

such circumstances have no "free-wheeling coordinate lawmaking power ... in the field of foreign affairs."⁵¹⁷

In my view, the approach of eight of the Law Lords in the two Pinochet judgments came close to being exercises of "free-wheeling ... lawmaking power." They employed arguments from propositions of customary international law never before incorporated in U.K. law to support the conclusion that Pinochet was or was not entitled to former head of state immunity. In doing so, they went well outside the bounds of any legislation or treaty enacted by Parliament.

I find the approaches of Lords Browne-Wilkinson, Goff, and Saville more congenial. They struggled to make sense of the former head of state immunity provision adopted by Parliament in light of a treaty (the Torture Convention) and another statute (the torture provisions of the Criminal Justice Act) without straying far afield into customary international law. They attempted to give meaning to the enactments of the legislature, not make law themselves. It is an approach that reflects the very same values that animate the principle of separation of powers.

CONCLUSION

Beyond my broad abstention and statutory construction claims, I have tried in this article to illustrate several themes about this most extraordinary episode in world legal history, including the following:

(1) The United Kingdom's court of last resort, the Appellate Committee of the House of Lords, rendered three opinions in *Pinochet*, two on the merits of his claim to sovereign immunity as a former head of state. The House of Lords vacated its first decision when it found that one of the judges who participated in it had an impermissible conflict of interest. As such, it is an important case on judicial bias and disqualification. When the House of Lords issued its second decision on the merits, it again found that Pinochet was not entitled to former head of state immunity but for very different (and much more narrow) reasons. As such, it is an important case on appellate procedure.

(2) *Pinochet* required construction of the "double criminality" requirement of the Extradition Act, required the Home Secretary to make important determinations under §§ 7 and 12 of the Extradition Act, and required a magistrate's court to make an important determination under § 9 of the Act. As such, it is an important case on extradition law.

(3) *Pinochet* implicated important foreign relations considerations: acquiescence by the U.K. government to Chilean government behavior under Pinochet; opposing positions taken by two U.K. allies (Chile and Spain); extra-territorial recognition of domestic reconciliation amnesties. As such, it is an important case on foreign and diplomatic relations.

(4) The *Pinochet* litigation featured a Spanish prosecutor pursuing in the United Kingdom a former head of state for human rights abuses alleged to have been committed in Chile. As such, it is an important case on extra-territorial enforcement of human rights law.

(5) *Pinochet* implicated important international human rights considerations: proper interpretation of the Genocide Convention, the Hostage Convention, and the Torture Convention; the extent of universal jurisdiction over international human rights abuses; and the extent to which a former head of state is entitled to sovereign immunity. As such, it is an important case on substantive human rights law.

As of today, the most tangible result of *Pinochet* appears to be that the willingness of Spain and the United Kingdom to examine allegations against Pinochet made it politically possible for Pinochet and his henchmen to be pursued at home in Chile. The role played by the U.K. courts undoubtedly contributed to that salutary result. But the U.K. courts paid a price in terms of prestige and institutional legitimacy; it remains to be seen whether the price was too high.

In this article, I have argued that separation of powers and its animating values of institutional competence and democracy should have dictated that U.K. courts dismiss Pinochet's application for habeas corpus on grounds of non-justiciability and that, if faced with the sovereign immunity defense during judicial review of an extradition order, resolved the question as a matter of statutory construction and not by reference to customary international law. Had the courts followed this more restrained course, I believe they would have played a more appropriate role in this most extraordinary drama.

