
BOOK REVIEWS

The Pinochet case: a legal and constitutional analysis edited by Diana Woodhouse, Hart Publishing, Oxford – Portland Oregon, 2000, ISBN 1-84113-102-4, 297 pp, £30.00 / \$50.00.

The *Pinochet* case has attracted enormous international attention and many articles have been written on the subject. Its focus on original themes makes this particular book a very refreshing one. The publication is based on a workshop on the Pinochet case, held at Oxford Brookes University in March 1999. Diana Woodhouse, the editor of the book, introduces the work by summarising the events that occurred after Pinochet's arrival in the United Kingdom. She discusses the position of international law in the domestic British legal system and indicates that the extent to which British judges apply international law is limited by the doctrine of parliamentary sovereignty and by the dualist system of law. She highlights the fact that the Pinochet case will have great implications for British, as well as international law, not merely with regard to the obvious matters, such as the waiver of Head of State Immunity, but also with regard to questions concerning bias. Thereafter, the book is divided into two parts, and holds an annex with the three Pinochet judgments.

The first part, consisting of three different essays, addresses the issue of bias, and the legitimacy of the House of Lords as the final British court of appeal for constitutional and political cases. In the first essay, David Robertson highlights the problems of the British judicial system and, in discussing the Pinochet case, examines whether the House of Lords fulfils the requirements of a political and constitutional court. The writer qualifies as the essential problems: the lack of clarity of the Lords' general consensual point of view, their technical way to solve legal conundrums, their dualist approach, their full reliance on the oral arguments made by counsel of the parties to the case, and the fact that not all Lords sit on a case, resulting in the dependence of the outcome on the composition of the committee. With regard to Lord Hoffman's disqualification, the writer holds the opinion that the Lords failed to provide a judicial conception to bias, and that they wrongfully found that Lord Hoffman appeared to be biased, as bias is inevitable in politically loaded cases. He also addresses two ironic facts. First, that without interventions, the Lord Hoffman problem would not have arisen, and second, that Pinochet would have been released if Lord Goff had replaced Lord Hoffman. His conclusion is that the House of Lords "cannot take us safely into a twenty-first century where constitutional review will become commonplace" (p. 40).

Robertson makes very strong arguments. Perhaps his statement on the issue of bias fails to appreciate the significance of the evidence used to disqualify

Lord Hoffman. It is true that any judge may have previous opinions regarding political and constitutional matters. However, in a case as sensitive as the Pinochet case the suggestion that Hoffman's decision was politically motivated was potentially so damaging that he had to be disqualified.

This coincides with the opinions of the writers of the following two essays, both of which concentrate on the issue of the apparent bias of Lord Hoffman and his subsequent disqualification. Evadne Grant examines whether the House of Lords had jurisdiction to set aside its own earlier order, and whether it was right to do so because it was tainted by the appearance of bias. On both issues the writer agrees with the Lords' outcome, namely that the Lords had jurisdiction, as there exists no other authorised court to remedy faults of the Law Lords, and that they rightly used it to disqualify Lord Hoffman. However, she regrets that the Pinochet case, given the specific circumstances on which basis the Lords rendered their judgment, does not provide clear guidance with regard to the disqualification of a judge on the basis of the appearance of bias. Grant argues that the European Convention on Human Rights requires that a formal procedure to this effect should be provided for. Moreover, both Grant, and Paul Catley and Lisa Claydon, the writers of the subsequent paper, argue that the House of Lords should have made reference to the European Convention on Human Rights, as well as to the case law of the European Court of Human Rights, even though the outcome would most likely have been the same. Catley and Claydon compare the Pinochet judgment with the jurisprudence of the European Commission and Court of Human Rights. They regard the negative attitudes of some of the Law Lords towards the Convention, as well as their attempt to avoid sensitive publicity and questions concerning the impartiality and independence of the Law Lords (being legislators as well as judges) as possible explanations for their failure to even mention the Convention, or the related case law. The authors find this especially unfortunate because, in ignoring these, the House of Lords missed a great opportunity to "provide leadership in assisting courts in the proper application of the Convention" (p. 77).

The second part consists of three essays, which deal with the international implications of the Pinochet case.

First, Judith Hendrick addresses the morality issue in relation to the general statement that "justice should be done", which, in this case, is interpreted as the moral obligation to punish Pinochet for his alleged involvement in the atrocities in Chile and elsewhere, irrespective of his precise role and responsibility. She tries to identify the moral justification for Pinochet's punishment for his non-restorable wrongdoing in the past, and argues that such justification is based on the so-called 'retributivist' theory. This is a backward-looking theory, in that it finds justification for punishment in the wrongfulness of the act performed in the past, rather than in future advantages of such punishment. The theory holds that wrongdoers deserve punishment, regardless whether the punishment does any good to society. She then continues to analyse what would be the right punish-

ment to be imposed on Pinochet, alleged to being personally responsible, and in his capacity of Head of State. Although the writer repeatedly states that the allegations against Pinochet are not yet proven, she concludes that "even if he is found not guilty, his 'connection' with the harm suffered by those who were tortured is, for many, enough to justify continued moral condemnation" (p. 92).

Hendrick makes most interesting and brave points. It is, however, unfortunate that she fails to express a clear view, or draw any real conclusion.

The next essay deals with sovereign immunity. The writer, Jonathan Black-Branch, argues that Head of State immunity should have been upheld. This is a respected opinion, built upon sound legal arguments. However, in concentrating his efforts on presenting all statements that possibly support his point of view, he sometimes fails to accurately represent the legal arguments of the Lords. It is evident that he is more preoccupied with his own desire to correlate his conclusions with those legal arguments than justly delineating them.

Furthermore, his argument that sovereign immunity has *jus cogens* status, and therefore prevails over the prosecution of responsible leaders for violations of *jus cogens* norms, is arguably misinformed. As long ago as the Treaty of Versailles, States began to hold Heads of State responsible for international criminal behaviour (Article 227). Hence, it seems that priority is given to the accountability of leaders above their immunity.

Despite these criticisms, he does make two strong political arguments. First, he highlights the hypocrisy of the matter, as Pinochet was recognised and received as Head of State in the United Kingdom and other countries. In doing so, leaders tacitly accepted the alleged wrongful acts. Therefore, any comparison with Hitler or Milošević loses ground. He also highlights the fact that such problems should be solved by international tribunals, rather than individual States.

Moreover, he expresses the concern that the judgment could provide a blank cheque to arrest world leaders, including those of the western world. He holds the opinion that, if universal consensus exists that anyone, including world leaders, should be held accountable for performed atrocities, the international community should take the initiative to implement legislation to this effect.

In the final essay, Ben Chigara argues, while upholding the common view that there exists universal jurisdiction in relation to acts of torture, that a granted amnesty to persons, who would otherwise be charged with crimes against humanity, should be recognised, provided that it is registered with the United Nations. Moreover, the writer argues that international tribunals, rather than domestic courts, should deal with international crimes, not the least to avoid the accusation that justice is arbitrary. With reference to the practice of the two ad hoc tribunals currently in function, he also states that national pride, which may be offended when a citizen of one State is tried in another State, is not at stake in international tribunals. Hence, Chigara supports the future permanent International Criminal Court. In this case, Pinochet's trial by an international tribunal

would stop victims from taking revenge, and the international community would demonstrate that it upholds rules of *jus cogens*.

In general, the book is of a high legal standard. It is written in technical legal terms. Some background knowledge to the case seems therefore relevant to fully comprehend the essence of the essays. Although one might not always agree with the statements made, the essays provide a solid selection of different legal issues, all of which autonomously provoke further discussion.

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Human Rights Standards and the Responsibility of Transnational Corporations, edited by Michael Addo. Kluwer Law International, The Hague, 1999. ISBN 90-411-1246-4, 416 pp., NLG 225.00 / USD 135.00 / GBP 79.00.

This book comes out of a major conference, held at the University of Exeter in September 1998, on the broad topic of human rights in international business. The theme of the conference, as explained by the editor in his introduction, was, "to put forward the proposition that the uncertainties and difficulties in the process of defining corporate (social, political or other) responsibilities may be remedied through existing human rights standards" (p.5). This could be justified on the ground that the private transnational corporation (TNC) could now be said to have matured into a mainstream policy institution and less into a private commercial undertaking (p.7). Thus, the starting point for this work is an assumption that human rights responsibilities must extend to TNCs. However, the editor is at pains to stress that the approach to regulation adopted in this work does not seek to victimise the TNC as "a selfish profit-motivated parasite" (p.8), but, rather, aims for a balanced view of corporations as integrated parts of the societies in which they operate. On this basis TNCs have certain obligations from which a duty to observe human rights emerges. The essential themes of the Conference are further to be gathered from the short but pithy Keynote Address of Sir Geoffrey Chandler, who calls for a new human rights agenda for companies involving the development of codes, their implementation through management systems and for the monitoring and external auditing of that process.

The discussion in the book then develops a number of themes. The most prominent are: the relationship between existing ideas of corporate social responsibility and human rights questions; what TNCs themselves should do in order to observe human rights; and the practical implementation of human rights regulation to corporations. The book is divided into sections starting with "Policy Issues" and continuing through "Regulation", "Application", "Issues of Doctrine", "Globalisation" and ending with three "Case Studies" concerning the

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Body Shop and the Ogoni, the human rights implications of the privatisation programme in Zambia and ethical standards and principles of sustainability. Unfortunately, these headings do not help to organise the papers in a very clear way. The papers in each section seem to be put together without much connection between them. Thus, under the heading "Policy Issues" there is an interesting, though truncated, paper on "Making Civil Regulation Work", a topic that would be better placed under the section on Regulation or Application. Furthermore, the papers in the "Globalisation" section do not really deal with that issue as such, but with, first, Oxfam's policy towards TNCs and, secondly, the use of ombudsmen and human rights commissions in Commonwealth countries to protect human rights in the privatised industries. Without labouring the point, this collection, as a result, is somewhat hard to navigate and there is little sense of a coherent narrative. Perhaps this is an ever-present danger when a book is constructed out of conference papers from a great many participants (there are 25 contributions, excluding the extensive introduction). Thus, the reader must enter each paper and see for themselves what it contains, and make their own connections with other related papers which may be found in other parts of the book.

As to the content of the papers themselves, this varies from detailed and scholarly analyses of specific topics, to papers explaining the policies of leading non-governmental organisations (NGOs) and corporations on human rights and corporate social responsibility. This mix reflects clearly the range of participants at the Exeter conference and offers one of the strengths of this book. Among the more scholarly works feature an elegant essay by John Parkinson on "The Socially Responsible Company", Janet Dine's discussion of workers rights and company law and John Hatchard's paper on privatisation and human rights accountability in the transitional economies of the Commonwealth. There are also papers on economic and social human rights and their application to corporations by Sigrun Skogly, a discussion of the legal personality of TNCs by Nicola Jagers, an informative paper by the editor himself on the legal aspects of corporations as victims of human rights abuses, and a valuable guide to the issues facing a TNC that wishes to develop a human rights policy by Margaret Jungk. From the NGO community there are papers *inter alia* by representatives of Friends of the Earth, the World Development Movement and Oxfam, all of whom have been active in recent years in advocating increased responsibilities for TNCs as a *quid pro quo* for the increased economic freedoms offered by a liberalisation of trade and investment conditions in the global economy. From the business community there are a number of papers outlining the policies of particular corporations, most notably the contributions of Worth Loomis, the former Director and President of the Dexter Corporation, and of Simon Williams, Head of Corporate Affairs at the Co-operative Bank, one of the most prominent "ethical investor" corporations in the United Kingdom. Finally, mention should be made of Richard Meeran's paper on the legal issues surrounding

the asbestos claims cases before the English courts and of Joachim Karl's short paper on the OECD Guidelines on Multinational Enterprises.

Turning to the themes of the book, the most prominent is that of corporate social responsibility. After reading the relevant papers the reader is left with the major impression that there are two discourses, one a technical discussion of corporate governance, the other a debate on whether human rights obligations should extend to corporations, which exist across but not within the papers. For example, John Parkinson asserts that one aspect of the corporation as property is that the obligation to maximise profits is qualified by a requirement that the company's activities are morally defensible. (p.51). However, there is little specifically on the question of human rights. Indeed this paper must be read in the light of others (for example Jungk) for the reader to draw his or her own conclusions as to how human rights fit into the wider discourse on corporate social responsibility. Equally, Janet Dine's paper concentrates on worker participation in the corporate decision-making process, an issue that has an extensive history in the study of corporate governance, but does not raise questions of fundamental human rights, save, perhaps, in relation to the freedom of association. In the same way, Richard Meeran's valuable account of the technical legal issues in the Cape and related asbestos claims cases, does not reach the issue of human rights, while Jessica Woodroffe's paper outlining the World Development Movement's views on the regulation of TNCs only briefly mentions human rights as one issue in a wider agenda of regulation for corporate social responsibility. One is left feeling that these papers, good works in their own right, needed some further linking with other papers which dwell mainly on human rights issues.

A more serious concern may be that there are real limits to the value of introducing human rights discourse into the fields of corporate governance and liability. How is an appeal, say, to the right to work, or the right to fair and safe working conditions, going to impact on the decision-making structures of the firm? So long as we are living within the logic of a free-market economy based on the sanctity of contract and property, the answer is likely to be "not very much". In response to the "right to work" argument it can be said that firms are not guarantors of secure employment, and an appeal to human rights will not change that. On the other hand, an appeal to human rights will matter in relation to violations of the freedom of association. However, even here, so long as the law of the place where the firm operates guarantees such a right, any action by the firm to undermine it will probably be open to challenge as a breach of national labour law. If local law does not guarantee such a right then it is the host state, and not the company, that commits the violation of the human right in question. Equally, how is an appeal to human rights going to result in a judge accepting the validity of lifting the corporate veil and holding the parent liable for the acts of its subsidiary in a mass tort claim? Is it not better to develop a doctrine of strict liability for the ultrahazardous acts of the subsidiary on the part

of the parent rather than appeal to human rights? While the latter may motivate such a development, we must not confuse the general constitutional principles embedded in human rights discourse with real regulation.

On the other hand an appeal to human rights has a clear role to play in challenging any imposition on the freedom of the owners of the corporation to deal with their property as they see fit, as Michael Addo's paper on the corporation as victim shows. Indeed, the protection of private property against interference by the state lies at the heart of the history of human rights. To extend such rights to operate against private corporations requires a redefinition of human rights priorities. To an extent Skogly tackles this matter in her paper, where she shows that TNCs may be complicit in violations of economic and social rights that are then linked to violations of civil and political rights. However, more work needs to be done in this area, so that a clearer conception of the linkage between human rights and corporate governance is established.

Turning to the theme of what TNCs should do to further the protection of human rights, we have a contrast between the NGO positions and those taken by business people. The NGO papers assert that, because TNCs have become a powerful force in the global economy they must take a part of the responsibility for observing and protecting human rights. Thus, Tony Juniper of Friends of the Earth offers a model of the environmentally sustainable enterprise. Andrew McLean of Saferworld discusses a code on arms exports to be followed by TNCs, in part to prevent the arming of regimes that systematically abuse human rights. A most valuable analysis of the human rights effects of transnational tourism, and of what firms in the industry should do in response, is offered by Jane Forbes of Tourism Concern, while Paddy O'Reilly and Sophia Tickell give an insightful discussion of what TNCs should and should not do in relation to human rights questions. The most pressing lesson that emerges from these papers is that TNCs must be aware of not becoming complicit in government policies which serve to threaten, or actually to breach, the human rights of local persons and/or populations. There is much practical advice in these papers on how to avoid that situation. They indicate how corporate governance systems could develop to tackle these issues.

By contrast the business-oriented papers tend to suggest that observance of human rights is a good thing because it is also good business. This is most prominently displayed by the paper on the Co-operative Bank by Simon Williams, who indicates that the profitability of the Bank has risen since it adopted an ethical investment policy. Such an argument sounds positive. In reality it should be dismissed, as it tends to reinforce the view that corporations engage in human rights policy, and draw up corporate ethical conduct codes (on which see the contribution by Simon Webley), as a public relations exercise. This is a concern echoed in the interesting contribution by Heike Fabig on the policy of the Body Shop towards the Ogoni people of Nigeria. Moreover, as Zadek and Forstater show, only niche companies in socially sensitive industries need to be se-

riously concerned about their record on social responsibility. The larger companies will suffer little, if at all, in the financial markets if they pursue non-socially responsible policies that lead to consumer boycotts.

A further concern expressed by the business contributors, is that by adopting an active policy stance on human rights abuses, the corporation may be accused of undue interference in the political affairs of the country in question. There is a very difficult line to be drawn between the conduct of business and such interference. It should be remembered that the Draft UN Code of Conduct on Transnational Corporations specifically condemned unwarranted interference in the domestic affairs of the countries in which the TNC operated. However, a provision requiring respect for fundamental human rights by TNCs was also contained, as was a condemnation of practices tending to support apartheid in Southern Africa. Thus, TNCs could take their lead from international organisations in this matter. In any case, the implication of this argument, namely, that remaining silent about human rights abuses and/or violations is not a political action, simply does not stand up to scrutiny. Clearly a further dialogue between business and civil society will continue on these issues. The papers in this book will help in that dialogue.

A third theme of the book concerns the process of implementing human rights policies in relation to corporations. Here the contributions of John Hatchard and Patricia Feeney stand out. They both consider the implications of privatisation in developing countries upon the institutions for the protection of human rights. In particular, John Hatchard's paper explores how those institutions can adapt in order to deal effectively with claims of denial or violation of human rights by the privatised enterprises. Such enterprises have taken over certain hitherto public functions that would have been within the jurisdiction of ombudsmen or human rights commissions prior to privatisation. While the operator of the activity has become private in character their capacity to violate human rights has remained. Hence, new initiatives have evolved to meet this challenge. For example, Namibia has extended the ombudsman's role to the private sector in relation to fundamental rights violations and ecological degradation (pp. 294-295), while Uganda's Human Rights Commission has powers to deal with violations of human rights by private persons (p.301). In the case of Zambia's privatisation programme, discussed by Patricia Feeney, the potential role of international institutions such as the World Bank and the IMF, in helping to secure the observance of human rights, is highlighted, though their performance in this case is criticised. Thus, these initiatives are not without their problems, but they show concrete examples of how the extension of human rights obligations to private parties could be achieved.

In all, this collection of essays offers a great deal of information and argument on the question of the human rights responsibilities of TNCs. Its principal shortcoming lies in the lack of a fuller integration of the individual contributions into a more structured and analytical narrative. Nonetheless, for the reader inter-

ested in the issue, there is much raw material to use in formulating his or her own views on this difficult subject. For this the book may be commended.

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