No Safe Haven: the Case for the Prosecution

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Geoffrey Bindman's name is well known to all of us who take an interest in the protection of human rights in the UK. A practising solicitor who defies many of the popular preconceptions about his profession, he has played a prominent and progressive role in shaping several important areas of modern UK law (most notably the law relating to race and sex discrimination) and has acted, often to spectacular effect, in a number of landmark cases.

As an unapologetic campaigner for human rights, one would expect to find Bindman working for the defence rather than the prosecution when he is involved in criminal cases. And that is indeed where one often finds him. But not always. In the famous Pinochet extradition proceedings, for example, he was retained by Amnesty International to help make the case *in favour of* extradition. As the work of human rights lawyers becomes more influential in legal and political culture, the people in the dock are increasingly going to be those who are charged with human rights violations rather than those who are victims of them. At which point one begins to find the human rights organisations, and their lawyers, working alongside the prosecutors and not only on the defence team.

That change of perspective is, indeed, the theme of Bindman's Amnesty Lecture. It might be subtitled "The Case for the Prosecution", because he reveals himself as an enthusiast not only for human rights but also for the criminal prosecution and punishment of those accused of human rights violations. His particular concern here is with the proper way to ensure that such prosecution and punishment is undertaken, and undertaken properly, when the violations in question occur against a

background of war or unrest, or under an oppressive regime that is complicit in the violations, or more generally in those times and places at which there is no local legal system that is willing and able to do the prosecuting and punishing.

In these times and places Bindman sees a central role for international law, conceived in its post-Nuremberg form as a body of law enforceable not only against states but also against individual people. In particular he stands up for the principle of "complementarity" embraced in the United Nations Charter of 1945, whereby the same international human rights standards were supposed to be enforced *both* by co-operative international action *and* by the actions of each signatory state acting alone. What he wants to see is more fidelity to this two-pronged approach: more concerted international action, of the kind that the International Criminal Court has recently been set up to deliver, but also more vigorous actions in ordinary domestic courts against international human rights abusers – by which he means, in principle, prosecution and punishment of such people *wherever they may find themselves*, and not only in their own countries or the countries of their victims or the countries in which their violations were committed.

In his lecture, Bindman expresses some disappointment and frustration at the caution with which both routes are currently being pursued. Concerning the jurisdiction of the International Criminal Court, he worries that a major loophole protects the worst offenders most. Why is it, he asks, that human rights violations committed on the territory of a non-signatory state by its own citizens cannot be prosecuted before the ICC, even when the violators leave home and travel to a signatory state? Concerning the contribution of national courts to prosecution and punishment for violations of international human rights standards, he has some harsh words for the UK's rather timid position under recent legislation designed to complement the arrival of the ICC. When the standards being enforced under this new legislation are international standards, why are prosecutions

in UK courts in respect of human rights violations committed outside the UK to be available only against UK citizens or residents?

Both of these limitations Bindman regards, with disapproval, as the symptoms of "a desire to cling to state sovereignty [that] impedes the development of a rational system of human rights enforcement." To those who say that countries should be entrusted with sorting out their own pasts, and allowed to implement negotiated amnesties and similar arrangements as part of their effort to move forward, he replies that no doubt they should. But what this does not entail, he points out, is that the perpetrators of crimes against humanity should be protected by such national amnesty arrangements when they travel abroad. Their crimes were against humanity, and whatever safe haven they may negotiate with their own fellow citizens in a spirt of national reconciliation, that is no reason to think that the rest of humanity owes them a safe haven by the same token.

The main problem with this argument is that of keeping its conclusions under control. If we should overcome our "desire to cling to state sovereignty" in respect of where and by whom crimes against humanity are tried, why shouldn't we by the same token abandon the protective shield of the law of extradition, which presupposes and affirms the importance of state sovereignty? If one would be happy to see Pinochet tried in the UK, then why would one not be equally happy to allow the Spanish police to come and arrest him and haul him off without further ado? The answer cannot be that we have to check whether Pinochet is being despatched into the clutches of a tolerably decent legal system. Why would *we* have to check this unless there is some salience in *our* state sovereignty, i.e. in the fact that Pinochet finds himself under our jurisdiction rather than that of the Spanish? And if jurisdiction matters in this respect then why not in other respects? If we grant Pinochet the relatively safe haven of our extradition laws – procedures to control whether others can try him – then why is it any less

rational to afford him, by the same token, a safe haven in respect of whether *we* can try him?

It is also hard to see why the logic of such an argument should not carry us far beyond crimes against humanity. In his lecture, Bindman adopts the international lawyer's view of what counts as a crime against humanity: "murder, extermination, enslavement, torture, rape, enforced disappearance and other similar inhumane acts" when these are committed "within the context of a widespread or systematic attack on any civilian population." The latter limitation means that not everything that counts as a human rights violation in international law also counts as a crime against humanity. But if we want a 'rational system of human rights enforcement' why do we only want it in respect of the narrower class of crimes against humanity, and not in respect of other human rights violations? Why, in particular, don't we want it in respect of the whole gamut of murders, enslavements, rapes, kidnappings, and so on, all of which infringe the human rights of their victims? If we insist on the international law duty of all UN member states to criminalise all *torturers* under their own domestic laws, wherever in the world their crime may have been committed, why should we not also require all UN member states to criminalise all murderers and pimps and rapists and kidnappers, wherever in the world their crime may have been committed? This would mean the abolition of a jurisdictional requirement for the trial of such diverse criminal defendants as Harold Shipman, Peter Sutcliffe, Michael Tyson, Timothy McVeigh, and O.J. Simpson as well. But in these cases we would presumably want them to be tried within the jurisdiction in which they allegedly committed their crimes. What remains unclear, therefore, is how we can justify doing away with local trials for Milosevic and Pinochet while preserving existing jurisdictional requirements with respect to other violators of human rights.

These remarks of mine reflect two very different anxieties. The first concerns the way in which the idea of the "rational" has

been appropriated by tidy-minded folk who would prefer to see more uniformity and less variety in human practices and attitudes. But there are plenty of reasons for plenty of important issues to be determined by individual choice or local convention, such that they will be dealt with differently by different people in different places and at different times. It has become the norm to regard the scope of human rights as lying outside the range of issues which are subject to such rational variation. But even if the scope of human rights does lie outside that range – which I very much doubt – it does not follow that the enforcement mechanisms are similarly outside the range. It does not follow, in particular, that jurisdictional claims to monopoly of enforcement should not be respected. The reasons for respecting such jurisdictional claims, even in international law, are many. Political reasons, for example, may, as Bindman argues, threaten the adequate protection of human rights. But that does not stop them being valid reasons and hence does not make following them any the less rational. So a system of human rights enforcement may be none the less rational merely for the fact that it accommodates such political reasons, together with the patchy enforcement practices that they may sometimes yield.

My second – very different – worry concerns Amnesty International's own recent policy direction. Among the most important human rights are many which have the effect of inhibiting the trial and punishment of people who undoubtedly deserve to be tried and punished. Governments – democratic governments as well as undemocratic ones - commonly find these inhibitions annoying, and often attempt to short-circuit them. Amnesty International exists in part to keep an eye on these attempts and to act as a persistent nuisance to governments who make the trial and punishment, *even of the deserving*, too easy for themselves, especially by reducing the "due process" hurdles that have to be crossed to mount an effective prosecution. This "nuisance" role is important because trial and punishment, even of the deserving, ought to be difficult. There ought to be a large

number of hoops for prosecutors to jump through, including some which are about jurisdiction, or more generally about the possession of proper standing to prosecute. It is therefore worrying to find it argued by Amnesty International and its lawyers that trial and punishment of one class of people who deserve to be tried and punished – namely those picked out as human rights abusers – ought to be made *easier* than it is already. I for one rebel at the idea of seeing the trial and punishment of *anyone* made easier than it is already, least of all in the name of human rights. If that rebellion means that Milosevic or Pinochet escapes his just deserts, then that is just the price we pay for being committed to human rights. Far from being a matter of global shame for all believers in human rights, our willingness to see a Milosevic or Pinochet go free on a "technicality" – that is, for reasons of due process - is surely an excellent test of our convictions.