CHAPTER 3

The Pinochet Judgment Fifteen Years on

J. Craig Barker

1 Introduction

I am delighted to have been invited to contribute to this volume. As a colleague of Professor Sandy Ghandhi for just over ten years, and a friend for even longer, I have benefitted, through countless engaging and challenging discussions, from Sandy’s wisdom, thoughtfulness and rigour. It is particularly his rigour that I believe sets Sandy apart as a human rights lawyer. Christopher Waters, in the Introduction to this volume, has highlighted Sandy’s concern with “proper procedure” and his focus on the achievement of the furtherance of human protection “within the confines of the relevant treaty or legislation.” The work that Sandy and I did together on the Pinochet case, resulting in a co-authored piece published in the Indian Journal of International Law in 2000, fully reflects Sandy’s rigorous approach. The purpose of that article was to examine the House of Lord’s judgment in Ex Parte Pinochet No. 3 and to highlight some of the potential implications of that judgment in terms of both domestic and international law, with a particular emphasis on the question of the protection of human rights.

For many leading scholars writing at the time, the Pinochet case was a game changer. According to Ruth Wedgewood, for example, the decision “changed the structure of international law.” William Aceves asserted that the Pinochet case represented an “emerging trend towards the development of a universal system of transnational law litigation,” while Christine Chinkin spoke of a

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1 See Introduction to this volume, text accompanying notes 8–10.
3 R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3) [1999] 2 All E.R. 97 (hereinafter Pinochet No. 3).
4 Ruth Wedgewood, “International Criminal Law and Augusto Pinochet,” Virginia Journal of International Law 40, 4 (2000): 829, 831. Wedgewood further noted that “the case has dramatically limited the immunity that State officials can claim for criminal activities conducted during their days in power.”
victory for the globalisation of human rights law over the horizontal vision of international law based upon the sovereign equality of States. Furthermore, the “unprecedented character” of the case led Andrea Bianchi to assert that “neither jurisdictional immunities nor act of State and other doctrines of judicial self-restraint are consistent with the notion of crimes of international law.” Sandy and I were far more circumspect in our analysis, noting the very limited ratio of the decision in relation to the various different elements at issue in the case, concluding, ultimately, that “in spite of the many claims that the case against Senator Pinochet stands at the threshold of a new international legal order, the reality is that the case was dependent on a certain very narrow question of UK law.”

Fifteen years after the Pinochet judgment this chapter will identify the key arguments in our original article and test that analysis against the present day state of international and domestic law, particularly within the context of the highly controversial relationship between immunities and human rights. Additionally, this chapter will seek to further analyse the judgment against recent case law emanating from domestic courts, the European Court of Human Rights and the International Court of Justice (ICJ). The analysis will also briefly consider the alternatives to the constant challenges to immunity from jurisdiction that have the potential further to undermine what is an important procedural safeguard in the conduct of international relations.

2 The Pinochet Case: A Limited Precedent

It will be recalled, briefly, that Senator (then General) Augusto Pinochet had become Head of State in Chile after leading a coup d’état on 11 September 1973 and had remained in power in that country until 11 March 1990. Pinochet’s time in office was notable for the many appalling acts of brutality perpetrated by his forces against the civilian population of that country. In 1998, Senator Pinochet visited the United Kingdom to receive medical treatment. Judicial


Ghandhi and Barker, supra note 2, 707–708.

Pinochet No. 3, supra note 3. This factual account is drawn largely from the speech of Lord Browne-Wilkinson.