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THE *PINOCHET* CASE—SOME PERSONAL REFLECTIONS

The Rt Hon The Lord Millett

It is fifty years since I studied public international law at Cambridge. 'Studied' rather overstates the case; prospective barristers like me knew that we would be unlikely to need the subject in the Hendon Magistrates Court or the Southend County Court where we expected to spend our early years in practice. So we did not pursue our studies with as much diligence as we should have done. But we were assiduous in attending the lectures, which were given by the great Sir Hersch Lauterpacht, the most venerated international lawyer of the day. He was a marvellous lecturer and an inspiring teacher who conveyed his own enthusiasm to his students.

The Nuremburg trials were then of recent memory and the Cold War was in its early stages. We were still optimistic that Nazi criminals remaining at large would be brought to trial, that the international community would take on board the lessons of the holocaust, and that in future crimes against humanity would be punished. No longer, we hoped, would the way in which a sovereign State treated its own nationals be regarded with indifference by the rest of the world.

But it was not to be. The Cold War lasted for a further forty years. With the notable exception of Eichmann, the major Nazi criminals were not brought to justice. They were too useful to be locked up or hanged. Former neutral and even Allied countries offered them refuge and competed for their services. Not until the Cold War was over did the world turn its attention once again to unfinished business. And by then a new generation of monstrous tyrants had appeared. The international criminal court, which Lauterpacht had advocated with such passion fifty years ago, has finally been established, albeit in a different millennium.

In the years between I had little or nothing to do with public international law. As a barrister practising at the Chancery Bar, first as a Junior and later as Queen's Counsel, my time was almost exclusively spent on domestic English legal problems. Occasionally they had a foreign element, so private international law issues occasionally reached my consciousness. But public international law, like criminal law, was a distant memory. It recalled undergraduate days, along with punting on the Cam and May Balls, but that is all.

In 1986 I was appointed to the Chancery Bench, and one of my first cases was the *International Tin Council* case. The question was whether the English Court had jurisdiction under the Companies Act to wind up an international organization. It involved issues of company law and both private and public international law. Twenty-two counsel, if I remember correctly, appeared before me in a packed court. They included Rosalyn Higgins, now a judge of the International Court of Justice at the Hague, but then a junior counsel appearing for the International Tin Council, and Eli Lauterpacht, Hersch's son, who was appearing as junior counsel for the creditors. He delivered an academic lecture rather than a legal argument. I well remember the moment when, referring to a decision of the House of Lords, he mentioned in passing

that it was generally regarded by international lawyers as wrongly decided. Since a mere High Court judge like myself is not allowed even to entertain such a thought, I hurriedly made a mental note not to mention the case at all in my judgment.

I have only one regret about the *International Tin Council* case. Before it began my wife presented me with a model of the Tin Man in the Wizard of Oz and suggested that I place it on the Bench in front of me, but I never had the courage to do so.

By 1998 I was a Lord of Appeal in Ordinary and a member of the Appellate Committee of the House of Lords. Within a few months I had the great privilege of being a member of the seven-man panel which sat to hear the *Pinochet* case, arguably the most important public international law case in my professional lifetime.

The story of the case is well known. In September 1973 General Pinochet, the Commander-in-Chief of the Chilean army, seized power in Chile and installed himself as Head of State. He retained power until 1990, when he stepped down in favour of a democratically elected government. It was alleged that he had maintained himself in power by the systematic and institutionalized use of torture as an instrument of State policy. In October 1998 he visited the United Kingdom in a private capacity. Contrary to some press reports at the time, he was not travelling on a diplomatic passport. He was arrested by the Metropolitan Police on an international warrant issued by a Spanish examining magistrate. The Crown Prosecution Service, acting on behalf of the Kingdom of Spain, applied for his extradition to Spain. General Pinochet opposed the application and applied for a warrant of *habeas corpus*.

General Pinochet put forward two arguments. First, he claimed that the English courts had no jurisdiction over offences committed by a foreigner abroad. The Criminal Justice Act 1988, which conferred extraterritorial jurisdiction on the court, was not retrospective. Secondly even if there was jurisdiction, he claimed State immunity as a former Head of State for acts committed in the exercise of his official functions.

The case was heard by the Divisional Court—three judges presided over by the Lord Chief Justice. It was tried with great urgency. The hearing lasted only two days, and unreserved judgment was given on the following day. General Pinochet's submissions on jurisdiction were rejected. The 1988 Act was not retrospective, so we could not bring a prosecution ourselves. But the Extradition Act *was* retrospective. We could extradite a defendant for an offence in respect of which the English Court had jurisdiction at the date of the warrant. But the General's claim to State immunity was upheld.

The Crown's appeal to the House of Lords was originally heard by a panel of five Law Lords. General Pinochet did not challenge the ruling that the Extradition Act was retrospective, so the appeal was confined to the question of immunity. Once again there was something of a rush to judgment. The hearing lasted six days, and judgment was given with unusual speed only two weeks later. By a majority of three to two the Appellate Committee ruled that extradition could go ahead. The immunity of a former Head of State was confined to acts performed in the legitimate exercise of his official functions, and these did not include torturing his political opponents.

As is well known, the decision was later set aside because of Lord Hoffmann's presence on the panel which heard the case. This was an example of pure bad luck. The case was obviously politically sensitive, and the senior Law Lord, Lord Browne-Wilkinson, who is responsible for selecting the particular Law Lords to sit on a case, was concerned that whatever the outcome the losing side would accuse him of having

packed the Committee. So he simply selected the five most senior Law Lords to sit. These did not include Lord Hoffmann. Unfortunately Lord Browne-Wilkinson then found that he himself was unable to sit, and at the last moment the sixth senior Law Lord took his place. This was Lord Hoffmann.

Judgments of the House of Lords are delivered in the Chamber, and take the form of a formal debate whether the appeal should be allowed or dismissed. Each member of the Committee who sat on the case rises in order of seniority and briefly states his opinion. Lord Hoffmann, being the most junior, spoke last. When he rose the voting was 2–2, and there was intense excitement in the Chamber. It was shaping up to be a penalty shoot-out. Lord Hoffmann has often been described since as having had the swing—or even the casting—vote. But in truth his vote was no more decisive than those of the other two in the majority.

I was sitting over a coffee in the Bois de Boulogne when I received a call on my mobile to invite me to sit on the seven-man panel to re-hear the case. This time there was no rush to judgment. The case was much more fully argued. The Republic of Chile appeared for the first time to press the claim for State immunity. The hearing took twelve days, and we took six weeks to consider our decision. General Pinochet successfully argued that the Extradition Act was not retrospective. Our decision on this point was unanimous. We can only extradite where we can prosecute. Like the previous panel, we rejected General Pinochet's claim to immunity, this time by a majority of six to one. On the question of jurisdiction, five of the six ruled that there was no jurisdiction over offences committed by foreigners abroad before the Criminal Justice Act 1988 conferred extraterritorial jurisdiction on the English courts. I disagreed. At first sight, the difference between us appears to be a technical one. We all agreed that torture by public officials carried out as an instrument of State policy was already an international crime of universal jurisdiction by 1973. The majority considered that this meant that, as a matter of international law, the United Kingdom was free to assume extraterritorial jurisdiction, which it eventually did in 1988. I considered that it meant that, as a matter of customary international law, which is part of the common law, the United Kingdom already possessed extraterritorial jurisdiction.

But the difference really goes far deeper than that. The majority considered that torture by foreigners abroad was not a crime at all under English law before the 1988 Act made it one. I could not accept that. In my opinion torture has always been a crime under every civilized system of law. It is just that, until 1988, our courts had no jurisdiction over it if it was committed abroad. There was no question of retrospective criminalization of conduct which was lawful when committed. Torture was already a crime under both English and Chilean law. A similar point was made by the Nuremburg Trial and by the Supreme Court of Israel in the Eichmann case.

On the same day that we delivered our judgment, NATO forces began to bomb the sovereign state of Serbia in an attempt to stop the atrocities its government was committing against its own citizens in Kosovo. Two events on a single day showed how far we had come from the classical doctrines of international law as we had learned them fifty years ago. No longer is international law a matter which concerns sovereign States alone. It marches with human rights law to protect individuals from State action. The world community has finally decided that the way a sovereign State treats its own nationals is not a purely internal matter. International intervention is justified to prevent a widespread and systematic attack on a civilian population by its

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own government. The justification for intervention is that such an attack, conducted on a large scale and as a matter of State policy, is an attack on the legal order itself and threatens the peace and security of the world. As with the *Pinochet* case, the moral justification is that some crimes are so great that they are not just crimes against domestic law and order but crimes against humanity itself. Those who commit them do not merely offend against their own domestic law, but are ‘enemies of all mankind’.