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The Pinochet Precedent and Universal Jurisdiction

Naomi Roht-Arriaza*

In October 1998, General Augusto Pinochet, military ruler of Chile from 1973 to 1990, was arrested in a London clinic on orders of a Spanish court. That court, acting under a Spanish law[1] permitting universal jurisdiction over certain crimes, has since 1996 been investigating the top leadership of the Chilean and Argentine militaries for their role in the murder, disappearance and torture of thousands of real or perceived opponents throughout the Southern Cone of South America. Pinochet's detention merely exposed to the world the tip of a larger iceberg.

The *Pinochet* case and the related cases in Spanish and other European courts provide a fascinating case study of the benefits and risks of universal jurisdiction. My talk today will focus on a few aspects of these cases: first, the jurisdictional bases of the Spanish and other European suits in national law, and the implications of this grounding in national law; second, the effects of the Spanish cases, in particular, within Chile and Argentina; and third, some of the particular factors that have made the Spanish prosecutions relatively successful.

The Spanish cases[2] began when members of the Spanish Union of Progressive Prosecutors filed a complaint in April 1996, accusing members of the Argentine military junta of genocide, terrorism, and other crimes regarding the detention and subsequent disappearance during the 1970s of a number of Spanish citizens and citizens of Spanish descent who were living in Argentina. The case was filed under Spanish laws allowing public interest organizations, as well as aggrieved individuals, to file and maintain criminal complaints even without the backing of, and in this case over the strenuous opposition of, the state prosecutors office. Thus, a group of exiles and human rights activists, backed by the Spanish political party United Left and by professional associations, could maintain the prosecution without state consent, merely with a commitment by the state not to interfere with the independence of its own judiciary.

Article 23.4[3] of the Spanish Judicial Law allows prosecution of non-Spanish citizens for some crimes committed outside Spain, among them

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1. *Ley Organica del Poder Judicial*, art. 23(4) (1985).

2. *See* Spanish National Court (*Audiencia Nacional*), Case 19/97 (Judge Garzon) *and* Case 1/98 (Judge Garcia-Castellon) (1998).

3 *Ley Organica del Poder Judicial*, art. 23(4) (1985).

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genocide, terrorism, and other crimes under international law contained in treaties ratified by Spain.[4] The law does not limit prosecutions to Spanish citizens, but applies to victims of any nationality.[5] The case was by law assigned to the National Audience with jurisdiction over international crimes. By lot, the case fell to Judge Baltazar Garzón.

Garzón accepted the complaint, created an investigating team, and sent requests to Argentina for documents and testimony. The Argentine government replied that it considered the case a violation of Argentine sovereignty and would not cooperate, despite a Spanish-Argentine judicial cooperation treaty. In 1998 Garzón issued an international arrest warrant for retired General Galtieri and nine other Argentine officers, later expanding indictments and warrants to encompass over a hundred officers. The case received its first defendant in custody when retired navy captain Adolfo Scilingo arrived in Madrid to testify. Scilingo, who confessed to throwing prisoners alive from airplanes into the sea, was detained in October 1997, and is now free on bail but unable to leave Spain. The presence of a live defendant ensures that there will be a full bench trial; Spanish law, unlike that of other European states, does not permit trial in absentia. Another defendant, Miguel Angel Cavallo, is currently detained in Mexico on a Spanish warrant, pending extradition to Spain.

Meanwhile, in May 1996 a second complaint accused General Pinochet and others of the deaths and disappearances of Chileans, and was accepted for investigation by Judge Manuel Garcia Castellon. Judge Garzón began looking into Operation Condor, a coordinated effort by the South American militaries to assassinate and disappear opponents across borders in Latin America, Europe and the United States. The two cases were later consolidated within a single investigation under Judge Garzón. It was Garzón who, in the course of the Operation Condor investigation, issued an arrest warrant and a request for extradition of General Pinochet when he arrived in London for medical treatment.

The two House of Lords decisions[6] denying immunity for Pinochet and allowing the extradition to proceed are no doubt known. In those decisions, the court held that there was no former head-of-state immunity for certain international crimes, including torture.[7] The second decision allowed the extradition to go forward, but reduced the number of extradit-

4. *See id.*

5. *See id.*

6. *See* Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [1998] 3 W.L.R. 1456 (H.L.), *reprinted in* 37 I.L.M. 1302 (1998); Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [1999] 2 W.L.R. 272 (H.L.), *reprinted in* 38 I.L.M. 430 (1999); Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [1999] 2 W.L.R. 827 (H.L.) [hereinafter House of Lords Decisions].

7. *See id.*

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able charges to those alleging torture committed after 1988, the date the United Kingdom passed implementing legislation for the Convention Against Torture.[8] Less well known in the U.S. is the decision of the Appeal Chamber of the Spanish Audiencia Nacional, made up of eleven judges.[9] In that decision, the judges affirmed Spanish jurisdiction over the Argentine and Chilean cases.[10] The court found that domestic amnesty laws could not bind the Spanish courts.[11] More controversially in the Chilean and Argentine cases, the court agreed with the characterization of the crimes committed as genocide, a genocide aimed at destroying part of a national group.[12] The national group at issue here was that of Chileans in leadership positions or of Argentines who did not share the military's view of what the "nation" should look like. The court found that the lack of express authorization for universal jurisdiction in the 1948 Genocide Convention did not mean such jurisdiction was barred, as it was consistent with the intent of the drafters.[13]

The interesting thing about both the British and Spanish decisions on jurisdiction for present purposes is that they relied on local, not international law. The Spanish courts grounded Spanish jurisdiction in the language and history of Article 23.4. They carefully considered the relevant dates of passage of the legislation, whether it was substantive or procedural in nature and thus could be applied to conduct occurring before its passage, and its relationship to an earlier Spanish law that also allowed for extraterritorial prosecutions.[14] They talked about universal jurisdiction, but grounded their decision in domestic statutory law.

The British House of Lords, similarly, looked to U.K. law, especially the implementing legislation of the Convention Against Torture,[15] to ground its jurisdiction over Pinochet. Both courts also looked to the domestic law definitions of the relevant crimes, not to their international definitions. Thus, the House of Lords found that torture could only be considered an extraditable crime after the date when the U.K. ratified the Torture Convention despite the fact that torture was considered an inter-

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8. *See id.*

9. *See* Anto de la Salade lo Penal de la Audiencia Nacional confirmando la jurisdiccion de Espana para conocer de los crimenes de genocidio y terrorismo comtedidos durante la dictadura chilena, Nov. 5, 1998, Rollo de Apelacion 173/98.

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

15. *See* House of Lords Decisions, *supra* note 6; *see also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, Art. 19, para. 1, 1465 U.N.T.S. 85.

national crime long before 1988.[16] It was the incorporation of the Torture Convention into U.K. law that gave the court jurisdiction, not the underlying customary law norm. In the Spanish case as well, the court focused on the transposition of the 1948 Convention into domestic law. This law had originally included a reference to social groups as one of the protected groups under the definition of genocide.[17]

What are the implications of this reliance on domestic law for both the jurisdictional and substantive definitions of what are admittedly international crimes subject to an international jurisdictional regime? I think we have to look more closely at how international law commitments are transposed into national law. In many cases, ratification of an international treaty on human rights or humanitarian law does not lead to incorporation of the crimes into the domestic penal code, even though the terms of the treaty may well require such incorporation. Only about half of the states that have ratified the Genocide Convention,[18] have some definition of genocide in their penal codes; torture fares a little better, but not much. At times, legislatures seem to be convinced that ratification *per se* will suffice, but criminal courts have tended to disagree on *nullum crimen sine lege* grounds. Thus, for example, within Chile, courts have not taken up genocide charges against Pinochet because there is no definition of the crime in the Chilean penal code; Chile ratified the Genocide Convention years ago. One lesson of the *Pinochet* cases is that human rights lawyers and advocates need to do a much better job insisting not just on ratification of treaties, but on their full implementation in domestic law. The Spanish cases underscore the need for a concerted effort, perhaps within the context of International Criminal Court (ICC) ratification efforts, to make sure that the crimes and jurisdictional bases of concern are fully transposed into national penal law so that they can be used by domestic criminal courts.

A related issue concerns the way universal jurisdiction has been combined with other possible jurisdictional bases in the cases. While the letter of the law did not require it, the *Pinochet* case and related cases were careful to include and prominently feature victims who were citizens of the forum state. Thus, in the Spanish cases the original list of victims was made up of Spanish citizens and descendants of Spanish citizens who had been killed or disappeared in Argentina. Only later, after the case had been accepted for investigation, were non-Spanish victims added. This

16. *See* House of Lords Decisions, *supra* note 6.

17. *See* Anto de la Salade lo Penal de la Audiencia Nacional confirmando la jurisdiction de Espana para conocer de los crimines de genocidio y terrorism comtedidos durante la dictadura chilena, Nov. 5, 1998, Rollo de Apelacior 173/98.

18. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

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was done in part for political reasons – to avoid charges of Spanish court meddling – and in part to take advantage of Spanish constitutional mandates to the courts to do justice for Spanish citizens. The Belgian case against Pinochet, also based on universal jurisdiction, involved Chilean citizens living in Europe; there was always a tie to the forum state.

My second point concerns the effects of the application of universal jurisdiction within the states where the crimes took place. The Chilean and Argentine governments based much of their opposition to Spanish jurisdiction on the argument that extra-territorial adjudication of crimes committed within Chile and Argentina would upset a delicate political consensus regarding the proper balance between truth, justice and amnesty. As a policy matter, it was better to leave adjudication to the courts of the countries involved, even though they had proven inadequate for the task to date. One of the main lessons of the Chilean and Argentine cases in Europe is that the opposite is true: transnational prosecutions can catalyze domestic prosecutions.

This catalyzing process happens a number of ways. First, prosecutions abroad change the limits of the possible. One of the interesting stories coming out of my research in Chile was told by Eduardo Contreras, the lawyer who brought the first criminal complaint against Pinochet. He had wanted to bring a complaint for years, he said, and could find no impediment in domestic law. Yet his colleagues in the human rights movement laughed at him whenever he raised the issue, telling him no court would ever accept it, that it was a waste of time, or worse, to try. Yet once the Spanish cases were underway (even before Pinochet's detention) it became somewhat less of a crackpot idea. If a Spanish judge thought the charges were serious, and well-supported, perhaps it was worth trying in Chile as well. So he brought his complaint. There are now over 170 complaints pending against Pinochet in Chilean courts. The Supreme Court has approved stripping the ex-general of his parliamentary immunity, and a trial judge is investigating his participation in dozens of crimes. The unthinkable became thinkable.

A second type of catalyst is political. Once the Spanish cases were underway, it became a matter of national pride within Chile to argue that the General could be tried at home. Judges took it as an affront that a foreign judge was leading the charge; several became much more active in investigations that had been pending for years. In Argentina as well, cases based on child kidnapping had been actionable in Argentine courts from the start (because they were neither included in the due obedience or full stop amnesty laws nor covered in the trial of the generals) but they had languished in the courts for lack of evidence. Once the Spanish trials were underway, investigating magistrates found witnesses and evidence that allowed them to move forward. This resulted in the jailing or house arrest of Videla, Massera, Suarez-Mason and a number of other high-ranking Argentine ex-military officials for baby-snatching in cases involving the

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children of the disappeared. The defendants include a number of generals pardoned by then-President Menem in 1990. At least one defendant in these cases, Jorge Acosta, reportedly came out of hiding and turned himself in to an Argentine court after Judge Garzón in Spain asked Interpol to track him down.

The European cases[19] put the Frei Christian Democrat Socialist coalition government in Chile into something of a bind. To argue for Pinochet's release, they had to affirm that he could be fairly tried at home. It became fashionable for politicians to call for domestic trials, and even the right wing was forced to go along. Once he returned they were under political pressure to show that he could get a fair trial, which made them more supportive of domestic prosecutions.

A third effect concerned civil society. In Argentina as well as Chile, the European cases have helped revitalize the anti-impunity movement in the legislature, the courts, and society. The legislature in Argentina in 1998 repealed the due obedience law, which in 1987 had stopped the prosecutions of mid-level military officers. New legislation expanded reparations to survivors of the concentration camps. A number of high-profile cases were reopened on the theory that even if criminal prosecution was foreclosed by the due obedience and full stop laws, investigation into the fate of the disappeared was required by international law-enshrined rights to truth and to mourn one's dead. In four Argentine cities, Trials on the Truth began, in which investigating magistrates heard witnesses, subpoenaed ex-police and military officers, and tried to piece together the crimes committed during the dirty war. As a result the human rights movement and the groups of family members of the disappeared, after a period of little activity during the early 1990s, have reemerged as major political forces within both Argentina and Chile.

In Chile, the Spanish cases and Pinochet's subsequent detention made the events of the early 1970s a topic of national conversation for the first time since 1991. Human rights groups achieved new prominence, and the government and military realized that the issue had not just gone away, nor would it disappear simply with the passage of time. As investigating judges began issuing arrest orders for ex-colonels and generals, the military leadership decided that action was needed. With government help, they instituted a dialogue roundtable involving some human rights lawyers, military brass, and representatives of civil society. The results of the

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19. *See, e.g.*, *In re* Pinochet Ugarte, Trib. 1st inst. Brussels (investigating magistrate), Nov. 8, 1998; Pinochet v. *Procureur de la Republique* [Chanfreau, Claudet & Pesle], T.G.I. Paris, Order, Nov. 2, 1998; Pinochet v. *Procureur de la Republique* [Baquet & Klein], T.G.I. Paris, Order, Nov. 12, 1998; Pinochet v. *Procureur de la Republique* [Ropert Contreras & Pere Jarlan], T.G.I. Paris, Orders, Dec. 10, 1998.

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roundtable were a limited military recognition that their agents had committed unacceptable crimes, and a commitment to search for the bodies of the disappeared. Those providing information on the location of the bodies are covered by a professional secret law which maintains their anonymity, but are not otherwise safe from prosecution.

In other Latin American countries, the Spanish cases have led to new or reopened investigations into Operation Condor, the region-wide military cooperation plan of the 1970s. In Uruguay the new president has opened investigations into the fate of the disappeared and of their kidnapped babies; other investigations have started in Brazil and Paraguay. Reinvigorated investigations into the overseas operations of the Chilean DINA (secret police) have resulted in an Italian extradition request for high-ranking ex-military officers in the shooting of Bernardo Leighton. An indictment and arrest warrant was issued against Pinochet by an Argentine court in the assassination of Carlos Prats. U.S. Justice Department lawyers also reopened their investigation into the Letelier bombing in Washington, D.C. The actions of those outside the state seems to have emboldened internal actors, created new possibilities, and limited the state's range of options.

I do not mean to suggest that there is a simple, unilateral cause-and-effect relationship between the Spanish cases and the changes within Chile or Argentina. Of course, social processes are never simple or one-dimensional. Here, judicial reform clearly played an important role in changing the attitude of the courts towards investigations of the military, especially in Chile. In the last three years the composition and structure of the Supreme Court changed dramatically as military-appointed judges retired and the court created a specialized Penal Chamber composed of judges predisposed to limit the effects of a 1978 self-amnesty for the military. Moreover, the legal theories used by domestic courts in these cases generally reflect the triumph of long-standing arguments based on domestic criminal law, not international law. For example, the theory that disappearances are in effect kidnappings, which constitute continuing crimes, allows the courts to investigate despite the amnesty law. That theory, while it draws inspiration from the 1992 Declaration on Disappearances[20] and analogous OAS Convention on Disappearances,[21] is not based on international but domestic law. The one exception is the use of the non-prescriptability of crimes against humanity as a way for Argentine judges to overcome statute of limitations problems. The development

20. *See United Nations Declaration on the Protection of All Persons From Enforced Disappearance*, G.A. Res. 47/133, U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc. A/47/49 (1993).

21. Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1529 (1994).

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over time of these legal theories also clearly contributed to the change in legal climate.

My third point has to do with the particular features of the Pinochet-related litigation that may not be easily replicable elsewhere. One has to do with the ability of plaintiffs in the Spanish legal system to go forward even without the agreement or participation of the state prosecutor. So long as the judge is convinced that the investigation has merit the prosecutor can be, and in this case was, adamantly opposed to proceeding. Thus, plaintiffs and their advocates are able, to some extent, to circumvent the will of the state. None of the states involved in this litigation promoted it, nor were they pleased with the potential for inter-state conflict it entailed. Yet, for the Spanish, U.K., Chilean, and Argentine governments the potential for embarrassment or conflict was not great enough for them to override norms on judicial independence or separation of powers until it became clear that the courts were willing to go the distance. The cases also illustrate the limits of the circumvention of the state's will. Most states, unlike Spain, do not allow a prosecution to go forward without the state prosecutor's agreement and participation. Moreover, the ultimate outcome of the *Pinochet* case, where the case was taken out of the legal realm altogether through the loophole of executive branch discretion, proves that if the stakes get high enough, politics will trump law.

Another feature of the case involved the role of human rights groups in Chile and Argentina, and human rights and exile groups in Spain. One of the objections that is often raised to prosecutions based on universal jurisdiction is that they are enormously resource-intensive and require national prosecutors to delve into evidence that may be far away and hard to obtain. In the Spanish cases, a network of non-governmental groups in Europe, Latin America and the U.S. provided the evidentiary backbone of the cases. Chilean human rights lawyers had long kept extensive files on each and every case of death or disappearance and the information in their files was forwarded to Judge Garzón. In Argentina the cases stimulated human rights organizations to collect and collate the available evidence. Groups coordinated the travel of witnesses, who often could only afford to travel from Latin America to Spain when invited for conferences or workshops. Much of the work of preparing evidence and witnesses was taken on by the private plaintiffs' lawyers. It was only their extensive work that made the investigation possible.

In terms of resources, the cases have been run on a shoestring budget with most of the lawyers acting pro bono and with no infrastructure to speak of. Compared, for example, to the cost of the International Criminal Tribunal Yugoslavia or International Criminal Tribunal Rwanda, the costs have been miniscule.

Finally, it may be some time before there is another defendant arrogant enough to chance traveling, knowing that a case was pending where he was a potential defendant. So in cases where national law does not allow

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trial in absentia, the universal jurisdiction cases may prove to be less prevalent in the future simply because they are a victim of their own success. Nonetheless, given that both national courts and the ICC will remain limited in their ability to obtain custody and jurisdiction over many potential defendants, the option of transnational prosecutions will be important to international justice efforts for some time to come.

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