

## *Against trying the elderly?*

**F**ormer President of Chile, General Augusto Pinochet, whom people with slightly longer memories remember as the man who ordered the assassination of his legally elected predecessor Salvador Allende, who also presided over the torture and liquidation of many others and, because of lack of prison space, used football stadiums to detain thousands of real and assumed political enemies, arrived in Great Britain at the age of eighty two for treatment of his ailing back. Several states demanded his extradition in order to try him in their courts. This case reached the House of Lords (which in this strange country also plays the role of the supreme court) on two separate occasions. We shall not dwell here on the legal niceties of the case: suffice it to say that the main obstacle to Pinochet's prosecution was removed – presidents and monarchs cannot hide behind their states in order to be absolved of their individual responsibility, at least for acts which constitute international crimes. However, it is not likely that Pinochet will be extradited since according to the opinion of some physicians he is unable to stand trial or defend himself in any coherent way.

The further unfolding of this case and its eventual outcome (because the doctors' findings could still be challenged) is not relevant to our theme. More important is the fact that parallel with the legal proceedings dilemmas have again surfaced about whether there is any sense in taking sick and senile old persons to court so many years after their crimes were committed. In this respect the Pinochet case reminds us of many others, such as those of Papon and Demjanuk, and, more familiar to us, the cases of Artuković and Sakić. Trials of weary old men have always been seen as an anti-

climax, a poor substitute for the real thing, as harassment with no purpose, as an unfair game and even as a violation of human rights. This provokes pity instead of support.

Let us attempt to define some of the fundamental grounds of this unease. They could be the following.

A weary old man is not the same person who, under the same name, acted in his full strength, sometimes even as a youth (e.g. Sakić). There is also a tricky parallel from the other side of the age spectrum: for example, if a thirteen year old murderer were to be caught and indicted many years later, say at the age of thirty, he would be treated in a juvenile court and given a sentence appropriate to a minor!

Linked to this is the circumstance that the accused is in all likelihood no longer aware of why he is being tried, that he is unable to remember either his crimes or the reasons for them and will not be even capable of feeling any remorse. The sentence, regardless of its severity, will not have any effect on him. He will not, in any case, be able to repeat his crimes.

The accused will not be able to defend himself adequately and the case will thus be discredited. We should never give in to the temptation to withhold human rights, including the right to a fair trial from the accused, no matter how serious or hideous the crimes, and especially if there are the gravest offences possible..

The death penalty is not popular and has been abolished in many countries. Consequently, there is no punishment severe enough for aged criminals. Even a life sentence would be too short. In such cases a short prison sentence could easily constitute imprisonment for life, it could in some cases even amount to a death penalty.

Persons close to elderly criminals, those who identify with

them, are also old and weary. Who is such punishment intended to influence, whom is it intended to deter from committing such crimes in the future? The candidates for such crimes, the new Artukovičs and Sakičs, are young and full of *hubris*, as Sakič and Artukovič once were. They cannot imagine themselves being old. For them Pinochet and his contemporaries only had bad luck and did not achieve total success, or, like other people of the same age, will have to die of something anyway.

### ***In favour of trying criminals who got old***

**T**he reasons summarised above, as well as others that exist against "late" trials, amount to an alleged lack of any real purpose for their punishment. As criminologists would say, there is no special prevention since the one who will be punished is no longer able to commit the crimes which he should be prevented from committing again. There is no general prevention because the punishment will not prevent others from committing similar offences. This does not even constitute revenge, since revenge in this case is not "sweet" and the one who is guilty does not understand this retribution. There are few people left who would enjoy such a form of revenge, they could even be regarded as sadists and the public might even find the whole experience sickening. Long lasting hatred is pathological.

**O**n the other hand, international crime does not fall under the statute of limitations. Should the crime then still exist if the perpetrator is not charged due to old age and ill health, like a child who is not tried due to his immaturity and inexperience?

**I**f we take a closer look at the those arguments, we may conclude that no matter how rational they sound, they are all of an emotional nature. In fact, we would like the anger directed at criminals to still subsist in its full intensity up to the moment when the deserved punishment is meted out, when both the criminal and ourselves are convinced that a victory over the culprit was indeed won. If we do not count the desire for revenge, the other reasons against punishment are allegedly not convincing enough.

**T**he principle of justice demands that everyone be punished for acts they knew were punishable by law when perpetrated and for which they knew the type of punishment. There

is no justification for any deviation from this principle. Just as there is no justification for the suspects of war crimes not to have the right to be presumed innocent or not to enjoy of their human rights as defendants. Behind such procedural guarantees lies the wish for the trial to take place in calm, without any passionate outbursts, without pressure from the public or media and before an impartial court and jury. For these very reasons, trials sometimes change their venues far from places where the crimes were actually committed, judges close to the victims are disqualified, as well as jurors who hold strong opinions about the crime committed, and there is often a cooling-off period for emotions and passions to settle. Does the trial of a person, whom the majority of people have not even heard of or have forgotten, towards whom there is only indifference, even a feeling of pity, not provide the ideal conditions for a fair trial?

**T**his type of situation might appear inhumanly cold only to those who confuse justice with wrath and emotional satisfaction. On the contrary, the trial of an elderly person is in principle procedurally cleanest. If the trial does not take place because the accused is not considered to be mentally competent or is sick, h/she would thus be treated as **any** mentally incompetent or sick person, regardless of age. The assumption that someone is physically or psychologically handicapped only because of old age has statistical but not concrete validity: it is only as strong as the statement that anyone who smokes has cancer. As regards the previous comparison with the adult who committed a crime as a child, resulting in the adult being tried in the same manner as a minor, here we have the case of an adult having committed crimes in full knowledge thereof and being procedurally treated as though he had the mental and moral capability of a child .

**I**f we adhere to this rationale, we shall realise that the purposes of punishment developed by modern penology are attempts made by lawyers and administrators to transform the moral imperative of punishment into something both practical and useful to society. Pragmatic arguments of general prevention had to be used to counter the previously prevailing attitude that the criminal sanction is in fact a form of revenge, as it was in traditional societies, where the victims and their relatives and tribesmen autonomously decided on whether

prosecution would take place at all. It had to be explained that society had its own interests, not in revenge, but in the prevention of new crimes through threats and deterrents. What would happen if we gave up trying elderly criminals after so many years? Would that serve any useful purpose? We cannot come up with any but that judges and prosecutors would be spared performing such unpleasant tasks. However, their work is important but very rarely pleasant. In contrast to that, damage, albeit small, would ensue. In addition to the many reasons why a potential criminal normally hopes to avoid trial and punishment another could then be added, that of becoming too old to be tried!

A "belated" trial provides the opportunity to clarify the events and atmosphere which led to the crime being committed in the first place, to recognise that those who are *not* on trial might actually be the real authors and inspirers of the crimes, who managed to escape by dealing covertly or hiding behind their titles or acting from another country. These circumstances can usually not be investigated very well until a certain time has elapsed; historians and other individuals who are not authorised to reach decisions on the appropriate punishments later deal with these cases. A trial after many years represents the chance for evidence to be judged with stricter attention to detail and for the perpetrator, whether or not he is accessible, not to remain unnamed. More importantly, this type of case draws public attention, and in the reconstruction of the past, similarities with the present may be found which intelligent people could use as a more efficient method of prevention than threats of punishment. This type of trial could play the role of the truth commissions.

### ***The case of evil old men***

Taking a closer look at the circumstances which facilitated the commission of crimes attributable to the now old and at those who intellectually created and inspired them would

eliminate a further objection made to courts, in particular to international courts, that they try only the small fish, the executors and not those who gave the orders. Then, among the guilty, many people would be found, who in fact had been fairly old when the crimes were actually committed, people who are at the time of trial are hiding behind the ultimate immunity, that of <1>death</1>. Did they subconsciously count on forgiveness due to their approaching even more advanced age?

I am convinced that in a decade or so, if the trial of today's young criminals takes place, our public will be more preoccupied with the role the older evil men in our society played in the background of the tragedy of Yugoslavia in the ninth and tenth decades of this century. They have been called "voluntary donors of other people's blood", they sketched ethnic maps arrogating other peoples' territories, drew up plans for "humane" resettlement and exchange of entire national and religious groups, calculated the cost-effectiveness of their young compatriots falling in wars to attain grandiose national ideals. They welcomed, glorified, or at least failed to condemn "patriotic" criminals who could hardly wait for the opportunity to ennoble their pathological and cupid motives, because the latter were useful to larger national aims

These evil old men, Serbs and others, should be studied in detail. Was the reason for such callousness merely vanity or ill temper and senility which comes with old age? Or was it the hope of avoiding responsibility? It is not very probable that they counted on the *ultima ratio* of death and God's mercy (even though many of them became religious in their later years). It is more likely that they believed that they already had immunity because it is considered to be dishonourable and unfair to put the old on trial. It again turns out that many elderly people are in fact evil children.

Evil old men are another reason why we should put elderly criminals on trial.

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<1>In a documentary from Kosovo produced in February 2000, all those questioned about the guilt of the members of their own community, without exception, pointed to heaven replying that only God could judge on such guilt; however, as far as the others were concerned, they knew for certain that the latter were guilty — *Kosovo — ein Tagebuch*, Hessisches Fernsehen, 24 February 2000. </1>