The role of lawyers in “establishing” customary international law in the Pinochet case

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1. Introduction

The arrest of Senator Pinochet in a London hospital on 17 October 1998 gave rise to a host of intractable legal issues in English law and in public international law. The circumstances in which they fell to be resolved were far from ideal. The facts which gave rise to the proceedings were highly political and could not have been more emotionally charged. The apparent enormity of arresting a former head of State caused the proceedings to be brought on with great haste. The entire proceedings were conducted under the ceaseless glare of media attention. In the result, the Judicial Committee of the House of Lords, by a majority of three to two, delivered a decision greeted in some quarters as opening a new chapter in the international law of human rights and deplored in others as a violation of fundamental and long-established rules of international law. Most unfortunately, that decision had to be set aside and the case re-argued before a differently constituted panel of Law Lords. That reconstituted Committee came to a different conclusion for reasons that were very different from those on which the first decision was founded.

Nevertheless, some very positive things did come out of the Pinochet litigation. Christine Chinkin in a note in the American Journal of International Law had this to say:

English international lawyers may take satisfaction in a House of Lords that has demonstrated that it is so attuned to international law. Twelve Law Lords heard complex international law arguments, the first Appellate Committee for six days, the second for twelve, and unlike the Supreme Court of the United States, the Law Lords proved receptive to such arguments. The two decisions show a remarkable willingness to explore treaties and their travaux preparatoires, UN resolutions, draft articles of the International Law Commission, and the Statutes and jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to inform understanding of such concepts as torture, jus cogens and universal jurisdiction. The judges appeared at ease with the concept (and vagaries) of customary international law and its incorporation into English law [...] All this is extremely encouraging as United Kingdom law embarks upon a new era of human rights application with the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹

That passage gives some indication of the breadth of the substantive and conceptual ground which was covered in the Pinochet cases and I welcome this opportunity to
consider some of the problems thrown up in those cases and to address more generally some of the practical difficulties which are encountered in arguing customary international law before the English courts.

2. The impact of time constraints on the determination of customary international law

The practical problems raised by the Pinochet cases were enormous. Some, no doubt, came about from the particular circumstances of that case. Others were more general and prompt the question of whether different procedures might enable questions of international law to be argued more efficiently and effectively before the English courts.

The situation which confronted the English courts in the Pinochet litigation was extraordinary, if not entirely novel. Nothing of its kind had occurred in Britain since 1815 when on 15 July Napoleon Bonaparte (who had abdicated the throne of France on 22 June after the Battle of Waterloo) surrendered unconditionally to Captain Frederick Maitland of HMS Bellerophon. At a subsequent interview with Admiral Lord Keith, Commander in Chief of the Channel Fleet, Bonaparte protested that he was not a prisoner of war but a guest of England and referred to the writ of habeas corpus. Lord McNair commented on this incident “[s]o hallowed is the name of habeas corpus that it alarmed Lord Keith much more than the French had ever done.”

The problem caused great consternation to, among others, the Law Officers. The eventual outcome on that occasion was an Act of Parliament in 1816 “for the more effectively detaining in custody Napoleon Buonaparte.” The 1816 Act legalized his detention and provided that he should be treated as a prisoner of war. A second Act of Parliament, which received the Royal Assent on the same day, granted an indemnity to all persons concerned in his detention.

Happily, for those of us involved in the case, there has been no need for a Pinochet Indemnity Act of 2000. However, in the case of Senator Pinochet, the apparent enormity of arresting a former head of a friendly State and subjecting him to the criminal jurisdiction of our courts may well have been the cause of the speed with which the matter was brought on for hearing. It was that haste which gave rise to the greatest practical problem for the lawyers involved in the case. The warrant for Senator Pinochet’s arrest was issued in Spain on 16 October 1998. On the same day, a magistrate in London issued the first provisional warrant and he was arrested the following day. Spain issued a second warrant on 18 October, which resulted in a second provisional warrant which was issued on 22 October. Senator Pinochet started proceedings for habeas corpus and leave to move for judicial review. The matter was argued on 26 and 27 October, and on 28 October judgment was given quashing the decision to issue the provisional warrant. The Divisional Court certified a point of law of general public importance to enable an appeal to be heard by the House of Lords and a stay was granted on an undertaking by Spain to lodge a petition to the House of Lords on 2 November.