

2004

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Stacie Jonas

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Recommended Citation

Jonas, Stacie. "The Ripple Effect of the Pinochet Case." Human Rights Brief 11, no. 3 (2004): 36-38.

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The Ripple Effect of the Pinochet Case

by Stacie Jonas

THE 1998 DETENTION OF FORMER CHILEAN DICTATOR Augusto Pinochet in London and the subsequent legal proceedings against him marked one of the most important events in international law since Nuremberg. Although Pinochet's release was a blow to the struggle to end impunity for human rights violators, five years later, it is clear that the case against him has had lasting political and legal impacts in Chile and other countries around the world. The legacy of the Pinochet case is a tribute to three decades of creative and persistent collaboration between legal pioneers and human rights advocates, many of whom continue to fight for justice today. This article describes the ripple effects of the "Pinochet precedent" in Chile and Argentina, highlighting ways that international cases can help foster greater accountability at home.

PINOCHET CASE BACKGROUND

GENERAL AUGUSTO PINOCHET LED a 1973 military coup that overthrew democratically-elected Chilean President Salvador Allende. According to a national truth and reconciliation commission, at least 3,196 people were killed or forcibly disappeared during Pinochet's subsequent 17-year dictatorship. Thousands more were tortured or exiled.

On October 16, 1998, British authorities detained Augusto Pinochet in London on an arrest warrant issued by Spanish Magistrate Baltasar Garzón. Garzón had charged Pinochet with genocide, terrorism, and torture committed during the Chilean dictatorship.

Although Garzón's complaint included several Spanish victims, the majority were Chilean citizens who had been killed or tortured in Chile. Garzón's case was therefore largely founded on the principle of universal jurisdiction—that certain crimes are so egregious that they constitute crimes against humanity and can therefore be prosecuted in any court in the world.

In November 1998, a panel of British law lords ruled that Pinochet did not enjoy immunity from prosecution as a former head of state, and he could be extradited to Spain. This decision, based largely on customary international law, was set aside, however, when one of the judges who heard the appeal was found to have ties to Amnesty International. A larger panel of law lords heard the appeal again in March 1999, and in a 6-1 decision, reaffirmed that Pinochet could be extradited. This time, however, the majority based their decision primarily on British domestic law and limited Pinochet's extraditable crimes to acts of torture committed after the UK ratified and incorporated the UN Convention Against Torture into domestic legislation in 1988.

The Chilean government and other extradition opponents then urged the British government to send the former dictator back to Chile on medical grounds. Despite the protests of legal and medical experts from several countries, British Home Secretary Jack Straw released Pinochet on March 2, 2000, ostensibly on health grounds.

IMPACT OF THE PINOCHET CASE IN CHILE

PRIOR TO PINOCHET'S LONDON ARREST, a Chilean trial of the former dictator seemed impossible. Pinochet was protected by Decree Law 2191, an amnesty declared by the military junta in 1978 to pardon human rights crimes committed between the September 11, 1973

coup and March 10, 1978, when the state of siege was lifted. Although a referendum and elections forced Pinochet out of power in 1990, the General stayed on as Commander-in-Chief of the Army until 1997. He then immediately assumed a non-elected, lifetime seat in the Chilean Senate, giving him additional parliamentary immunity from prosecution. In 2000, the Chilean Congress granted yet another layer of immunity to all "former Presidents of the Republic."

Much had changed in Chile during Pinochet's 16-month detention, however. Pinochet's arrest put human rights issues back in the headlines, giving victims new voice and sending the message that the international community considered Pinochet a criminal. Although a dozen cases had been filed against Pinochet in Chile prior to his arrest, the detention emboldened victims to submit an avalanche of new cases against the former dictator, mounting to nearly 300 by the end of 2003.

The new political space created by Pinochet's arrest was complemented by judicial reforms implemented in the late 1990s that changed the composition of the Chilean courts and removed many Pinochet-appointed judges. Courts also began re-interpreting the amnesty law. Even before Pinochet's arrest, several judges ruled that the amnesty could only be applied after an investigation. In cases of forced disappearances, they went a step further. Since the bodies of the victims had not been found, they held that disappearances were actually crimes of ongoing, aggravated kidnapping. Because the crime had not ended before the 1978 amnesty law cut-off, the amnesty did not prevent the prosecution of the perpetrators.

Chilean Judge Juan Guzmán was one of the first to uphold this new interpretation of the amnesty law. Since January 1998, Guzmán had been investigating Pinochet's role in the 1973 disappearance of over 70 political opponents in an operation known as the "Caravan of Death." Shortly after Pinochet's return from London, Judge Guzmán asked the courts to strip the former dictator of his parliamentary immunity. The Supreme Court agreed, and Pinochet was indicted and placed under house arrest. Based on new medical exams and a deposition, Judge Guzmán determined that the General was, in fact, fit to stand trial. The Santiago Appeals Court disagreed, suspending the legal proceedings against Pinochet on mental health grounds. The Supreme Court upheld the suspension of the case in July 2002. Pinochet resigned from the Senate shortly thereafter, but retained immunity from prosecution as a "Former President of the Republic."

In 2003, victims' lawyers argued that several public appearances proved that Pinochet was able to stand trial. In August 2003, Judge Guzmán again tried to strip Pinochet of his immunity, this time for the disappearance of ten communist party leaders. The Chilean Supreme Court rejected his petition on medical grounds.

A few months later, Pinochet gave a lengthy television interview, claiming he was never a dictator and had no reason to ask for forgiveness. Victims' lawyers pounced on the interview as evidence of Pinochet's fitness for trial and persuaded Judge Guzmán to request that the courts reconsider stripping Pinochet of his immunity. The Santiago Appeals Court will rule on the new request in 2004.

CHILEAN CASES AGAINST OTHER MILITARY OFFICERS

Pinochet's detention also helped pave the way for the prosecution of other Chilean military officials. Prior to 1998, there had been

only a few successful cases, primarily involving crimes explicitly excluded from the amnesty or committed after the 1978 amnesty cut-off. By July 2003, however, over 300 military officers had been indicted and dozens had been convicted, many for disappearances that occurred in the early dictatorship years. After Pinochet's arrest, special judges were appointed to work exclusively on human rights cases, allowing for further breakthroughs.

Despite this unprecedented progress, recent judicial rulings have been contradictory. For example, there have been conflicting developments in two cases involving Pinochet's former secret police chief, Manuel Contreras.

In December 2003, the 7th Bench of the Santiago Appeals Court overturned an indictment of Contreras and two other defendants charged with the "ongoing, aggravated kidnapping" of two political opponents disappeared in 1974. In a 2-1 ruling, the Court found that there was insufficient evidence that the victims were still being detained and that the idea of disappearance as an ongoing act of kidnapping was therefore a legal fiction.

In contrast, on January 5, 2004, the 5th Bench of the Santiago Appeals Court upheld the conviction of Contreras and four other mil-

Court on the Sandoval decision, an appeal that would ordinarily be heard by the five-member "Criminal Chamber." Because Chile is governed by a civil law system, judges are not obliged to follow legal precedents. However, a decision by the Supreme Court to uphold Contreras' conviction in the Sandoval case would mark a historic victory in the struggle for justice in Chile, encouraging other judges and victims in their efforts against impunity.

ABOLISHING THE CHILEAN AMNESTY?

Although judges in Chile have found creative ways around the amnesty law, human rights advocates have long sought the repeal of the law by the executive branch. The Inter-American Commission on Human Rights echoed these demands in numerous reports, deeming the government's failure to revoke or amend the law a violation of the American Convention on Human Rights.

Thus far, the Chilean government has been unwilling or unable to act. In a recent proposal calling for new human rights legislation, Chilean President Ricardo Lagos stated that his government would "leave the interpretation of the Amnesty Law to the courts." He then proposed a series of measures including the provision of immunity or

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itary officers in a different case involving the 1974 disappearance of Miguel Angel Sandoval. This was the first appellate level decision upholding the interpretation of forced disappearance as an ongoing, non-amnestiable crime of aggravated kidnapping in the sentencing phase. Although the decision was founded on domestic law principles, it broke new ground in Chilean jurisprudence by also extensively relying on international law.

In the 2-1 decision, the Court noted that the Inter-American Convention on Forced Disappearances, signed by Chile in 1996, defines forced disappearance as an ongoing or permanent crime as long as the fate of the victims is unknown and obliges signatories to punish those responsible. Although the Convention has not yet been ratified by the Chilean Congress, the judges highlighted Chile's obligations under Article 18 of the Vienna Convention on the Law of Treaties stipulating that a State that has signed or expressed consent to a treaty is "obliged to refrain from acts which would defeat the object and purpose of a treaty," even when it is still awaiting ratification.

The judges further noted that forced disappearances have been defined as a "crime against humanity" by a number of international instruments including the UN Declaration on the Protection of All Persons from Forced Disappearance and the Rome Statute of the International Criminal Court. They pointed out that these and other international instruments require both the investigation and punishment of crimes against humanity.

The decision also cited the Inter-American Court of Human Rights' March 14, 2001 decision in the *Barrios Altos* case (*Chumbipuma Aguirre et al. v. Peru*), which affirms that amnesties and statutes of limitations cannot be applied to grave violations of human rights, including forced disappearance.

Contreras is now seeking a hearing by the full Chilean Supreme

reduced sentences for military officers who provide useful, verifiable information about human rights crimes to the courts. Although Lagos' proposal also included measures such as increased reparations for families of human rights victims and the creation of a commission to investigate torture, the immunity provisions have been criticized as a serious setback in the efforts to end impunity. The proposal is currently under consideration by the Chilean Congress.

IMPUNITY UNDER FIRE IN ARGENTINA

NEIGHBORING ARGENTINA HAS SEEN EVEN MORE dramatic advances in the struggle for accountability in the years since Pinochet's arrest.

After the end of Argentina's 1976-1983 "dirty war," authorities tried several military officers for human rights crimes in the Argentine courts. Under pressure from the military, however, Congress passed two amnesty laws that protected many rights violators from prosecution. The two laws, known as the "Full Stop" and "Due Obedience" laws, respectively set a 60-day deadline for the filing of human rights cases and exempted low-level officers from trial on the grounds that they were unaware of the illegality of their orders. Former Argentine President Carlos Menem later pardoned military officers who were indicted or convicted despite these laws.

Faced with these new obstacles, victims joined international human rights advocates in filing cases against Argentine human rights violators in Italy, Sweden, Germany, France, and Spain. In March 1996, a few months before charges were filed against Pinochet, Spanish Judge Baltasar Garzón began investigating crimes committed during the dirty war.

Although one Argentine naval officer, Adolfo Scilingo, turned himself over to Spanish authorities in 1997, until recently, extradition requests from Spain and other foreign courts largely fell on deaf ears.

In 1998, President Carlos Menem issued Decree 111/98, formally refusing to cooperate with Judge Garzón's investigation. Menem's successor, Fernando De la Rúa, reinforced this move in 2001 with Decree 1581/01, rejecting any extradition request for crimes committed on Argentine territory.

An Argentine naval officer living in Mexico, however, was unable to avoid being "Pinocheted." Ricardo Miguel Cavallo was detained in Cancún on August 24, 2000, after being identified by torture victims. Judge Garzón immediately issued a warrant for Cavallo's arrest and, on June 10, 2003, the Mexican Supreme Court ruled in favor of the extradition.

In contrast to his predecessors, newly elected Argentine President Nestor Kirchner did nothing to prevent Cavallo's extradition and refused to provide the naval officer with legal assistance, asserting, "the Argentine state does not defend delinquents." An oral trial of both Cavallo and Scilingo before a panel of the Spanish National Criminal Court (*Audencia Nacional*) is expected to begin in 2004.

NEW ACCOUNTABILITY EFFORTS IN ARGENTINA

Both Pinochet's arrest and investigations of Argentine military officers in foreign courts added momentum to the existing movement against impunity, facilitating a wave of new cases in the Argentine courts.

Between 1998 and 2002, the Argentine courts indicted a number of military officers for human rights crimes not covered by the amnesties. These prosecutions focused on the kidnappings of prisoners' babies and the crimes of Operation Condor, a coordinated campaign uniting the security forces of Southern Cone dictatorships to carry out joint operations against political opponents.

In 2003, under the new Kirchner administration, foreign investigations of Argentine rights violators had an even more visible impact. Acting on Judge Garzón's outstanding arrest warrant, on July 24, 2003, Argentine Judge Rodolfo Canicoba ordered the arrest of 45 military officers and one civilian charged with crimes of genocide, terrorism, and torture. Canicoba's unprecedented move was followed by President Kirchner's equally bold decisions to repeal De la Rúa's 2001 decree preventing the extradition of the military officers and to formally ratify the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

ARGENTINE CONGRESS ANNULS AMNESTIES

These developments prompted the Argentine Congress in August 2003 to annul the Argentine amnesty laws and to pass additional legislation facilitating the prosecution of crimes against humanity.

While some critics questioned the practical effects of the new law, the annulment sent a clear political message. It "gives the green light to judges and prosecutors to open or re-open cases," stresses one Argentine human rights lawyer, "and puts pressure on the courts to face the question of the constitutionality of the amnesty laws."

In fact, a number of Federal District Courts have already held that the amnesty laws are unconstitutional and, in 2001, the Federal Appeals Court for Buenos Aires upheld a lower court ruling on the unconstitutionality of the amnesties. Although the Supreme Court recently postponed a decision on this appeal, it may still rule on the issue before the end of 2004.

Meanwhile, the Spanish government used the Argentine Congress' annulment of the amnesty law as an excuse to block extradition efforts. Never fully supportive of Judge Garzón's initiative, the Spanish government announced on August 23, 2003 that their country would no longer seek the officers' extradition because they now

could be tried in the Argentine courts.

Shortly thereafter, Argentine authorities released most of the men detained under the Spanish warrant. However, the Federal Appeals Court for Buenos Aires immediately re-opened two cases involving hundreds of dictatorship crimes and issued new arrest warrants for dozens of the released officers.

CONCLUSION

RECENT LEGAL DEVELOPMENTS IN CHILE AND ARGENTINA highlight the ripple effect set in motion by the international cases against Pinochet and other military officers. They also show, however, that while extradition requests from foreign courts can help create the political will for prosecutions at home, domestic political factors also influence the extent to which international cases have an impact. President Kirchner's commitment to justice, for example, has allowed the efforts against impunity to gain new ground in Argentina.

Although Pinochet's detention clearly had lasting effects, it is important to remember that the case did not begin with his arrest in London. It was, instead, the product of nearly three decades of persistent work by victims, human rights advocates, and lawyers in Chile and around the world who carefully documented violations, filed cases even when they seemed destined for failure, and refused to give up the demand for truth and justice. Their insistent and effective activism also helped propel the case even when many of the governments involved wanted it to disappear. Further, the Pinochet case developed in the context of an unmistakable trend towards greater international justice, evidenced, for example, by the creation of the Ad-Hoc Tribunals for Rwanda and the Former Yugoslavia and the International Criminal Court.

Just as the case against Pinochet did not begin with his arrest in London, it did not fail with his release. In addition to setting an important legal precedent, the case helped educate the world about Pinochet's crimes and the potential of international law, inspiring new legal efforts against dictators and human rights violators in countries around the world. It also re-energized the human rights movements in Chile and Argentina, giving victims new voice, putting human rights issues back at the center of public debate, and reminding government and military officials that neither amnesty laws nor the mere passage of time could silence the call for justice.

According to legal scholar Naomi Roht-Arriaza, author of a forthcoming book entitled *The Pinochet Effect*, the most important impact of Pinochet's London arrest was that it "changed the perception of what was possible," creating the political and psychological space that allowed for the effective application of previously existing legal theories and arguments.

While the "Pinochet precedent" has led to encouraging developments in both Chile and Argentina, significant challenges remain. The Argentine Supreme Court now has a historic opportunity to declare the national amnesty laws unconstitutional, echoing the growing international consensus that egregious human rights crimes cannot go unpunished. While the recent Santiago Appeals Court decision in the *Sandoval* case should serve as a building block for further incorporation of international law into Chilean jurisprudence, other branches of the Chilean government must also ensure that domestic legislation upholds international obligations to investigate and punish human rights crimes. As long as the crimes of the Chilean and Argentine dictatorships remain unpunished at home, international mechanisms—including universal jurisdiction—must continue to serve as a complement to domestic efforts to hold human rights violators accountable for their crimes.

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