

English Courts and Serious Human Rights Violations Abroad: A Preliminary Assessment

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INTRODUCTION

Do the English courts provide a forum in which transnational corporations could be sued for their activities abroad which amount to, or contribute to, serious human rights violations? Or is there something particular about the United States legal system which makes it unlikely that we will see cases similar to those involving Unocal oil company and Royal Dutch Shell being taken before the courts of other countries.¹ This article seeks to provide a preliminary answer to these questions in light of some recent work by a committee of British lawyers, and in light of the *Pinochet* case.²

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- 1 For discussion of these cases, see B. Stephens' contribution to this volume.
- 2 *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, and Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 25 Nov. 1998 [1998] TLR 735; 37 *ILM* (1998) p. 1302; in which the House of Lords held that English courts had jurisdiction over General Pinochet and decided that the doctrine of sovereign immunity did not protect Gen. Pinochet from extradition to Spain for claims that he had violated international human rights norms. This original decision was overturned on the grounds that one of the presiding judges was involved with one of the human rights organizations intervening against Gen. Pinochet. *In re Pinochet*, 17 Dec. 1998, 38 *ILM* (1999) p. 430. A later panel of the House of Lords reached the same decision, though in a somewhat more circumscribed ruling. *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet and Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 24 Mar. 1999, 38 *ILM* (1999) p. 589. All decisions cited from and available on the House of Lords website under Judgements, <<http://www.parliament.the-stationery-office.co.uk>>, accessed on Sep. 20, 1999.

1 HUMAN RIGHTS CIVIL SUITS IN THE UK

During the 1980s and 1990s there was a rapid increase in the number of civil suits in the United States concerning serious human rights violations abroad.³ However, it was not until 1996 that the English Court of Appeal heard its first case of this kind. *Al-Adsani v. Government of Kuwait and others* concerned acts of torture that had allegedly been committed in Kuwait by a member of that country's royal family.⁴ The Court of Appeal held that the Government of Kuwait was, under Section 5 of the State Immunity Act 1978, immune from the jurisdiction of the English courts in respect of all non-commercial torts committed abroad.

Despite the loss experienced by the plaintiff, the case did serve an important purpose by galvanizing a group of British-based international lawyers into considering whether, and to what degree, the English courts could serve as a potential forum for the pursuit of justice for the victims of atrocities committed abroad. In 1997 the British Branch of the International Law Association re-activated its Human Rights Committee for the specific purpose of studying this issue. Jeremy McBride of Birmingham University was appointed chair of the committee, while I was appointed its rapporteur. A number of experts drawn from both academia and practice were invited to join the committee: experts not only in public international law, but also in private international law, criminal law, and civil procedure. By October 1998, after several preliminary drafts and a number of meetings, a final draft report was being prepared. The report deals with a wide range of issues, including jurisdiction, the stay of proceedings, State and diplomatic immunity, the applicable law, the effect of amnesties, evidential issues, damages, the allocation of costs, and the relationship between criminal and civil actions. However, before the report could be completed, an extremely important – and completely unexpected – development occurred.

That development was, of course, the arrest of General Augusto Pinochet in a private London hospital on 16 October 1998. Having worked closely on a number of the issues, and in particular the key issue of the application of the State Immunity Act 1978 in cases involving serious human rights violations, several members of the British Branch committee – myself included – were quickly brought into the case by a coalition of non-governmental human rights organizations. The coalition, which included Amnesty

3 See, generally, B. Stephens and M. Ratner, *International Human Rights Litigation in US Courts* (1996).

4 [1996] TLR 192, CA. For commentary, see: M. Byers, 'Decisions of British Courts During 1996 Involving Questions of Public International Law', 67 *Brit. Y.B. Int'l L.* (1997) p. 537 at pp. 537-42.

International, the Redress Trust, the Medical Foundation for the Care of Victims of Torture, and a number of individual victims, was granted leave to make written and oral submissions to the House of Lords in three sets of hearings during late 1998 and early 1999.⁵ The substantive issues that arose in the *Pinochet* case are part of the public record and will be examined by myself, and no doubt many others, elsewhere.⁶ Suffice it to say that the work carried out by the British Branch committee proved extremely helpful as the coalition's legal team (led by Professor Ian Brownlie QC of Oxford University) made sure that the most relevant arguments against immunity, which included arguments of both international law and statutory interpretation, were put before the Law Lords in a rigorous yet readily comprehensible way.

The arrest of Augusto Pinochet and the subsequent litigation has, however, delayed the completion of the committee's report, for a number of reasons, not least the need to wait for the Law Lords' decision on the issue of immunity. Given my own involvement in the case, and the need for the committee's work to be seen as objective if it is to have any real effect in stimulating law reform, I chose to step down as rapporteur, while remaining an active member of the committee. Chanaka Wickremasinghe of the British Institute of International and Comparative Law has been appointed as the new rapporteur and intends to produce an agreed final report by December 1999.

2 POSSIBILITY OF HUMAN RIGHTS LIABILITY FOR TNCs IN THE UK

Although the work of the committee has focused on the possibility of civil suits against natural persons, and though the *Pinochet* case is (so far) limited to a criminal extradition, my involvement in both developments does enable me to make a preliminary assessment of whether English courts might be used as a venue for imposing liability on transnational corporations ("TNCs") for violations of public international law committed abroad. In light of developments elsewhere, and in the context of this volume, it makes

5 Human Rights Watch chose not to participate in the coalition and sought to intervene on its own. It was granted the right to make written submissions only.

6 *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet and Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, loc. cit. n.2.

sense to do so by considering the advantages and disadvantages of the English courts as compared to courts in the United States.⁷

2.1 Problems With TNC Human Rights Litigation in the UK

There are a number of reasons why the English courts may be considered a less desirable venue than the United States courts for cases of this kind. First and most importantly, the loser of a civil suit in England generally has to pay the legal costs incurred by the winner. This means that the average plaintiff in a human rights suit against a foreign State or TNC faces the very real possibility of hundreds of thousands of Pounds in legal bills. Added to this financial disincentive is the increasingly restricted availability of legal aid in civil litigation in the United Kingdom, a much less developed system of contingency fees, and the relative absence of a culture of volunteer work among English lawyers and law firms.

Second, the limitation period in personal injury cases in England is an extremely short three years, though in exceptional situations this restriction may be waived at the discretion of the judge (something which has recently occurred in tobacco litigation). The very short limitation period is one of the reasons why a civil writ has not yet been served on Augusto Pinochet, whose alleged crimes were committed more than a decade ago.

Third, in cases concerning torts committed abroad, English law (especially following the introduction of the Private International Law Miscellaneous Provisions Act 1995) considers the law of the country in which the tort was committed to be the 'applicable law'. In cases involving serious human rights violations such as torture this will not normally pose a problem, in that most if not all national legal systems consider torture to be a tort or delict. However, it may well raise problems in respect of torts which are not universally recognised, not to mention in respect of amnesties granted abroad (Does an amnesty in the country where the tort was committed operate as an amnesty in terms of the applicable law under the 1995 Act?). It remains to be seen how these difficult issues will be dealt with by the English courts in such human rights cases.

To make matters worse, in 1997 the English Court of Appeal rendered judgement in a case which suggests that, absent law reform and notwithstanding the more recent decision of the House of Lords in the *Pinochet* case, the State Immunity Act 1978 provides much more of an impediment to civil actions against many human rights violators than does the equival-

⁷ On the current situation in the United States, see B. Stephens' contribution to this volume.

ent legislation in the United States. In *Propend Finance Pty. Ltd. and others v. Alan Sing and the Commissioner of the Australian Federal Police*, the court held that under Section 14 of the Act, employees and agents of foreign States fall within the definition of 'States' rather than that of 'separate entities'.⁸ The consequence of this definitional allocation is that employees and agents benefit from a presumption of immunity even when acting outside the scope of their official functions. It is therefore conceivable that an English court would hold that a TNC violating human rights while acting as an agent of a foreign State benefits from that State's immunity, whereas in the same situation a United States court would deny immunity.

2.2 *Advantages of TNC Human Rights Litigation in the UK*

At the same time, there are reasons why the English courts may be considered a more desirable venue than the courts of the United States. One such reason is that, in addition to exercising 'tag jurisdiction', English courts are in certain circumstances able to grant leave to serve a writ on a defendant abroad.⁹ Although the circumstances are quite restricted, for example requiring that damage have occurred within England, where victims have come to England for medical treatment and similar purposes there is a very real possibility of such leave being granted.

Another possible advantage of English courts is that many English judges demonstrate a greater knowledge and receptivity towards public international law than most of their colleagues in other countries, especially the United States. Following the 1977 Court of Appeal decision in *Trendtex Trading Corp. v. Central Bank of Nigeria*, English judges have generally accepted that customary international law is automatically part of the law of England and that the doctrine of *stare decisis* does not apply to customary international law.¹⁰ This receptivity towards public international law has made ground-breaking decisions like that concerning head of State immunity in the *Pinochet* case possible, and should be a consideration when deciding where to commence future cases of this and other kinds. That said, many English judges are still far from being full-fledged experts in public international law. They still make mistakes on issues arising at the interface

8 [1997] TLR 238. For commentary, see: M. Byers, 'Decisions of British Courts During 1997 Involving Questions of Public or Private International Law', 68 *Brit. Y.B. Int'l L.* (1997) p. 301 at pp. 312-318.

9 See Order 11 of the Rules of the Supreme Court of England and Wales.

10 [1977] 2 WLR 356; [1977] 1 All ER 881, CA. For commentary, see J. Crawford, 'Decisions of British Courts During 1976-1977 Involving Questions of Public International Law', 48 *Brit. Y.B. Int'l L.* (1978) p. 332 at pp. 353-362.

of international and national law, as demonstrated by the decision in the *Pinochet* case to limit universal jurisdiction to those alleged acts of torture which were committed after the adoption, in 1988, of implementing legislation for the 1984 Torture Convention. The mistake here was that the judges ignored the existence of universal jurisdiction in customary international law – and therefore the common law.¹¹

In the last couple of years, thanks in large part to the important work of Richard Meeran, English courts have also adopted a refreshingly liberal approach to the issue of *forum non conveniens* when it is clear that the plaintiff will not obtain justice in the country in which the tort occurred – for economic as well as other reasons.¹²

Finally, unlike in the United States, the situation in the United Kingdom concerning the Act of State doctrine and serious human rights violations is in no way ambiguous, following the 1980 decision in *Oppenheimer v. Cattermole*. There the House of Lords considered whether English courts were bound to recognise and give effect to a Nazi nationality law that deprived Jews outside Germany of their nationality.¹³ The majority of the judges agreed that the courts must ‘be very slow to refuse to give effect to the legislation of a foreign State in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction’.¹⁴ However, they held that there were certain exceptional situations when this was not the case. The most important of these is that the courts will not recognise foreign legislation that constitutes a grave infringement of human rights. Lord Cross stated:

[I]t is part of the public policy of this country that our courts should give effect to clearly established rules of international law. Of course on some points it may be by no means clear what the rule of international law is. But what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort

11 For commentary, see M. Byers, ‘*Trendtex* under Siege: The *Pinochet* case and Customary International Law’, *Int’l & Comp. L. Q.* (forthcoming).

12 See Richard Meeran’s contribution to this volume.

13 [1976] AC 249. For commentary, see P. Carter, ‘Decisions of British Courts During 1974-75 Involving Questions of Private International Law’, 47 *Brit. Y.B. Int’l L.* (1975) p. 369 at pp. 372-374.

14 *Ibid.*, at p. 277.

constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.¹⁵

This conclusion is supported by a number of the individual judgements in the *Pinochet* case, as well as by a consideration of the reasons for the act of State doctrine, or non-justiciability more broadly speaking. As Lord Wilberforce explained in the leading case of *Buttes Gas and Oil Co. v. Hammer*, the concern is that 'there are ... no judicial or manageable standards by which to judge these issues'.¹⁶ Traditionally, international law provided no standards for what a State did within its own territory. This situation has clearly changed in the latter half of the twentieth century, at least in respect of the most fundamental of human rights.

2.3 Challenges for TNC Human Rights Litigation in the UK

However, any consideration of the prospects for civil suits of this kind should not confine itself to considering only the legal issues. At a more general level, those who attempt to litigate against TNCs in English courts and elsewhere will encounter a series of major challenges, all of which arose during the course of the *Pinochet* case. The most important of these is that the defendant will almost invariably be extremely wealthy, or at least have extremely wealthy supporters. The old saying that justice is open to all, just like the Ritz Hotel, is highly appropriate here. Good lawyers are usually expensive lawyers, and expensive lawyers have the support staff and resources that are essential to fighting a complicated case. Victims and human rights organisations planning to sue a TNC must plan on a long and extremely expensive litigation in which they will face large, highly paid and extremely well-supported legal teams seizing every opportunity for delay and procedural challenge. Having financial backing, logistical support and sympathetic, able and experienced counsel in place before a case begins should be considered a prerequisite to any such suit. The alternative, for plaintiffs and at least the smaller human rights organizations, may extend beyond failure into bankruptcy and closure.

A good example of the importance of these practical considerations is the 'McLibel' case which has tied up the English courts for the last five years. The fast food chain McDonald's sued two unemployed 'green' campaigners

15 Ibid, at p. 278. See also R. Higgins, *Problems and Process: International Law and How We Use It* (1994) p. 218.

16 [1981] 3 WLR 787 at 810; [1981] 3 All ER 616 at 633. For commentary, see J. Crawford, 'Decisions of British Courts During 1982 Involving Questions of Public International Law', 53 *Brit. Y.B. Int'l L.* (1983) p. 253 at pp. 259-268.

for allegations in a leaflet published by them in the late 1980s. The two campaigners had to represent themselves (legal aid not being available in England for libel cases) in a 314 day trial spread over two and one half years, with McDonald's being represented by some of London's most expensive lawyers. Although some of the allegations were held to be well founded, McDonald's was awarded £60,000 in damages, which enabled it to claim a highly public victory.¹⁷ Moreover, appeals have been sought on a variety of issues throughout the process, with the most recent judgement being issued – against the campaigners – on 30 April 1999.¹⁸

Apart from the wealth and persistence of TNCs, this example demonstrates that cases against them will be fought as much in the public arena as in the courts. Victims and human rights organisations must be prepared to engage in a lengthy and costly public relations campaign, because professional public relations agencies and lobbying firms will be engaged to discredit their efforts and motives in the eyes of the general public – and in government (not to mention judicial) circles. Given that a favourable public image is essential to the long-term financial existence of most human rights organisations, and that good-will on the part of (democratic) governments is necessary for a variety of purposes, including pro-human rights law reform, the battle to retain these constituencies must be fought in the course of each and every litigation against a wealthy defendant, be it Shell, UNIC-AL, or Augusto Pinochet.¹⁹ If such battles are not fought – and won – the short and long term consequences could be serious indeed. In the *Pinochet* case, for example, there was a very real possibility of political discretion being exercised to release the accused. The fact that this discretion has not been exercised is a tribute to the hard work done by the human rights coalition to retain public support and thus exert pressure on government ministers.

17 *McDonald's v. Steel and Morris*, Judgement of the High Court of Justice, Queen's Bench Division, 19th June 1997, available at <<http://www.open.gov.uk/lcd/mclsum2.htm>>, accessed on Sept. 20, 1999. See also F. Gibb and J. Bale, 'Victory for McDonald's after David and Goliath libel fight', *The Times* (London) (20 July 1997) p. 27.

18 *Steel v. McDonald's Corporation*, unreported judgment of the Court of Appeal, available in LEXIS, Enggen Library, Cases File.

19 On the political context surrounding the *Pinochet* case, see M. Byers, 'The Significance of Pinochet', 21 *London Review of Books* (1999) No. 2, pp. 26-27, also available at <<http://www.lrb.co.uk/v21/n02/byer2102.htm>>, accessed on 20 Sept. 1999.

CONCLUSION

The upshot of all of this is that those who wish to use national courts to pursue TNCs for violations of international human rights have to prepare themselves well in advance of any particular case arising. Coalitions must be built, strategies developed, resources and expertise marshalled and improved upon. Moreover, the educating of judges, politicians, government officials and the general public on international human rights and the important role of national courts must be made an immediate and continuing priority. Without such long-term thinking and planning, there is little real prospect of ever successfully suing a TNC in this way. Yet it is precisely because TNCs are immensely wealthy, powerful, and legally literate that they must be made subject to the very real possibility of such suits – for the simple reason that their activities have a profound – and growing – impact on the lives of individual human beings everywhere.