

PINNING GUILT ON PINOCHET

*Alfred P. Rubin**

Britain's Highest Court has decided that a treaty requires the British to honor a Spanish request for the extradition of General Augusto Pinochet Ugarte, Chile's strong man from 1973 until he "retired" with a rank of "Senator for Life" in Chile. The decision has raised the hopes of many that Pinochet would finally be made to face the moral evils that many think justify criminal punishment. Less noticed, it has aroused the apprehension of those concerned with the structure of international society and the place of "law" in it. Assuming that Pinochet is in fact responsible for the evils his government has been accused of, I am reminded of Robert Bolt's play, *A Man for All Seasons*,¹ in which St. Thomas More refuses to cut a road through the law to catch a wicked person:

And when the last law was down, and the Devil turned round on you - where would you hide . . . ? This country's planted thick with laws . . . , man's laws, not God's — and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.²

The first rule of law is its distribution of authority; Constitutional Law. No matter how wicked a person, before he or she can be tried, a court must be found with jurisdiction over the person and the offense. Since Spanish criminal law does not apply to events in Chile any more than it applies to events in the United States, the first question is whether Spain has the necessary jurisdiction to apply to Pinochet its version of "international criminal law." There are many reasons why it does not. Spanish judges given authority in a Spanish legal order do not represent the international legal community; they represent the Spanish legal community. If under the law of Spain they can apply the Spanish version of "international criminal law" to the acts of a Chilean, Pinochet, in Chile, that remains an authority derived from Spanish constitutional law, not

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1. Robert Bolt, *A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS* (Vintage Books 1990) (Reissue edition).

2. *Id.*

from international law. Secondly, under the unwritten constitution of international society, derived from history, practice, and political necessity, like the unwritten British Constitution, all states are equal. If Spain can try Pinochet for violations of the Spanish version of international criminal law, then Iran can try Salman Rushdie under the Iranian version of international criminal law. Nor does the oft-mentioned example of piracy stand close inspection; the opinions of publicists and even dicta in tribunals does not make a convincing precedent, and the reasons why no country arrests or tries a foreign pirate who has attacked only third country shipping are clear. Would the United States accept the authority of Haiti or Cuba to rule the waves in that way? In main-stream international law texts jurisdiction is divided into segments. Even if a state has "jurisdiction to prescribe," that is the authority to make illegal by its own version of international law some acts by foreigners in so-called "universal jurisdiction" cases, it does not necessarily have "jurisdiction to enforce." It is the lack of that "jurisdiction to enforce" that makes it necessary for Spain to request cooperation, extradition, from the United Kingdom. Even if Pinochet is extradited, thus placing him within Spain's territorial "jurisdiction to enforce," that does not mean that Spain has "jurisdiction to adjudicate" in a criminal matter. I know of no case in which a war criminal or other supposed violator of "international criminal law" from a major power has ever been tried by a neutral tribunal.

The precedents in law all go the other way and have nothing to do with "chief of state" immunity. States in general do not interfere in the internal affairs of their neighbors but, except for spies, allow total personal immunity for any agent of state acting in a public capacity even if acting abroad. For example, France recently argued that the French agents involved in sinking the Greenpeace in New Zealand, because they acted for France, should be relieved of their liability under New Zealand's criminal law, even though the French actions were illegal as a matter of international law and their agents acted criminally under New Zealand's criminal law. Eventually, the convicted French agents were released to France as the result of the intermediacy of the United Nations Secretary General.

If there was a rule of international constitutional law under which Pinochet could be tried in Spain for his official actions, that rule could not apply equally among the sovereigns of the world who are supposedly equal before the law. Not only does the Salman Rushdie example indicate the problems, but, even more obviously, it would be politically disastrous to the cause of peace and reconciliation for a neutral state to attempt to indict Yasir Arafat, Ariel Sharon, various Russian and Chechen leaders, Margaret Thatcher, Gerry Adams, Milosevic, Izetbegovic, Tudjman - but the list is endless. However desirable it might seem, without forbidding revolutions by international law and placing international "guardians" over even democratically elected governments, it is

currently impossible to put the world into the hands of people who would agree that various particular atrocities could never be justified in the interest of stability, order, security of person, and property. When Plato made a similar suggestion, he noted that those best fit to be the “guardians” of society would not want the job.

What are the alternatives? For one, instead of a criminal action in Spain under the Spanish version of international criminal law, what about a normal civil suit against Pinochet in the United Kingdom (or anywhere else Pinochet is physically present or has assets) for the damage he has inflicted on anybody? Such suits are not uncommon. They are resolved by national courts referring to an applicable system of law, which might be the law of Chile, under which Pinochet has immunities, but might be international claims law. It depends on the “choice of law” rule of the tribunal; a thing to be investigated by plaintiffs’ attorneys and argued before a tribunal that has “jurisdiction to enforce” over the defendant and “jurisdiction to adjudicate” in the particular case. This difference between civil and criminal causes was illustrated in the United States most notably in the O.J. Simpson affair; he was acquitted in a criminal trial and convicted in a civil action. Another possibility is an ordinary international claim by Spain against Chile for the “denial of justice” to Pinochet’s Spanish victims. Again, the procedures are well-precedented and do not involve the complexities of proving the rules of a supposed international criminal law. A third possibility is the “Waldheim” solution: Kurt Waldheim was never tried by anybody and it is still not known if he committed any war crimes, but he cannot get a visa to visit any place outside of Austria. Pinochet, like other persons of dubious moral standing, but undoubted pride and political significance back “home,” can be restricted to his home turf by governments that agree that his past actions fall below their moral standards. Had the British taken this view, Pinochet would not have been given a visa, could not have visited England, and there would have been no extradition request or Pinochet case in the United Kingdom.