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Prosecuting Pinochet in Spain

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On March 24, 1999, six of seven British Law Lords decided to deny immunity from Spanish criminal charges to former Chilean dictator and Senator-for-Life, General Augusto Pinochet. Their action is a triumph of the rule of law over political expediency. It is another necessary crack in the armor of sovereign immunity. It is, perhaps more than any other single legal event, a demonstration of the increasing space for the operation of international criminal law and procedure in domestic courts in the post-Cold War era. It is all the more noteworthy when one realizes that it comes from a bastion of traditionalism: the bewigged Lords, powerful symbols of the age of empire.

The Lords' decision is both the beginning and the end of long juridical processes. It is the beginning of a process because the decision does not settle the question of what charges General Pinochet might face in Spain, an issue which will only be resolved at the end of protracted extradition proceedings in the British courts. Some lawyers estimate that the process could take up to two years. The April 15, 1999, decision of British Home Secretary Jack Straw to permit extradition by the British courts to proceed hewed closely to the line taken by the Lords in their decision. Moreover, if Spain does not succeed in gaining custody of the general, France and Switzerland already have requested Pinochet's extradition, and charges have been filed against him in at least five other countries. England itself also has considered the filing of criminal charges. So the end of the Spanish extradition process may mean the beginning of yet another process in London with any of the other countries seeking a trial of the general.

The Lords' decision is also the end of a long process. The arrest of General Pinochet exploded into international news on October 18, 1998, when he was arrested while recovering from back surgery in a London clinic by British police acting on an Interpol warrant from Spain. The warrant stemmed from a Spanish criminal investigation begun more than two years before the arrest. General Pinochet and other military leaders of the Chilean *junta,* as well as the ranking leaders of his security forces, the National Intelligence Directorate (DINA), which committed many of Chile's worst human rights violations, were first charged in Spain in July 1996 with crimes against Spanish citizens. The charges were filed under Spanish law by use of the *acción popular,* or popular action, a procedural device that permits Spanish citizens to file private criminal actions in certain circumstances. As originally filed, the charges named seven victims of Spanish descent who had been murdered or "disappeared" in Chile during the Pinochet dictatorship. General Pinochet ruled Chile from 1973, when military forces overthrew the elected president of Chile, Salvador Allende, until 1990, when he surrendered power to a democratically elected president, Patricio Alywin.

The Spanish Charges

The charges originally filed in Spain against Pinochet and the other Chilean defendants included allegations of genocide, terrorism, torture, and the various offenses that make up the crime of forced "disappearance" in Spain. Investigation of the Chilean case, along with a similar case against the military leadership of Argentina based on crimes committed during the years of that country's so-called "dirty war" (1976-1983), was taken up by investigating judges of the *Audiencia Nacional (Audiencia).* The *Audiencia* is a special, centralized court in Madrid with extraordinary powers, including extraterritorial jurisdiction, to prosecute cases such as international terrorism and narcotics trafficking. When the two cases began, they were filed separately and the investigations were assigned to separate judges. The Chilean case originally was assigned to Magistrate Manuel García Castillón, while the Argentine case was assigned to Magistrate Báltazar Garzón.

Jurisdiction for the charges against all defendants in both the Chilean and Argentine cases lay in a traditional jurisdictional concept called passive personality, which permits a country to prosecute defendants who victimize its citizens in any place outside of the home country. The investigating judge of the Chilean case later added victims from other countries, including the United States, because Spanish law also permits the use of universal jurisdiction. Under this principle, a country may proceed against a defendant regardless of the nationality of either the accused or the victim based on a category of particularly grave criminal offenses, which must be crimes against all humanity. Application of these jurisdictional concepts did not require the judges to apply innovative concepts of international law. These principles have long been part of the domestic criminal procedure of Spain and can be found in the criminal law of many countries today.

English police arrested General Pinochet in October 1998 after Judge Garzón, as part of his investigation of the Argentine case, found that the general had ordered crimes to be committed in Argentina through the work of Operation Condor, a secret international network of security forces in the Southern Cone region of South America. Within days after the issuance of the arrest order, the Argentine and Chilean prosecutions were consolidated under the exclusive jurisdiction of Judge Garzón. The chief public prosecutor of the *Audiencia,* Eduardo Fungairiño, who had taken no formal position on the cases previously, adamantly and openly challenged the jurisdiction of the *Audiencia* to hear the two cases from Chile and Argentina. Judge Garzón denied the jurisdictional challenge and the prosecutor appealed to the 11 trial judges of the *Audiencia,* sitting as a final court of review. In a November 1998, decision which garnered little international interest but was crucial to the survival of the legal proceedings in Spain, this panel upheld Spanish jurisdiction and allowed Judge Garzón to pursue charges of genocide, terrorism, and torture in both the Chilean and the Argentine cases. The ruling on jurisdiction permitted the Pinochet case to proceed, and the *Audiencia*'s approval also gave the go-ahead to the trial in Spain of retired Argentine Navy captain Adolfo Scilingo, one of the defendants in the original Argentine case. Judge Garzón had Scilingo arrested when the navy captain went to Spain to testify in October 1997. Scilingo had publicly confessed his role in "disappearances" in Argentina and had implicated many others in the military. He has been in Spain since his testimony, on bail but closely watched for his own protection.

Charge of Genocide

As approved by the Spanish *Audiencia,* the charge of genocide is unique both in its statutory structure and in the

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interpretation of that statute by the court. During the critical years following the Chilean coup of 1973, the definition of the crime of genocide, as codified in Spanish law, departed from the definition in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Under Spanish law at that time, genocide focused on the intent to destroy a "national ethnic, religious or social group." This language is different from that in the Genocide Convention in two crucial respects: first, there was no comma between the words "national" and "ethnic," and second, the term "social" replaced the term "racial" group in the corresponding section of the Genocide Convention.

Taking the concepts of social and national groups together, the *Audiencia* judges found that the group the Pinochet government attempted to eliminate in Chile was one whose views were inconsistent with what the military leadership saw as a necessary "new national and social order" in Chile. In essence, Pinochet's military forces simply eliminated groups or their leadership that were either opposed or indifferent to this new order. Judge Garzón issued an "indictment" of General Pinochet on December 10, 1998, which he forwarded to the Spanish authorities to justify the general's extradition for trial in Spain. In addition to the grounds for genocide discussed by the *Audiencia*, Judge Garzón included an allegation of intent to destroy a religious group based on its atheist or agnostic ideology. The genocide charge, however, was not among those approved to proceed in extradition by Home Secretary Straw in his initial ruling of December 9, 1998, because genocide as defined in Spanish law was not an extraditable crime in Britain. After the Straw ruling, the issue of genocide was neither raised nor analyzed by the Lords in the rehearing, and the alleged offense of genocide will not be discussed further in the extradition context.

Charges of Terrorism and "Illicit Association"

The second group of charges approved by the *Audiencia* against all of the relevant defendants, including General Pinochet, pertains to the crimes of terrorism and "illicit association" under Spanish law. Terrorism is defined in Spanish law as "membership in, acting in the service of, or collaborating with, armed bands, organizations or groups whose objective is to subvert the constitutional order or cause serious breaches of public peace." (Author's translation.) General Pinochet was charged with membership in a group whose objective was to subvert the constitutional order of Chile. On appeal, the *Audiencia* explicitly held that the law's scope is not limited solely to the subversion of Spain's constitutional order but may also extend to the subversion of other countries' constitutions. General Pinochet was also charged with the related statutory offense of "illicit association," which makes membership in a terrorist organization, in this case the Chilean DINA or the internationally structured Operation Condor, a crime in and of itself. Other types of illicit associations include those that have as their objective the commission of a crime or, after their formation, promotion of the commission of crimes.

Straw's December ruling on extradition made no mention of terrorism, as there is no exact parallel offense in Great Britain. Under the "double criminality" principle in extradition, the acts in question must be crimes in both of the countries involved, although the statues embodying the crimes need not be identical. Thus, Straw's December ruling permitted extradition to proceed for the crimes of conspiracy to murder, attempted murder, hostage taking, and conspiracy to take hostages. The March 24, 1999, ruling of the Lords, although it purported to address the matter anew, severely restricted the scope of the offenses for which extradition could be sought on these charges when compared to the crimes for which Straw originally gave approval to proceed in December. (See accompanying chart.)

Charge of Torture

The third charge the *Audiencia* approved was that of torture. Torture is the one offense shared in the criminal codes of both Spain and England. Both countries draw their definitions of torture from language grounded in the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, although Spain's definition is a bit more broad than the Convention's. This identity of crimes makes clear that the principle of double criminality is satisfied.

Home Secretary Straw's December ruling permitted extradition to proceed on this charge, as well as that of conspiracy to torture. Discussion of torture and conspiracy to torture was the territory of the most spirited debates in Great Britain's House of Lords on re-argument of the immunity issue in January and early February 1999. The Lords concluded in their March 1999 decision that, because Great Britain did not adopt domestic legislation punishing torture committed outside the United Kingdom until December 8, 1988, the principle of double criminality in extradition law barred the consideration of offenses committed before that

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Spanish *Audiencia* Ruling of December 4, 1998	British Home Secretary Ruling of December 9, 1998	Law Lords Ruling of March 24, 1999	British Home Secretary Ruling of April 15, 1999
Genocide →	NO →	Not Discussed →	Not Discussed
Terrorism/Illicit Association →	Murder—NO →	Not Discussed →	Not Discussed
	Attempted Murder, Conspiracy to Commit Murder, Hostage Taking, and Conspiracy to Take Hostages—YES →	Hostage Taking and Conspiracy to Take Hostages—NO →	Not Discussed
		Conspiracy to Commit Murder—YES, as to conspiracies in Spain to commit murder in Spain →	Conspiracy to Commit Murder—Not Discussed
Torture →	Torture—YES →	Torture—YES, as to acts after December 8, 1988 →	Torture—YES, as to acts after December 8, 1988, whether or not widespread or systematic
	Conspiracy to Torture—YES →	Conspiracy to Torture—YES, as to events after December 8, 1988 →	Conspiracy to Torture—YES, as to "acts of torture after [December 8, 1988, which] were done in the course of a conspiracy begun before"

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date, including General Pinochet's. Nonetheless, the Lords, in their most recent decision, hinted at the potential that Great Britain Crown Prosecutor could prove a conspiracy to commit torture before December 8, 1988, and the most recent ruling by Home Secretary Straw, on April 15, 1999, made clear that such conspiracies are within the scope of extradition. After Straw's ruling, Judge Garzón provided the British courts with evidence of Pinochet's involvement in additional cases of torture that occurred in Chile after December 1988. However, according to the European Convention on Extradition Order 1990, it is not necessary to offer "evidence sufficient to warrant the trial" of the accused. The Straw ruling makes clear that the remaining two original charges are sufficient, in themselves, to justify proceeding into extradition.

Prerequisites for Intervention Under International Criminal Law

One of the most frequent criticisms from those who oppose the arrest of General Pinochet is the "what if" question: what if the Pinochet precedent results in the arrest by a "rogue judge" of other foreign presidents, such as President Clinton, or any other present or former government official while traveling abroad? It is important to note, therefore, that the long and thorough criminal investigation of General Pinochet in Spain was not the action of a single judge, but that of a unanimous reviewing court that upheld Spanish jurisdiction in the face of a vehemently opposed public prosecutor. For domestic charges, such as the Spanish charges against Pinochet, to be brought under international law, several prerequisites must be met. First, there must be a dependable, independent, and well-coordinated investigation of the criminal charges. Second, the domestic legal codes of the prosecuting country and of the extraditing state, if extradition is involved, must contain both jurisdictional and substantive legal provisions that permit the charges to proceed. Third, there must be flexible and almost routine operation of a system of arrest and extradition through a treaty system. Finally, there must be victims who are able and willing to seek justice through a court of law.

Potential for Other Prosecutions

General Pinochet's human rights violations, perpetrated to a large extent by DINA operatives, were not limited to Chile alone. During the years just after the general assumed power, the DINA expanded its network of operations throughout the Southern Cone of South America, including Chile, Argentina, Paraguay, and Brazil, by means of Operation Condor. The Spanish private prosecutors and Judge Garzón allege that the DINA created Operation Condor in order to facilitate the transfer of alleged "subversives" from the country where they were captured to their home countries, where they faced likely "disappearance" or murder. These clandestine transfers avoided the use of formal extradition procedures between countries, the very process that now provides the general with scrupulous due process protections. The Operation Condor network soon expanded beyond the Southern Cone to carry out international assassinations against Chilean leaders-in-exile around the world perceived to be a threat to the Chilean regime. Although there is evidence in the Spanish courts and elsewhere that Operation Condor engaged in assassinations in Buenos Aires, Rome, Madrid, and other world cities, no case is more infamous than the 1976 assassination in Washington, D.C., of Orlando Letelier, a former minister to President Allende, and Letelier's U.S. citizen aide, Ronni Karpen Moffit. The ruling of the Lords seems to leave room to prove some offenses that may have arisen from Operation Condor. This may be the importance of the Lords' ruling that permits exploration of conspiracies to torture before December 1988, during which time Operation Condor and other illegal operations were well under way, all of which used torture as one of their hallmarks.

Important Developments for U.S. Law

The assassination of Orlando Letelier and Ronni Moffit brings the United States squarely into the Spanish legal process because their case was part of the international terrorist actions of the DINA and Operation Condor. In fact, family members of Ms. Moffit are named complainants in the Spanish proceedings. First, the Letelier/Moffit assassination gave rise to a request by Judge Garzón to U.S. Attorney General Janet Reno in late 1998, through use of a Mutual Legal Assistance Treaty signed by the two countries, to declassify and provide all relevant documents from U.S. intelligence services to the Spanish authorities. U.S. authorities announced in early 1999 that the U.S. government will proceed with declassification and will provide documents. No documents have been provided at the time of this writing, however, and no fixed date has been given to provide them.

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Second, and more importantly, the killing of a U.S. citizen in the United States gives clear grounds for the United States to charge General Pinochet accordingly and request his extradition to the United States. Although prosecutions took place in both the United States and Chile to convict the actual bombers and the DINA leaders responsible for giving orders in Chile to carry out the bombings, strong evidence before Judge Garzón indicates that the real orders in the Letelier/Moffit case came directly from General Pinochet. No action has taken place on that front yet, although a U.S. government spokesperson said in January 1999 that the Letelier/Moffit case is "active" in the Justice Department.

Conclusion

Many other developments in international law enforcement have flowed from the Spanish prosecution of the Chilean and Argentine cases. Argentine naval officer Scilingo will proceed to trial in Spain for his alleged complicity in atrocities at home, which included his personal involvement in the throwing of drugged but living persons from helicopters over the open waters of the Plata River, on the edge of Buenos Aires. Second, the Spanish magistrate has posted arrest warrants with Interpol for nearly 40 additional Argen-

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tine military officers who subverted the legal order of Argentina, including ruling *junta* members. In addition, Spanish judges have frozen Swiss bank accounts of these leaders, leading to charges of income tax evasion. This, in turn, resulted in the near impeachment of retired general Antonio Domingo Bussi, governor of Argentina's Tucumán province. More than 150 other Argentine military leaders are under active investigation by Spain for their complicity in the same array of international crimes that originally faced General Pinochet. Finally, several of the Argentine *junta* leaders are now under house arrest in Argentina based on new domestic charges of kidnapping infants from their "disappeared" mothers during the period of military rule in that country. Many believe that Adolfo Luis Bagnasco, the Argentine federal investigating judge who upheld charges in Argentina in the child kidnapping cases, was emboldened by the courage and independence of the Spanish judge who is moving to hold General Pinochet accountable for his crimes.

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The Washington College of Law (WCL) International Human Rights Law Clinic, under the direction of WCL Professor Richard J. Wilson, has been involved actively in the Spanish case against General Pinochet since early 1997. WCL clinic students provided the Spanish prosecutors with key research, some of which appears in the lawyers' pleadings and in Investigating Magistrate Báltazar Garzón's arrest orders for Augusto Pinochet. Student work also proved key to Judge Garzón's amended request for U.S. cooperation through use of a Mutual Legal Assistance Treaty between Spain the United States. Finally, in October 1998, two WCL clinic students accompanied WCL Professor Michael Tigar to London, where all assisted in the preparation of briefs for the Crown, arguing against immunity for the Chilean dictator.

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the Panel procedures and have begun to use political means to pressure the Board in order to get a full Panel investigation approved. This also has contributed to the politicization of the process and to the difficult atmosphere in Board meetings on Panel issues.

Lastly, the current procedures have not satisfied the Panel, whose members feel that the Bank Management is manipulating the process in a way that undermines their ability to function. They have also suffered from the growing hostility that some members of the Board feel towards the Panel.

Board Response to the Situation

By September 1997, the tensions between members of the Board over matters related to the Panel reached such a serious level that the Board decided to review the Panel process and see if some resolution to these problems could be found. This decision resulted in the Board appointing a Working Group of six Executive Directors to develop and propose a solution to the problems the Board had with the Panel process. By late 1998, the Working Group had prepared a proposal for the full Board.

The Working Group's 1998 proposal represented a significant weakening of the Panel. In fact, it would have made the Panel's situation untenable. In brief, the Working Group proposed that, in the initial phase of the Panel process, the Panel would limit itself only to investigating the issue of eligibility in any field visit it might make. In addition, the Group proposed that the Panel should base its recommendation for or against an investigation only on the information contained in the Request, the Management response, and the results of this limited field trip. The Management, on the other hand, would have been allowed to submit a "compliance plan" with its response to a Request for Inspection, which would have described the steps it had taken or expected to take in order to bring its actions into compliance with the applicable policies and procedures. This would have given the Management an opportunity to provide the Board with its own version of the facts of the project. In fact, it is difficult to see how the Management could have submitted a coherent compliance plan without including factual information that supported its view of the problems with the project and how its compliance plan will help resolve these problems. The result of the Working Group's proposal, therefore, would have been to recognize formally the Management's current informal efforts to undermine the independence and impartiality of the Panel process. This, in turn, suggested that the Working Group proposal would have increased the likelihood for polarizing and politicized discussions at the Board level.

The second problem with the Working Group's proposal was that it stated that the Board would accept "without discussion" the Panel's recommendation of an investigation "except with respect to the technical eligibility criteria, i.e. criteria other than the existence of *prima facie* evidence of serious failure of the Bank to follow its operational policies and procedures and the resulting material adverse effect." However, the Working Group did not define what it meant by "technical eligibility criteria." According to the Resolution establishing the Panel, eligibility also requires a showing that, *inter alia*, the requestor is "an affected party in the territory of the borrower which is not a single individual (i.e. a community of persons such as an organization, association, society or other group of individuals) or by the local representative of such party" (in exceptional cases, non-local representatives can also file Requests with the permission of the Board) (paragraph 12 of the Resolution); the affected party must demonstrate that its rights or interests have been or are likely to be directly affected by the acts or omissions of the Bank (paragraph 12); and the Request does not relate to matters that are the responsibility of other parties and do not involve any act or omission on the part of the Bank (paragraph 14). None of these three criteria is "technical" in the sense of being objective and easily determined. Consequently, without a clear definition of "technical criteria," this proposal could have become the vehicle that Executive Directors interested in blocking an investigation could have used to seek rejection of the Panel's recommendation. This would have further politicized Board discussions over Panel recommendations and would have recreated the polarizing conditions that currently plague Board discussions on the Panel.

The initial Working Group proposal also sought to impose a standard on the Panel for determining harm. The standard, which required a comparison between the situation of an affected people after the development project and what it would have been if there had been no project, was unrealistic. Because it is impossible to determine what an affected people's situation would have been without the project, the standard

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