sought to prosecute Anderson under domestic laws mandated by the Convention Against Torture. Criminal penalties took effect when the Convention Against Torture was ratified by the United States in 1994, and the law lays down severe penalties for "whoever outside the United States commits or attempts to commit torture." This legislation complies with Article 5 of the Convention Against Torture which requires each party to take action to establish jurisdiction over offenders in its territory. While Anderson was detained, the Justice Department contacted potential witnesses and began to prepare a case against him, yet Anderson was released in the early morning hours the day after his detention at the urging of the State Department, which argued that he had diplomatic immunity as the result of his visa status.

The decision by the State Department to release Anderson was clearly politically driven. While the issue has never actually been litigated or officially determined, it was the opinion of the Justice Department, on firm legal grounds, that Anderson's G-2 visa, which allows certain individuals who would otherwise be ineligible for visas to enter the country to take part in the business of international organizations, did not grant him diplomatic immunity. Even if Anderson had some form of diplomatic

20. While it was reported that Anderson was to have been prosecuted under the Torture Victims Protection Act, this act provides only a civil remedy against torturers. See, for example, Karen DeYoung and Lorraine Adams, US Frees Accused Torturer; Human Rights Groups Diary Ruling on Peruvian, Wash Post A1 (Mar 11, 2000); Youngers, The Pinochet Ricchet, Nation at 5 (cited in note 19); Torture Victim Protection Act, 28 USC § 1350 (Supp 2000).
21. 28 USC § 1350.
23. Id.
24. Id.
immunity, the Pinochet decision suggests that it might not have applied to his crimes against humanity. As a general matter, determinations regarding to whom a certain law applies are made first by the Justice Department when it decides to prosecute that individual and then reviewed by the judicial branch. This procedure was followed in the Pinochet case and is employed in conventional prosecutions. The State Department becomes involved only when political issues are implicated; in this case it overruled the Justice Department for political reasons. In the words of one official, "This floats up to State and the NSC [National Security Council], and they come back with 'We have to let him walk.'"

The United States likely felt it could ill afford the political cost of prosecuting Anderson. A cooperative relationship with Peru is important to the United States for a number of reasons, including drug eradication and interdiction. Even if the only concern was protecting human rights in Peru, a prosecution of Anderson might have done more harm than good. Peru is under a great deal of pressure from the United States regarding its human rights record. In October of 1999 Peru was censored by the United States Senate for "anti-democratic measures" and the Peruvian embassy in Washington continues to devote an entire section of their website to defending Peru's handling of the case of Lori Berenson, an American accused of membership in a leftist rebel group and sentenced by a Peruvian military court to life in prison for treason. The State Department has chosen to work with Peru to address issues of human rights and democracy and clearly finds this approach more suitable than confrontation. This dialogue was in a sensitive period when Anderson was arrested. The day before Anderson was detained the State Department had issued a statement expressing its deep concern regarding the pre-election conditions in Peru and describing its efforts to encourage the government to strengthen the democratic process. The State Department likely feared that its ability to pressure President Fujimori to allow a democratic election would have been seriously jeopardized by the prosecution of Anderson.

Prosecutions under the Convention Against Torture are vulnerable to a wide range of pressures. Habre was able to get the president of Senegal to quash his

25. See, for example, the opinion of Lord Hutton in R v Bow Street Metro Stipendiary Magistrate and Others, ex parte Pinochet Ugarte, 1 AC 147 (House of Lords 1999).
indictment because he had integrated himself into the wealthy elite of Senegalese society and had the contacts necessary to pull the needed strings. Anderson, in contrast, escaped not because of his personal power but because his prosecution would have damaged relations between Peru and the United States. With the exception of extreme circumstances such as Nuremberg, defendants are generally able to develop one or both of these types of pressure. Pinochet was actually able to exert both—he had powerful friends in the United Kingdom and abroad, such as Margaret Thatcher and George Bush, and he had the support of the government of Chile. Only the fact that the prosecutor had been preparing the case for a long time prior to Pinochet’s arrival in the UK, was from a third county, and was able to execute an Interpol warrant outside the British and Spanish political structure prevented Pinochet from escaping prosecution like Anderson. Once in the judicial system, the prosecution could not easily be influenced by political means given the strength of the independent judiciary and the public support for his prosecution. Although the Pinochet Principle may retain nominal legal force, it is likely only in these unusual circumstances—an uncontested entry into the court system, an independent judiciary and strong public pressure—that the political forces that tend to prevent successful prosecutions can be subverted.

31. Human Rights Watch, Senegal Actions on Ex-Chad Dictator Deported (cited in note 12).