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Britain's birthday gift for General Pinochet

Australia.....A$7.20
China.....RMB 55
Hong Kong.....HK$40
Japan.....¥866(¥825)
Saudi Arabia.....Rials 27
Argentina.....8.80 Pesos
France.....FFr28
India.....Rs90
Panama.....US$5.75
South Africa.....Rand 17.00
Brazil.....R$7.00
Germany.....Dm7.90
Israel.....NIS19.50
Peru.....S/.21.90
UK.....£2.50
Canada.....C$4.95
Guyana.....G$600
Italy.....Lire 8,000
Russia.....US$3.50
USA.....US$3.95

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Ex-dictators are not immune

FOR General Augusto Pinochet, his regular jaunt to London is this year turning into a nightmare. First an aching back forces him to seek medical treatment. Then, as he lies still groggy after surgery, a squad of London policemen barge into his hospital room to deliver an arrest warrant issued at the behest of some pesky Spanish magistrate. The British government rudely ignores his claim of diplomatic immunity. A respite comes when Thomas Bingham, England's Lord Chief Justice, rules that the general enjoys legal immunity as a former head of state. But now, after weeks of legal argument, the judicial committee of the House of Lords, Britain's highest court, surprises everyone, not least the general, by overruling Lord Bingham and declaring that he can be extradited to Spain after all. As if to add insult to injury, they do this on his 83rd birthday. Is there no rest, or respect, for retired dictators?

Until recently that question would not have sounded absurd. Plenty of dictators have enjoyed comfortable retirements, no matter what bloody deeds they committed while in power. They had little to fear from judges or lawyers. It looks as if those days are now coming to an end. The split 3-2 decision of the Law Lords reflects the complexity of the legal issues involved, and the unprecedented nature of the Pinochet case (see pages 23-26). The decision of whether to extradite the general to Spain to face charges of crimes against humanity ultimately rests with Jack Straw, Britain's home secretary. But whatever General Pinochet's fate, the Law Lords' ruling is a giant step towards establishing the rule of international law.

Over the past 50 years, nations have agreed a range of treaties outlawing the systematic murder, torture and arbitrary imprisonment perpetrated by General Pinochet and his sort. Many of these treaties explicitly rule out immunity for any official, including a former head of state. But these provisions have rarely been translated into national laws or applied by national courts. The perverse result has been that anyone who commanded the murder of thousands had nothing to fear from the law, while the murderer of a single person could be pursued to the ends of the earth.

Trials for tyrants

General Pinochet's arrest, and the Law Lords' judgment, are the latest signs that countries are no longer willing to tolerate this. The setting up of the Yugoslav and Rwandan tribunals five years ago were the first attempts by the international community since Nuremberg to put on trial those accused of egregious human-rights abuses. This week the British government backed the idea of setting up a similar tribunal to try Saddam Hussein in the unlikely event that he is ever apprehended after being toppled. Last July 120 nations backed the establishment of a permanent international criminal court.

In General Pinochet's case, individual countries have also shown themselves more willing than ever before to put a tyrant on trial. Relatives of victims and survivors of General Pinochet's brutal regime are scattered throughout Europe. At their urging, prosecutors across the continent have launched proceedings. France, Switzerland and Belgium are now also seeking the general's extradition. Authorities are pursuing investigations against him in Germany, Luxembourg, Sweden and Italy as well.

Nevertheless, the attempt to bring the world's greatest criminals to justice is only just beginning. It may be years before the planned permanent international criminal court is established. As the close decision by the Law Lords makes clear, much also remains to be done to give national judges the tools to apply international law.

But the biggest hurdle will be persuading those who oppose the entire effort as Utopian, or dangerous. Their most common objection is that, once former leaders are subject to trial, every leader will have to fear being ensnared by the same legal net. Yet the chances of this happening are remote. As the Pinochet case has shown, mounting an international prosecution is enormously difficult even when there is plenty of evidence of wrongdoing. What's more, international arrests and extraditions remain as much a political as a legal proceeding. Courts can only rule whether they are legal. Political leaders everywhere have the final say about whether they go ahead. If a rogue prosecutor somewhere demands the extradition of Margaret Thatcher or George Bush on bogus charges, politicians have the power to veto the move.

The price of impunity

A more substantive objection is that General Pinochet's arrest in Britain or extradition to Spain may upset a fragile transition to democracy in Chile, and discourage future dictators from handing over power. Some of the general's supporters in Chile have predictably expressed outrage at news of the Law Lords' ruling. There could yet be violence. Eduardo Frei, Chile's democratically elected president, pledged to continue his government's efforts to get General Pinochet released. Unlike British judges, Mr Straw will have to weigh the consequences for Chile of extraditing the general to Spain. He should stand up to official protests. Most Chileans want the general called to account. If Mr Straw genuinely believes that Chile's democracy will collapse under the strain, that might justify sending General Pinochet home. So far, though, there is no evidence for believing this (see page 39).

Moreover, there is a strong countervailing argument: the

ease with which dictators have escaped any consequences for their crimes has encouraged more to seize power and to commit further barbarities. Latin America, in particular, has been plagued by military coups. If a dictator forces democrats to grant him an amnesty at home, as General Pinochet did, that is where he ought to stay. The rest of the world is not bound to grant a blanket endorsement to such bad bargains. Putting ex-dictators on trial carries short-term political risks. But this bloody century has shown that the long-term risks of impunity have been far more terrible.

War of the worlds

The merger of two of Microsoft's keenest rivals does not undermine the government's antitrust case against Bill Gates's firm

THIS week's merger of America Online and Netscape Communications—the two pioneer firms that have done most to create the Internet as a mass-market medium for consumer services—is dramatic enough in itself. That both they, and a third company involved in the deal, Sun Microsystems, are the key government witnesses in the biggest antitrust case for a generation makes it even more so. And the question that is inevitably being asked, most loudly by Microsoft, the company that the Department of Justice has accused of bullying behaviour and of abusing its near-monopoly of the PC operating system, is whether this so changes the competitive landscape that the trial should now be abandoned.

Microsoft's counsel, William Neukom, claims that it proves what Microsoft has said all along: the computer industry is constantly shifting, competition is relentless and no single company can control the supply of technology. Microsoft is also eagerly drawing parallels between its case and the long antitrust war waged against IBM in the 1970s and 1980s, which lost relevance as power shifted—notably to Microsoft.

But there are two problems with this argument. The first is that it has no bearing on the legality of previous anti-competitive conduct by the software giant. The second is that, rich in both symbolism and potential as the AOL/Netscape deal is, it does not instantly create a new powerhouse, let alone one that will significantly diminish Microsoft's overwhelming market power. Just about the only thing that has changed is that Netscape's drawn-out struggle to survive as an independent competitor to Microsoft is no longer an issue.

A window on Microsoft

If anything, indeed, Netscape's desire to do a deal with AOL simply confirms how ruthlessly successful was Microsoft's strategy to eliminate it as a competitor (see page 63). Deprived of income from browsers by Microsoft's policy of giving away its rival Internet Explorer and then making it inseparable from the Windows operating system, Netscape has had to create alternative revenue streams. But its two remaining businesses are not as strong as it claims. In the market for heavy-duty software that underlies corporate web pages and the processing of Internet transactions, it has suffered thanks to fears about the long-term viability of any company "targeted" by Microsoft. Although its heavily trafficked Netcenter "portal" site has, as the default page for Netscape's browser, produced good revenue growth it too was threatened by the probable ultimate victory of Microsoft's Explorer.

There is in any case a terrible irony about the manner of Netscape's demise as an independent company, which goes to the heart of the antitrust case. Two of the charges levelled against Microsoft are that it entered into exclusive contracts and used its control of the desktop unfairly to disadvantage Netscape. Three years ago, Microsoft was determined that as many Internet and on-line service-providers as possible should distribute its Explorer browser exclusively; and it was prepared to make it worth their while to do so.

The biggest by far was AOL, but it regarded Microsoft as a deadly rival because of the recently launched Microsoft Network (MSN) on-line service. AOL's chief executive, Steve Case, had a number of bruising encounters with Microsoft. In one, he claimed, Bill Gates threatened either to "buy or bury AOL". Mr Case feared that MSN would overtake AOL because the distribution of its software with Windows made it uniquely easy for subscribers to sign up.

Yet by the spring of 1996, Microsoft was prepared to sacrifice MSN to further its war aims against Netscape. In exchange for an exclusive deal to use Internet Explorer, Microsoft gave AOL its heart's desire—equal billing with MSN on the desktop. Whatever AOL's qualms about such a marriage of convenience, it has not looked back since; yet for Netscape, the pressure of competing with Microsoft has proved intolerable. In an interesting twist, AOL wants to continue with the equal-billing arrangement despite buying Netscape. Not for nothing has the Windows desktop been described as the world's most valuable piece of real estate.

As to the power of the combined AOL/Netscape, it will control two of the three most-visited sites on the web. Moreover, AOL's strength in the consumer market (over 14m subscribers, with another 2m from its Compuserve subsidiary) should complement Netcenter's greater appeal to the business market. But marrying a media and a software company will not be easy. The introduction of Sun Microsystems, as a distribution partner for Netscape's software and a collaborator with AOL in developing cheap new Internet-access devices that use its Java programming language, is an extra complication. Sun is vital to the deal's success—but with no equity involvement, it is hardly locked in.

AOL has proved time and again that it is a formidable and highly flexible company, with a knack of reinventing itself when necessary. Netscape brings with it battle-hardened experience and a deep understanding of the Internet. But against Microsoft's market domination, vast financial clout ($17 billion in cash at the last count), technological prowess and strategic brilliance, there is no room for error. In short, and contrary to Microsoft's claims, the competitive landscape that led to the government's antitrust case has not changed significantly as a result of this merger.

THE PINOCHET CASE

Bringing the general to justice

In a landmark ruling, Britain's highest court has said Chile's ex-dictator can be extradited to Spain to face charges of murder, torture and hostage-taking

EVER since Augusto Pinochet's surprise arrest in a London clinic on October 16th, he has been at the centre of an extraordinary legal battle. While General Pinochet's supporters, and Chile's government, expressed outrage, his victims and foes rejoiced. And yet the real contest has not been on the streets, or in front of the television cameras, but in British and Spanish courtrooms. More than the fate of one 83-year-old former despot has been at stake. The arguments in General Pinochet's case have revealed the evolving state of international law and its tangled relationship with national laws. Can General Pinochet be tried for crimes committed by his regime? If he can, who can try him?

On November 25th, the judicial committee of the House of Lords, Britain's highest court, surprised both friends and foes of the general, as well as most of Britain's legal experts, by overturning a lower court decision that General Pinochet, as a former head of state, had absolute immunity from arrest for actions made while carrying out the functions of office. In what will become a landmark case in both British and international law, the five Law Lords ruled in a 3-2 split decision that murder, torture and hostage-taking are not the functions of a head of state, and so do not enjoy immunity from prosecution.

What now happens to the general is up to Jack Straw, Britain's home secretary, who has until December 2nd to decide whether to let an extradition hearing proceed. Mr Straw could let him fly home to Chile on compassionate or public-interest grounds either before or after such a hearing.

The Law Lords clearly understood the unprecedented nature and the gravity of the case before them. They are supposed to consider appeals only on specific points of law, and their hearings are usually dry, poorly attended affairs. This time the Lords made concessions not only to the intense popular interest in the case, but also to its broader legal significance.

They allowed human-rights groups such as Amnesty International, as well as some victims of the Pinochet regime, to be represented by lawyers, and the Law Lords were prepared to listen to a broad range of arguments beyond the narrow point of the appeal. When courts face an unprecedented situation, or ambiguous laws, they often look for guidance to the writings of legal scholars or to how foreign courts have coped in similar circumstances, although they are not bound to follow either. Both scholarship and foreign examples were freely cited in the Pinochet case, which turned into a wide-ranging legal debate. Altogether 55 lawyers participated. The packed hearings, originally scheduled for two days, stretched to six.

The face of sovereignty

The Lords were not ruling on whether General Pinochet was innocent or guilty of any of the crimes alleged, only on whether he could be arrested and extradited. In fact, the crimes of his regime were not even in dispute. These have been well documented. In a series of official investigations after General Pinochet stepped down, Chile's own government found that the intelligence service and the army, acting directly under General Pinochet's command, were responsible for 2,095 extra-judicial executions and deaths under torture, and 1,102 "disappearances" of people who have never been found. The actual number of those tortured or murdered is almost certainly higher. During General Pinochet's rule, a number of UN bodies and the Inter-American Commission on Human Rights also documented systematic murder, torture and kidnapping.

In 1978 General Pinochet's regime issued a decree granting its officials immunity from prosecution for any human-rights abuses. Before handing over power, General Pinochet also insisted on immunity being guaranteed in the constitution for Chile's new democracy. As a Senator for life, he cannot be prosecuted in Chile. The government of Chile argues that agreeing to the demand of General Pinochet and other military leaders for immunity was necessary to ensure a transition to civilian rule.

Britain's Law Lords did not endorse or condemn this domestic amnesty, but ruled that according to both international and British law, Britain itself is not bound by it. Other countries have taken the same view. Before the Lords' judgment, Spain's National Court had already backed Baltasar Garzon, the Spanish magistrate who requested General Pinochet's arrest in London. Arrest warrants have also been issued by France, Switzerland and Belgium, and prosecutors are pursuing cases against General Pinochet in Luxembourg, Germany, Sweden and Italy. In addition, relatives of victims in the United States are trying to mount a prosecution there.

Ticklish questions

The arguments in the Pinochet case are complex, and have set lawyers buzzing on three continents. But they boil down to two key issues. The first is whether General Pinochet enjoys "**sovereign immunity**" as a former head of state, a personalised version

of the legal immunity enjoyed by states in each other's courts.

The Lords overturned a judgment by Thomas Bingham, Lord Chief Justice of England and Wales, sitting as head of a three-judge panel in Britain's High Court. In a narrow, careful reading of English statutes, Lord Bingham concluded that General Pinochet enjoys criminal immunity for all actions carried out in his role as head of state—even the ordering of others to commit large-scale murder, torture and hostage-taking. Because he cannot be tried for crimes in a British court, claimed Lord Bingham, he cannot be extradited to Spain, a basic principle of most extradition agreements.

Sovereign immunity is a concept with an ancient lineage. Like diplomatic immunity, it was thought necessary to allow nations to deal with each other free of legal harassment. In fact, British law nowhere explicitly states that such immunity extends to a former, as opposed to a serving, head of state (none of the Law Lords disputed that a serving head of state enjoys immunity).

Hands off our hero

Lord Bingham concluded that a former head of state enjoys immunity as well because one English statute confers on a head of state the same legal protections as those enjoyed by an ambassador, which a second statute spells out as including immunity for official acts during his tenure as an ambassador even after he has left his post. The accusations against General Pinochet, Lord Bingham decided, refer to actions taken as head of state, not in a personal capacity, and therefore he continues to enjoy immunity from prosecution for them. Two of the Law Lords agreed with Lord Bingham's reasoning in the lower court.

But many international lawyers vehemently dispute this interpretation, and they succeeded in persuading three of the Law Lords to back their view. They cite a number of treaties and other international instruments which declare that no public official, including a head of state, enjoys immunity from prosecution for such "crimes against humanity"—ie, widespread or systematic murder, torture or arbitrary detention. No national amnesty such as Chile's, they add, can grant international immunity. If this were possible, international law would be meaningless, because despots would grant an amnesty to themselves, as did General Pinochet.

The lack of sovereign immunity for grave international crimes is stated explicitly in the Nuremberg Charter—which Britain played a key role in drafting—the decisions of the Nuremberg and Tokyo war crimes courts, and subsequent UN General Assembly resolutions affirming these decisions as international law. The Genocide and Torture Conventions, both of which Britain has ratified, state that any public official can be prosecuted.

In addition, legal scholars argue that this lack of immunity has become "customary" international law, consistently reaffirmed for the past 50 years and recently restated explicitly in the statutes of the Yugoslav and Rwandan tribunals. An article ruling out immunity for heads of state or government officials for the gravest crimes was one of the few non-controversial provisions in the treaty agreed in Rome in July to set up a permanent international criminal court.

"International law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone," said Lord Nicholls for the majority. "This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law." He went on to cite the Nuremberg charter and judgment and the 1946 UN General Assembly resolution affirming these. "From this time on, no head of state could have been in any doubt about his potential personal liability if he participated in acts regarded by international law as crimes against humanity."

In a concurring, and probably decisive opinion, Lord Steyn observed that absolute immunity would have protected Hitler against prosecution for ordering the "final solution", a point conceded by General Pinochet's lawyers during the hearing.

The second issue at stake in the Pinochet case has been **jurisdiction**. Countries take many different approaches to extraterritorial jurisdiction—ie, the claim to be able to try cases for crimes committed outside their borders. For example, British courts can try the case of a murder committed abroad, but only if the accused, not the victim, is British. Spain and Germany let their courts try cases where their nationals are the victim rather than the perpetrator. It was because of this anomaly that Lord Bingham quashed the original provisional arrest warrant: it charged General Pinochet only with the murder of Spaniards in Chile, a crime for which British courts could not have claimed jurisdiction.

A subsequent warrant charged General Pinochet with torture and hostage-taking in Chile, and conspiracy to commit murder in Spain. Lawyers appearing before the Law Lords for victims and human-rights groups argued that for crimes against humanity such as systematic murder or torture there is "universal jurisdiction" which overrides the various rules that different countries apply to ordinary crimes beyond their borders. An idea also endorsed by many scholars of international law, this means that all countries have a right, indeed an obligation, to try or extradite those accused of the gravest crimes no matter where they are committed.

The erosion of borders

Universal jurisdiction has only rarely been invoked. Some states such as Canada and Belgium have incorporated the idea directly into their law. In the case of Klaus Barbie, France's Court of Appeal explicitly endorsed the idea of universal jurisdiction. Spain's National Court did the same when it ruled that, contrary to arguments put forward by the Spanish government, Spain's courts can try General Pinochet, and other Chilean and Argentine military leaders, for genocide, terrorism and torture.

Israel tried Adolf Eichmann and John Demjanjuk under claims of universal jurisdiction, which were respected by most states. In deciding to extradite Mr Demjanjuk, accused of committing horrific crimes as a concentration-camp guard in the Ukraine during the second world war, the United States Court of Appeals for the Sixth Circuit explicitly endorsed the idea that "there is a jurisdiction over some types of crimes which extends beyond the territorial limits of any nation." (Mr Demjanjuk's conviction in Israel was overturned on appeal by the Israeli Supreme Court.)

In their judgment, the three Law Lords in the majority did not express an explicit view about universal jurisdiction, although their judgment will be seen as supporting the concept. Instead, Lord Nicholls stated that the acts of torture and hostage-taking

of which General Pinochet is accused are covered by the British statutes implementing two treaties, the 1984 Torture Convention and the 1979 Convention Against the Taking of Hostages. "This country has taken extraterritorial jurisdiction for these crimes," he said.

In his earlier judgment, Lord Bingham had argued that the proper place to try former heads of state like General Pinochet is not in national courts, but in an international tribunal. Many practising British lawyers agree, and this seems logical to many laymen as well. Most Spanish and British government ministers would be happier to hand over a diplomatic hot potato such as General Pinochet to a collection of international judges than to see their own courts deal with him. Both countries have been strong supporters of a permanent international criminal court.

General Pinochet himself will never be tried by this new court, which will take years to set up and which, in any case, will not be able to try any crimes committed before it begins operating—a provision needed to win widespread agreement from today's government leaders, who did not want to run any risk of ending up before such a court themselves.

But even future Pinochets may not always end up before the international court. Jealous of their national sovereignty, most countries insisted on a strong "complementarity" provision in the treaty. This dictates that the international court is only supposed to complement, not supersede, national courts, and so can take up a case only when they are unwilling or unable to do so. It gives governments ample opportunity to dispute the intervention of the international court on these grounds. Paradoxically, because these restrictions are so strong, they may also work in reverse. Governments—especially those like Britain with well-established legal systems—may find it awkward to explain why they are handing over a future Pinochet to the international court rather than putting him on trial themselves.

At the insistence of the United States and other opponents of a strong court, the court's jurisdiction was also restricted to cases in which the accused's own country, or the country where the crimes were committed, ratifies the treaty or agrees to the court's jurisdiction. This presents a bigger obstacle. It may well place countries such as Britain in the uncomfortable position of either putting a future Pinochet or Saddam Hussein on trial, or letting him go. By placing so many restrictions on the international court, countries have blunted its usefulness.

Beyond the specific legal issues in General Pinochet's case, the controversy in both Chile and Europe surrounding his arrest has raised the broader questions of whether it is practical or desirable to apply international law to former dictators. Are not such cases inherently political, or at least subject to abuse for political reasons? What is to stop some left-wing European magistrate from charging George Bush for civilian deaths inflicted during the United States invasion of Panama, or Henry Kissinger for the bombing of Cambodia? Libya might seek the arrest of Ronald Reagan for the bombing of Tripoli. Lithuania might want to charge Mikhail Gorbachev for the Soviet army's assault on civilians in 1991. The list seems endless. While in office, heads of state and senior officials enjoy immunity. But is every retired statesman to be subject to the whim of any prosecutor anywhere in the world?

Keep travelling, Mr Kissinger

If international law were applied more often, the answer would depend on the facts of any particular case. But frivolous or politically motivated prosecutions would stand little chance of getting off the ground. General Pinochet's case has shown just how difficult it is to mount such a prosecution. Even though the crimes of his regime have been so well documented, Mr Garzon, the Spanish magistrate who launched the case, has spent years gathering evidence which would hold up in a court of law. A case brought by British-based torture victims was barred by Britain's attorney-general last month for lack of evidence. Most governments would not allow a prosecution of Mr Bush, Mr Kissinger or Mr Gorbachev without overwhelming evidence of wrongdoing, which might be impossible for most prosecutors to obtain even if it existed.

And extradition remains as much a political, as a legal, procedure. Governments, not courts, make the final decision on whether to extradite accused individuals. They can refuse to do so if they believe an extradition request is politically motivated. That is why the final decision about whether or not to extradite General Pinochet will rest with Mr Straw, Britain's home secretary, not British judges.

For similar reasons, even frivolous arrests are unlikely. International arrest warrants usually have to be notified to political authorities before being served. It is almost certain that the Home Office was notified about the Spanish request for General Pinochet's arrest, transmitted through INTERPOL, before it went to the Bow Street magistrate who had to issue the warrant. In any case, Mr Straw could have intervened at any time to lift General Pinochet's arrest. Politicians are reluctant to do this, at least in countries which pride themselves on having an independent legal system. But if a request to arrest Mr Reagan or Mr Gorbachev came through INTERPOL, it seems clear that a senior politician in almost any country would be notified instantly. Most governments would not allow such a warrant to be served without a great deal of persuasive evidence.

Human-rights groups were jubilant over the Law Lords' decision, which was indeed a triumph for international law. And yet the fact that the legal victory was so narrow, and so unexpected, shows how much remains to be done to make the great body of international human-rights law applicable everywhere.

The most immediate task is to bring national laws into line with international treaties, giving national courts direction about how they should deal with other countries' human-rights violators. A longer-term task is to overhaul the treaties themselves, making them more specific and codifying concepts such as universal jurisdiction. Governments have said repeatedly over the past 50 years that murder, torture and arbitrary arrest are not acceptable behaviour for any state, and that those who pursue such policies should be brought to justice. Now the world has to give courts the proper tools, and authority, to do that.

Thank the Law Lords