



THE PINOCHET PROCEEDINGS: PROPELLING A NEW CLIMATE OF TRANSITIONAL POLITICS

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The Pinochet Proceedings: Propelling a new climate of transitional politics

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This paper analyses the proceedings brought against Augusto Pinochet. After a description of the case which took place on a truly transnational level, involving jurists, politicians and human rights groups across two continents, the paper will look at the impact on political life in Chile, arguing that transnational justice was important in not only seriously discrediting the ex-military leader's figure, but also in propelling a new political climate where new actors, in particular victims and judges, were given a greater prominence in the process of transnational justice. This sense of empowerment has had an impact at a global level, with victims elsewhere seeking to bring perpetrators of human rights violations accountable in foreign courts. The paper concludes that despite the success of the Pinochet proceedings in giving human rights a greater platform in Chile, the possibilities of universal jurisdiction becoming a widespread tool for victims around the globe are limited, now that important limitations have been placed on non-domestic cases by national lawmakers.

Keywords: Augusto Pinochet, Universal jurisdiction, Transitional justice, Individual criminal accountability.

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I procedimenti contro Pinochet: Una spinta propulsiva per una nuova politica di transizione

Alice Pease*

2016, p. 21 IRPPS Working paper 91/2016

Questo articolo analizza il procedimento contro Augusto Pinochet. Dopo una descrizione iniziale del procedimento svoltasi a livello genuinamente transnazionale, coinvolgendo giuristi, politici e gruppi per i diritti umani in due continenti, l'articolo esamina l'impatto sulla vita politica in Cile, sostenendo che la giustizia transnazionale è stata importante non solo per screditare la figura del ex militare, ma anche per spingere verso un nuovo clima politico in cui le vittime del regime militare, hanno avuto un maggiore ruolo nel processo della giustizia transnazionale. Questo senso di *empowerment* ha avuto un impatto a livello globale, con le vittime sparse in diverse parti del mondo che hanno potuto accusare chi ha violato i diritti umani i tribunali fuori dal Cile. L'articolo conclude che, nonostante questi importanti risultati, le possibilità di giurisdizione universale stanno diventando uno strumento molto diffuso cui possono far ricorso le vittime di crimini contro l'umanità in tutto il mondo, anche se importanti limitazioni sono state introdotte dai legislatori nazionali.

Parole chiave: Augusto Pinochet, Giurisdizione universale, Giustizia di transizione, Responsabilità penale individuale.

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Introduction

A study of the emergence of an international criminal justice system would be impossible without the analysis of the case of Augusto Pinochet. Once more General Pinochet grabbed the world's attention on 16 October 1998, this time not as the author of a bloody coup but due to his unexpected arrest in a London clinic. The Chilean military figure ceased to be the director of operations, and instead became a bystander who for 503 days awaited his fate at the hands of Spain and the United Kingdom's courts and senior politicians. During this lengthy time-span, politics and law became closely intertwined in an outcome that would have serious implications not only for human rights in Chile, but at a global level for the prosecution of former heads of states. Rarely is the trial of the former dictator described without the epithets "landmark" or "transcendental," and one commentator described it as a "jurisprudential bombshell" (Falk 2009) given that never before had a former head of state had been arrested abroad under the principle of universal jurisdiction.

The Pinochet case is key starting point for analysing what has become an important component of the emerging criminal justice system: trials in foreign courts under the principle of universal jurisdiction. When the possibilities of seeking justice for human rights crimes seem limited on a domestic level, due to an amnesty or as a result of the reluctance of judges to prosecute (or both in the case of Chile), then foreign courts may provide an alternative arena for trials.

Proceedings in Europe forced jurists in both Spain and the United Kingdom, as well as in several other European countries, to confront head on unchartered questions of international criminal law; amongst these, the potential of foreign courts as a forum for trying perpetrators of heinous crimes committed thousands of kilometres away, the limitations to the impunity granted to a former head of state, and the scope of interpretation of universal jurisdiction in domestic courts. The decision made by Spain's National Audience (*Audiencia Nacional*) and the final ruling of the House of Lords, in which six of the seven Law Lords decided against granting Pinochet immunity, made it clear that former dictators could no longer expect an automatic safety blanket against human right violations, at least not when they left the confines of their own countries. Rather than simply being a principle enshrined on paper in international conventions, the principle of individual accountability for the worst human rights violations began to take on practical significance.

But whilst an important advancement, the Pinochet case raised serious questions regarding universal jurisdiction, first and foremost the right of foreign courts to meddle in another state's delicate process of transnational justice. There was outrage at the decision of the British authorities to arrest General Pinochet, considered a gross violation of state sovereignty by many. The reaction of the Chilean president at the time, Edward Frei, on hearing of Pinochet's arrest, was to ask why, if the Spanish judges were so keen to prosecute heinous crimes abroad, they had not done the same in relation to violations committed during the country's own civil war between 1936 and 1939? (Roht-Arriaza 2005) It seemed as though double standards were being applied with one law for national crimes and another for extraterritorial crimes. Likewise, Henry Kissinger, wrote an article "The Pitfalls of Universal Jurisdiction", in which he criticised the

precedent for threatening to undermine the country's path to reconciliation. He argued that "the instinct to punish must be related, as in every constitutional democratic political structure, to a system of checks and balances that includes other elements critical to the survival and expansion of democracy" (Kissinger 2001).

The Pinochet case therefore raises important questions about whether foreign courts can and should administrate justice over human rights crimes which dig deep into national sensibilities and question collective memory. Were the fears expressed by Henry Kissinger really founded in the case of Pinochet? Are these transnational trials damaging to the reconciliation of a nation after a particularly fraught chapter of internal violence? Or, on the contrary, can foreign courts act as a catalyst for domestic justice?

This paper, after a description of the proceedings itself, will focus on the political ramifications of the Pinochet case, considering the effect of proceedings abroad in reopening discussion about past events at home. As this paper will discuss, the Pinochet case had a significant impact in propelling a new political climate in Chile. With General Pinochet's absence from the country, his grip over politics loosened and made way for a new stance towards human rights. New state and non-state actors were empowered; victims, human rights groups and judges all began to play a much more transcendental role in advocating a new approach to transitional justice. However, the long-term possibilities of challenging impunity through universal jurisdiction are more uncertain, however, as national legislators have sought to curtail the scope of extraterritorial laws.

Part I. Testing the Limits of Universal Jurisdiction

A brief background

The story behind Augusto Pinochet Uguarte's rise to power is well known. The news of the coup d'état that deposed Chile's first democratically elected socialist leader Salvador Allende on 11 September 1973 and resulted in his subsequent death at the presidential palace of *La Moneda* palace stunned the world. Congress was dissolved and a military junta was established. The years which followed were marked by brutal killings, torture and disappearances which forced General Pinochet's opponents into silence. Whilst the number of political murders in the seventeen-year dictatorship is estimated at 3,065 individuals (Valech Commission 2011), the number of Chileans that fled into exile was far greater. Almost 200,000 Chileans were forced to leave the country and many settled abroad permanently.

The worse period of human rights abuses came at the start of the military regime between 1973 and 1977. The Chilean secret service, DINA, was established toward the end of 1973, and initiated an organized method of political persecution. The military government did not deny the violation of human rights abuses, but rather justified it on the grounds that the country was on the verge of a civil war. In 1978, the military junta issued a self-amnesty aimed at absolving security agents for the crimes committed from 1973. To this day, the amnesty, the Decree Law 2191, remains in place, although Chilean judges have found notable ways to circumvent it.

General Pinochet stepped down following a 1988 referendum in which 54.7% of the population voted against a prolongation of his rule. But the return of democracy in 1990 did not mean the disappearance of Pinochet from politics; a pacted transition ensured that the military would be safeguarded an important standing in many aspects of public life. As part of a deal which he struck with the new democratic government, the former head of state continued as chief of the armed forces until 1997. He was then named a life-long senator, a position which under Chilean law automatically granted him impunity. Key supporters of the military dictatorship kept their positions in public office, including in Chilean courts.

As in the case of other countries struggling to overcome years of dictatorship, incumbent President Aylwin was confronted with the key question of how best to achieve the reconciliation of his country whilst consolidating the transition to democracy. Chilean society was, and still is, a divided one and an attempt to reconstruct the country had to avoid exacerbating the deep polarization existent. A considerable proportion of Chileans still supported General Pinochet when he stepped down as shown by the fact that 43% of Chileans voted to keep him in power in the 1988 presidential plebiscite. Any successor therefore had to tread cautiously over the eggshells of the past. Argentina's approach through the trials of the country's highest military officers in the mid-1980s persuaded the Aylwin administration to adopt a more cautious path of reconciliation and to avoid outright persecution.¹

The National Commission on Truth and Reconciliation was established in 1990 to reconstruct the picture of human rights violations during the Pinochet years. It produced a tentative report, known as the Rettig Report, which named the regime's victims but not those of the perpetrators. Chile's strategy of reconciliation was based, therefore, during most of the 1990s on offering victims material reparations in the form of public health, pensions and education grants for the damages inflicted upon them (worth fifteen million dollars a year), rather than through the legal channel of holding perpetrators accountable. There was a strong political reluctance by the post-dictatorship governments to delve any deeper, and one significant illustration of this tacit acceptance of the status quo is the fact that the National Holiday, celebrating the 1973 coup, was abolished as late as 1998.

Neither was the judiciary branch in Chile keen to initiate domestic trials for human rights violators. A few prosecutions did occur in the early 1990s, but these targeted only a tiny minority. By 1999, only 19 former members of the military had been convicted for crimes

¹ On assuming the Argentine presidency in 1983, Raúl Alfonsín took decisive steps to address human rights violations committed under the military regime (1976-1983) including the revocation of the self-amnesty law, the creation of a truth commission known as the National Commission on the Disappeared (CONADEP) which produced the *Nunca Más* report and the trial of the regime's key military figures. But the investigations went further than anticipated, and the government began to lose control over the transitional justice process, with the military fomenting unrest and threatening another coup d'état. Finally, under intense pressure in the wake of the *Carapintada* uprising, Alfonsín's government passed the Due Obedience law, an amnesty to block future trials, in 1987. Several years later, President Menem's issued a pardon for the former military leadership. Although a number of military leaders would be prosecuted in the following decades, Argentina's experience in 1980s encouraged the *Concertación* governments in Chile to exercise caution.

during the military dictatorship (more than 5,000 lawsuits had been filed), and almost all of these were low-ranking officials for crimes which were not included in the self-amnesty (Chinchón 2007). The possibilities of bringing Pinochet to account, therefore, seemed a long way off in the 1990s.

The proceedings in Europe

In many ways, the arrest of Augusto Pinochet in London on 16 October 1998 came out of the blue. The proceedings were initiated as a symbolic struggle more than anything else. For years, a sprinkling of human rights groups and members of civil society had been actively fighting for the crimes under Pinochet's military dictatorship to be recognized, but the calls were met on deaf ears as the government and society at large seemed intent on forgetting this chapter of Chile's history. So what acted as the detonator for the Pinochet case in 1998? A handful of extremely determined judges and the strong backing of a transnational network of human rights organizations prepared to work insatiably to see Pinochet stripped of his immunity were amongst the main ingredients for success, but also important was a new concern at a global level for human right violations (Roht-Arriaza 2005).

The principle triad of countries that were to have a bearing on Pinochet's fate were Spain, the United Kingdom and Chile. The Pinochet drama unfolded initially in two main theatres, Spain's National Audience and the British House of Lords, although allegations were later also brought against the military dictator in France, Belgium and Switzerland. So divisive was the Pinochet case that it had to be re-heard in three separate phases of litigation by the House of Lords, Britain's highest court of appeals until 2009.

Although diplomatic tensions surfaced, the particular political climate in these three countries was also important in allowing the proceedings to run their course. Both the British and Spanish governments were caught in a catch-22 situation, between the obligation to uphold the nations' commitment to human rights and international conventions on the one-hand, and damaging relations with a strong economic and at one time strategic power, Chile, on the other. The United Kingdom especially had important arms deals with Chile, which could have been jeopardized by an escalation of a diplomatic conflict. But in reality, the fact that all three of the governments at the centre of the Pinochet proceedings were fairly centrist and committed to upholding a due process of justice allowed the proceedings to continue. In Spain, the right-wing People's Party (PP) had recently been elected into government under the leadership of José María Aznar. Following a series of corruption scandals which saw the socialist party fall from grace, the new government was keen to show the complete independence of the judiciary, and its actions was closely scrutinized by the Spanish public and press, firmly in support of seeing General Pinochet stand trial. Likewise in the United Kingdom, public pressure made the Labour government under Tony Blair reluctant to intervene, especially given its stance on pushing forwards an "ethical" foreign policy. It would have been a very different story, for example, if Pinochet had come to Britain a decade previously as a very firm friend and ally of Margaret Thatcher. In fact, Thatcher paid a visit to Pinochet when he was under house arrest in the spring

of 1999 as a gesture of solidarity. Pinochet's months of detention signalled a rocky patch in bilateral relations, but in the end, the damage was "ephemeral" (Roht-Arriaza, 2005).

The first case of extraterritorial crimes filed in Spain in 1996 concerned victims of the military regime in Argentina during the 1970s. The person who headed the investigation was Judge Baltazar Garzón who had already made a name for himself with his involvement in politics and high-profiled drug trafficking cases. Victims of the Chilean dictatorship were keen to jump on the bandwagon of justice and an initial complaint against General Pinochet was filed by Joan Garcés, a lawyer with deep ties to Chile and Manuel Murillo, representing the Salvador Allende Foundation, along with several human rights organizations including the Chile's Association of Family Members of the Disappeared. Amongst the crimes alleged, were genocide, terrorism, torture and illegal detention from 1973 to 1990. Initially, the Argentine and Chilean cases were considered separately but eventually these were assimilated into a broader investigation on Operation Condor, a regional plan aimed at obliterating leftist political opponents across Latin America in the 1970s, under Judge Garzón.

So why were these initial complaints filed in Spain? In addition to close cultural ties and the fact that many political exiles had fled to Spain during the military dictatorship and had as a result established human rights networks across Europe, the peculiarities of the Spanish legal system facilitated a judicial process which in other countries may have proved impossible (Roht-Arriaza, 2005). A 1985 article confers on Spanish courts the jurisdiction to investigate and prosecute extraterritorial crimes typified as genocide and terrorism, or any crime that Spain is obliged to prosecute under international treaties. The victims concerned do not necessarily have to be Spanish nationals, thus leaving a large window for prosecuting extraterritorial human rights violations. Not only this, but under Spanish law ordinary civilians can file a case with a procedure known as *acción popular* without having to prove a direct connection to the victims or incur the costs. In the initial stages, this action does not require the support of the public prosecutor and only needs an investigating magistrate prepared to pursue the case. This unusual feature allowed Judge Garzón to move forward with the Operation Condor investigations despite the opposition of the public prosecutor. There was, however, one seemingly important obstacle under Spanish law: no trials are permitted *in absentia*. This meant that if any Generals from the Southern Cone were to stand trial, they would have to be brought to Spain.

This explains why when news broke out that Pinochet was travelling to London for a medical operation, events accelerated rapidly. Faced with the possibility of Pinochet once more returning to the safe-heaven that Chile's justice system granted him, Judge Garzón decided issue a warrant under the 1989 British Extradition Act. On the night of 16 October 1998, General Pinochet was arrested at the private clinic where he was receiving treatment. This marked the start of a long legal battle, after which Pinochet's immunity would not be questioned in Europe, but also in Chile.

The Spanish public prosecutor rapidly challenged Judge Garzón's call for the extradition of General Pinochet before the National Audience. But in a ruling on 5 November 1998, the court's eleven judges unanimously upheld the exercise of universal jurisdiction in Spain, specifying that

Spain had a legitimate interest to hear these cases since more than fifty nationals had died or disappeared in Chile.

Meanwhile, Pinochet appealed Spain's decision to issue an international arrest warrant. The General's lawyers pointed out the technical problem with Garzón's warrant; the detention of Pinochet was for crime of genocide, which is not an extraditable offence under British law. Under the rule of double criminality, extradition can only be sought when a crime is both prosecutable under the law of the requesting state and the state to which the fugitive has fled. The Spanish judge therefore issued a new warrant, this time for acts of torture and hostage taking. But the Divisional Court quashed this second warrant on the grounds that Pinochet, as a former head of state, enjoyed absolute immunity from prosecution under British jurisdiction. The Crown Prosecution Service, representing Spain, appealed the decision and the Appellate Committee of the House of Lords was called upon to hear the case. The cases decided by the Appellate Committee tended to be dealt with swiftly, but in this case, with the principle of universal jurisdiction at stake, the proceedings in the United Kingdom would involve three separate phases of litigation by the House of Lords, known as *Pinochet I*, *Pinochet II* and *Pinochet III*.

The principal issue of *Pinochet I* was whether Pinochet, as a former head of state, enjoyed sovereign immunity from arrest and extraditions proceedings in the United Kingdom. Since Pinochet was still in government during the period of the alleged crimes, the Law Lords contemplated whether these could be considered part of his official functions as head of state, or whether they fell outside of the scope of his duties.

On 25 November 1998, with a vote of three to two, the House of Lords ruled that acts of torture, hostage taking and crimes against humanity fell beyond the scope of official functions, and therefore the former head of state could not be granted immunity from extradition for these crimes. Although a close battle, it was a momentous moment for the notion of individual accountability and universal jurisdiction. Lord Nicholls' opinion reflected the view that the principle of sovereignty does not shield political leaders from persecution for heinous acts:

International law recognizes, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law. (*R v Bow Street Metropolitan Stipendiary Magistry, ex parte Pinochet Uguarte* 3 W.L.R 1456 [HL 1998])

By contrast, the two judges presenting the dissenting view argued that General Pinochet was acting in a sovereign capacity and showed a certain scepticism towards the implementation of universal jurisdiction, pointing out that no consensus existed regarding its application.

In accordance to British law, however, it was the Home Secretary, Jack Straw, who was obliged to have the last word and make the decision of whether General Pinochet should be

returned to Chile. By sending Pinochet back to Chile, he would be breaching the United Kingdom's commitment to the principles of international law, but by denying such a move, he faced uncertain diplomatic consequences as the United States and Chile were both exerting strong pressure for the defendant to be returned to his home country. Despite these pressures, Straw maintained that legal questions rather than political matters should decide the case.

Whilst human rights' advocates lauded the Appellate Court's decision, the principle of judiciary independence was questioned in *Pinochet II*. It emerged that one of the five Law Lords was a Director of the Amnesty International Charitable Trust, thus raising the question of his possible bias since Amnesty International had acted as an intervener in *Pinochet I*. Automatic disqualification had never before been the result of non-pecuniary motives, but the case was too important for Pinochet's case for a fair process not to be heard. Although the impact of the connection on Lord Hoffman's final decision was debatable, it was agreed that there was an *appearance of bias* and that the first order should be set aside. A new panel was set up made up of seven Law Lords who had not previously been party to the case.

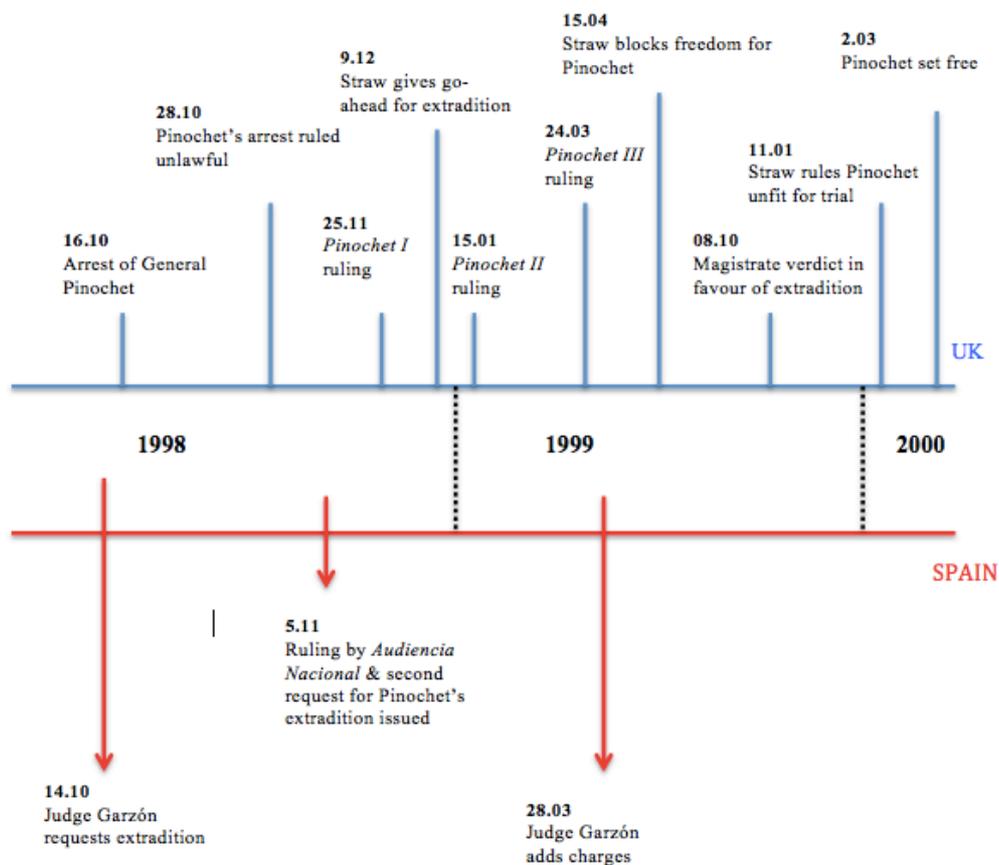
The third phase of litigation however, in contrast to the first, focused on much narrower, technical issues related to UK law rather than international customary law. On 24 March 1999, after several weeks of deliberation, six of the seven judges handed down their judgement upholding the decision to deny Pinochet immunity. But timing became crucial to the ruling. The court ruled that all crimes filed against General Pinochet prior to 29 September 1988- the date when the International Convention Against Torture was incorporated into British law- did not constitute extraditable crimes. In this way, severe limitations were imposed on the number of crimes for which General Pinochet could be extradited, adding to all those charges of terrorism and kidnapping which had already been discarded at an earlier date due to the rule of double criminality.

Analysts of the case have pointed to the final ruling as a shrewd decision, from a political standpoint, in which Law Lords attempted to placate all those involved in the narrowest possible terms (Roht-Arriaza 2005). The Appellate Court had the delicate task of balancing legal questions with domestic and international pressures whilst dealing with a huge amount of public scrutiny. At a time of serious legal shakeup in Britain, the overturning of the decision made in *Pinochet I* several months later would have seriously undermined the credibility of the British legal system, but at the same time, Pinochet's close association with Margaret Thatcher meant that there was vehement opposition from Conservatives to the legal proceedings in the first place (Byers 2000). Even more importantly, the hearings were strongly opposed by the Chilean government itself, and the Pinochet case threatened to snowball into a full-blown diplomatic crisis with Chile severing ties with the British government in December 1998. Therefore, the final ruling, which recognized the limits of Pinochet's impunity but in concrete terms, found him extraditable for just a small percentage of the initial allegations, was seemingly a practical compromise.

But this was not quite the end of the story. Pinochet's case would rest on politics rather than on the legal hearings. Determined to see Pinochet stand trial in a national court, the Chilean government finally got its way. At the end of 1999 after Pinochet's medical condition had

deteriorated somewhat, Home Secretary Jack Straw allowed the Chilean former head of state to undergo an inspection by British doctors who declared him unfit to stand trial. Controversially, General Pinochet was released on humanitarian grounds at the start of March 2000. His health would be the subject on intense debate over the next few years, his opponents claiming that he had feigned illness to escape extradition and he was even awarded a symbolic Oscar for his performance by protesters in Santiago. In the end, General Pinochet would not be the first defendant to stand the test of universal jurisdiction in a European court, but neither would he find himself quite as sheltered from justice as he had once been.

Table 1. External developments: The Pinochet Proceedings in Spain and the United Kingdom (1998-2000)²



Source: Author's own elaboration

² This timeline excludes the actions of three other States, France, Switzerland and Belgium, who also sought the extradition of General Pinochet in late 1998.

PART II. Domestic impact of the proceedings

A new climate of transitional politics

When Augusto Pinochet landed in Chile on 3 March 2000, amongst the first words he pronounced to his son Marco Antonio were “the air is different here” (El Mercurio 2001). Although it was an expression of his joy at having returned to the more favourable climate in his home country, he would soon find that the air had undergone some profound changes in the months he had been absent. The perception of Pinochet’s invincibility had been swept away, and both efforts at uncovering truth and pursuing justice went a little further than they had in the 1990s. After suffering from years of obscurity, the victims’ claims entered the public realm for the first time and General Pinochet’s power and peace was shattered by a number of court cases which stacked up against him. As The New York Times put it, Pinochet returned to Chile as the “emperor with no clothes” (Krauss 2000).

Transitional justice in Chile can be time-lined into two separate phases (Collins 2013). The first, between 1990 and 1998, was a static period during which justice was done, in the words of President Aylwin, “to the extent possible” through the national truth commission whilst avoiding human rights trials. It was very much a period of forgetting and moving on, of restorative justice with a curtain seemingly having been drawn over the past. This approach was influenced by the argument of transitional justice theorists who argued that human rights trials were a destabilizing force to the consolidation of transitional democracies (Huntington 1991). According to this view, prosecutions were counter-productive- and even threatening- to the rebuilding of institutions and society. Likewise, there were plenty of voices within Chile who advised against holding the military regime accountable. In a lecture, an influential Chilean lawyer José Zalaquett, reflected on the political compromises which, in his view, were needed for a successful reconciliation with the past:

Political leaders cannot afford to be moved only by their convictions, oblivious to real-life constraints, lest in the end the very ethical principles they wish to uphold suffer because of a political or military backlash. In the face of a disaster brought about by their own misguided actions, politicians cannot invoke as a justification that they never yielded on matters of conviction. That would be as haughty as it would be futile, and certainly would bring no comfort to the people who must live with the consequences of the politician's actions (Zalaquett 1992).

The very real fear of another coup meant there was very little retributive justice in the immediate years following Pinochet’s resignation; the truth commission initiative was conservative, failing to address the issue of torture for the survivors of the regime and the amnesty was firmly entrenched, with judges seemingly reluctant to challenge it. Pinochet’s sway over politics was still pretty tight in these years.

The year 1998 was therefore a turning point for the second phase of transitional justice, after which the feeble non-judiciary mechanisms in place were no longer deemed sufficient to

overcome the past. Prosecutions at a national level since Pinochet's arrest have not been a total success with "a kind of rough and partial justice" being done (Roht-Arriaza 2005). Statutes of limitation have prevented some cases from being heard and the amnesty law continues to be a clear hurdle. But there is no doubt that the search for individual criminal accountability has gained significant momentum, and a more complete form of transitional justice combining retributive sentences and renewed truth endeavours, as well as symbolic measures of reparation, has been introduced. In this second phase too, the empowerment of civil society and judges has meant that the Executive branch has lost its monopoly over steering the course of justice in this second phase (Collins 2013).

Pinochet's arrest seems like the clear-cut division between two periods of transnational justice, but the merit for initiating this second phase of transitional cannot be solely attributed to external events, since significant developments were already occurring at a national level (Pion-Berlin 2004). Changes had already been put into motion prior to the proceedings in Spain with substantial judicial overhaul beginning in the mid-nineties. The reforms concentrated on creating a new, open court system of criminal law, on creating specialized chambers to hear appeals on closed cases and on establishing a new relationship between civilian and military courts. The number of judges in the Supreme Court was expanded from 17 to 21, and there was a change in its composition. With eleven new judges incorporated by the end of 1998, the majority of Supreme Court judges had been appointed after Pinochet's stepping down from power. The change in the composition of key judiciary organs meant the gradual loosening of loyalty to the military amongst judges which paved the way for subsequent human rights cases.

Secondly, a lawsuit against Pinochet and a Supreme Court ruling marked significant progress even before the General's arrest in London. At the start of 1998, Judge Guzmán of the Santiago Appeals Court began investigating the crimes committed by the "Caravan of Death", the special military unit in charge of murdering political opponents in the regime's early days. For the first time ever, General Pinochet's name was linked to several of these crimes, and although he still enjoyed parliamentary immunity at the time, the case would eventually lead to his indictment in December 2000, something which for many years had proved unimaginable. In another ruling a month before Pinochet's detention in London, the Chilean Supreme Court ruled in favour of re-investigating a case, the Poblete Córdova case, which had been closed concerning a disappearance during the military dictatorship. As well affirming Chile's obligations under international law, the ruling was crucial in providing a way to circumvent the 1978 amnesty laws. It considered that for the amnesty to be applied, the whereabouts of the victim had to be known; otherwise the "disappearance" was an on-going crime and could therefore be investigated. With the amnesty law still in place, this was to provide a widow for investigating numerous cases which had been previously set aside.

Significant national developments cannot therefore be excluded from the picture. But the Pinochet hearings abroad accelerated changes in Chile by shaming the government into pressuring its own courts into delivering justice (Pion-Berlin 2004). The Frei administration had pushed for the return of General Pinochet to Chile based on the premise that he would face

justice domestically; now that the whole world was following the case, the old *status quo* of impunity could hardly be maintained.

Pressure from outside was accompanied by intensified pressure from civil rights groups within Chile. Thousands of protesters marched in the streets of Santiago demanding that General Pinochet should be investigated. The proceedings abroad had the effect of empowering victims, granting them an important voice in the public sphere. Civil groups had played an important role during the dictatorship in Chile, detailing human rights abuses in the early years of Pinochet's dictatorship and acting as a key force behind the 1988 referendum. But their importance had faded with the transition to democracy, and they did not wield enough influence to guide the course of the official reconciliation strategy. With the proceedings in Europe, these groups, such as Association of Families of the Detained and Disappeared (AFDD) and the Association of Families of Executed Political Activists (AFEP), regained a prominent role in providing evidence for the indictment of General Pinochet. These groups then came to occupy place in the public sphere, exerting pressure on the government to enact more legislation dealing with past human rights abuses.

Addressing human rights abuses in Chile

So what concretely was done to address human rights abuses under Pinochet's military rule? One of the earliest measures after Pinochet's arrest was the establishment of the Dialogue Round Table, forcing former military personnel, religious leaders and human rights groups to sit around the same table. Despite criticism about the political motives for fomenting the dialogue, it led to the appointment by the Supreme Court of 60 special judges to investigate human rights cases.

Another important initiative under the government of Ricardo Lagos, was the creation of a second truth commission, the Valech Commission, which between 2003 and 2004 had the task of investigating political imprisonment and torture. In contrast to the first truth-telling initiative of the early nineties, the Valech Commission was instructed to identify the survivors of the military dictatorship, as well as methods and torture chambers, as opposed to just the dead or disappeared. The Commission did not altogether abandon the cautious approach of the Rettig Commission; testimonies are protected by a law of secrecy, impeding their use in trials for 50 years, and torture victims were only recognized as such when they had suffered physical abuse in political prisons, rather than in homes or temporary detention centres. But despite its limitations, the Commission identified more than 28,000 victims of the military dictatorship, including children, the elderly and women.

Efforts to account for the past continued under subsequent governments, showing that politically the Pinochet effect was not just a short-term attempt by the Chilean government to satisfy spectators abroad, but that it has become part of a new obligation by the Chilean executive branch to confront human rights abuses. Reparation measures of the last decade have included the passing of legislation of symbolic and economic value and the edification of sites of remembrance. Two initiatives of note were the opening of the National Institute for Human Rights in 2010 and the inauguration of the Museum of Memory and Human Rights in Santiago

de Chile, under Michelle Bachelet's first presidency in 2010. The fact that among those to make official visits to the Museum are not only those political figures who have always declared themselves against the military dictatorship, but also right-wing politicians such as President Sebastián Piñera is revealing of a new political climate. As human rights lawyer Roberto Garretón pointed out, this museum has provided a vital collective space for remembrance:

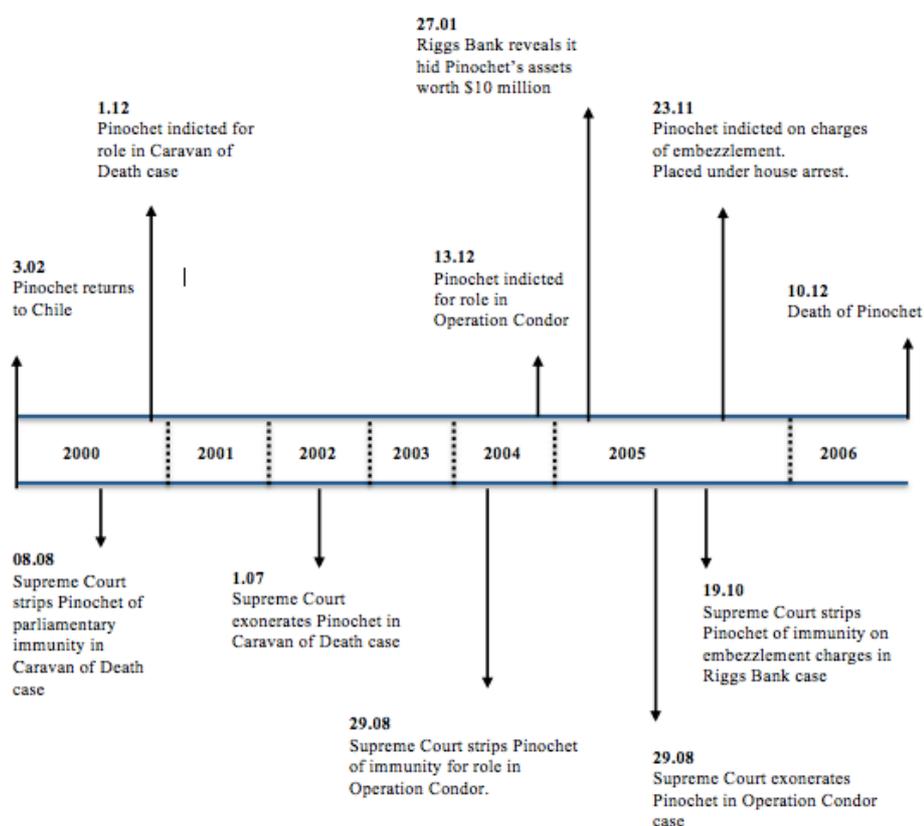
The point is that when reconciliation is talked about, two sets of actors are mentioned, not three. The first actor is the State, the second set of actors are the victimisers, and the third actor, the victims. This museum is a step in the positive direction for the reconciliation between the Chilean State and the victims (Garretón 2010).

This shift has also been notable in the judiciary branch. Judges were a set of actors empowered by the Pinochet proceedings both at a domestic and international level. According to Kathryn Sikkink and Ellen Lutz (2001), processes of transitional prosecutions are not the result of a natural evolution of international criminal law. Rather, they are the product of individual figures, judges and human rights lawyers, the so-called "norm entrepreneurs" who push the boundaries. Arguments that had fallen on death ears in the 1980s, such as the non-applicability of the amnesty to victims classified as "disappeared", were suddenly heard in a new light, leading to an increase in cases. In Spain, Judge Garzón proved to be one such "norm entrepreneur" and in Chile, Judge Guzmán was important in testing the limits. Guzmán was the first to file a petition to have Pinochet's immunity lifted on 3 March 2000, the same day that the General returned to Chile. Many were sceptical both within and outside Chile about breaking Pinochet's shield of impunity. But this scepticism was initially dispelled, however, as on 8 August 2000, with a vote of 14 to 6, the Supreme Court stripped Pinochet of his immunity, and a couple of months later he was formally indicted on the charge of participation in 18 kidnappings in the Caravan of Death case. He would be stripped of his immunity a further six times between 2000 and 2006, but legal proceedings suffered a roller coaster ride over the next few years, as he was released on several occasions on the grounds of ill health. Added to the various human rights cases, he was indicted in 2005 for embezzlement after a U.S. Senate inquiry revealed that he had offshore accounts with Riggs Bank containing at least \$27 million. This was a huge political blow, as his supporters found it increasingly hard to defend a corrupt man. Table 2 shows a timeline of the most important cases brought against Chile including indictment for his role in the Caravan of Death and Operation Condor. He would never stand trial by the time of his death on 10 December 2006, but there is no doubt that his image had been seriously discredited by this time.

Similarly, prosecutions for key figures of the military regime have been a stop-go process wielding mixed successes. There have been important convictions such as that of Manuel Contreras, the ex-head of the secret police DINA, in 2006, the conviction of eight ex-military figures for their role in the murder of fourteen detainees in 1973 in the Caravan of Death case in 2013. But a Human Rights Observatory at the University of Diego Portales (2014) highlights the reverses in matters of human rights prosecutions between 1990 and 2014, which are in large

part due to the lack of consistency regarding the interpretation of Chilean law. One of the major obstacles to cementing accountability are the sharp differences in the Supreme Court on statutes of limitations and on the application of international law principles. The lack of consensus on these legal questions means that the verdict is dependent on the composition of the court on the day, the upshot being an unpredictable distribution of justice, which creates extreme frustration amongst the victims. Faced with these conditions, several victims have chosen to appeal their case to the Inter-American Court of Human Rights for Chile's failure to investigate and to make reparation of various acts of torture.

Table 2: Justice at home: Proceedings against Pinochet in Chile (2000-2006)



Source: Author's own elaboration

Obstacles remain on the political front too. The greatest sore is the 1978 amnesty law, which has not been overturned despite campaign promises to do so during President Michelle Bachelet's election campaign. The failure to do so is a reflection of the sensitivity of human rights issues in Chile which continue to this day. The Pinochet proceedings in Europe impacted on perceptions on Pinochet's dictatorship, but there are still very visible fractures from the period of the military dictatorship, which are played out along political lines.

PART III. Global impact of the proceedings

Reactions abroad

And what can be said of the impact of the Pinochet proceedings on global political life? The Pinochet case clearly captured the public's imagination across the world in 1998. Chile had for long time been of interest to Europeans due to its democratic traditions which resembled Europe's political spectrum, with a clearly defined left and right, as opposed to other Latin American countries with a stronger populist tradition. There had been general shock when Pinochet, with Chile's long-standing tradition of democracy, ousted a democratically elected leader in a most brutal way. Added to this, many Chileans, often well educated and resourceful, had fled to Europe during the military dictatorship, and had tried to keep the issue in the public eye. All these factors meant that when Pinochet was arrested in October 1996, public opinion was mobilized fairly quickly. Chilean exiles, but also British supporters, took part in anti-Pinochet demonstrations, whilst others back pro-Pinochet marches. The media got fully on board, perhaps because there were few other gripping stories to report around that time, and the events of the drama were well documented in public broadcasts. For the first time in British history, a Law Lords' decision was broadcast on live television. Public identification with the cause meant that whilst Jack Straw was issuing his final decision regarding the release of general Pinochet, more than 70,000 letters and e-mails had been sent to the Home Secretary.

Similarly to what occurred at a national level, the Pinochet proceedings empowered victims across the world to initiate lawsuits against human rights abusers. As scholar Todd Landman (2013) points out, transnational prosecutions provided "political leverage and the language of rights for advocates and victims groups to mobilise and seek accountability for offenders around the world." Victims mobilized and began to look for alternatives of justice beyond their own borders, many following the Pinochet path of transnational persecutions. The structural characteristics of transnational prosecutions, which rely heavily on testimonies and the gathering of evidence from victims, as opposed to a "top-down" strategy from prosecutors, have given survivors a renewed importance in the fight for justice. In particular, several cases brought before Spanish, Dutch and Belgium courts at the end of the 1990s seemed to have been a direct result of the Pinochet case; those of Hissène Habré of Chad, Désiré Bouterese of Suriname, Abdulaye Yerodia Ndombasi of the Democratic Republic of Congo and Efraín Ríos Montt of Guatemala. In all of these instances, victims of the respective genocides or human rights persecutions filed cases before European courts using the principle of universal jurisdiction.

In the years immediately following Pinochet's arrest, hundreds of lawsuits were filed in Belgium and Spain against current and ex-head of states from Ariel Sharon and Amos Yaron to George H.E.W. Bush. These cases originating from civil society organisations resulted in a few landmark sentences, such as that of Adolfo Scilingo, the ex-Argentine chief of the navy, who in 2005 was convicted in Spain to 640 years imprisonment for crimes against humanity. But it soon became clear that the Pinochet precedent had not opened the way for easy extraterritorial justice across the globe. On the contrary, national courts in Europe became wary that the

decision to press on with the application of universal jurisdiction in the case of Pinochet could potentially lead to an avalanche of requests from across the world.

This had resulted in boundaries being placed on the exercise of universal jurisdiction. The tightening up of the laws relating to universal jurisdiction has occurred most notably in Spain and Belgium, two of the countries which had the most favourable jurisdiction in applying international criminal law; both have imposed greater conditionality on the application of universal jurisdiction, in effect linking the principle to nationals or residents, and by abolishing the possibility of an appeal in the cases which have been dismissed. The United States exerted much pressure on Belgium to repeal the Universal Jurisdiction Law in 2003, with U.S. Defence Secretary Donald Rumsfeld threatening to pull NATO headquarters out of Belgium if such a move was not made. Likewise, Spain placed new boundaries on universal jurisdiction in both 2009 and 2014 after diplomatic pressure was exerted by Israel, China and the United States to reduce the scope of its laws. The second reform came shortly after Spanish authorities released an arrest warrant in November 2013 against five Chinese officials stood accused on participating in genocide against the Tibetan people. The upshot of these reforms is the virtual removal of universal jurisdiction from the Spanish legal system (Alija 2014), and in this way justice has been traded to avoid political and diplomatic conflict to the detriment of victims of heinous crimes.

Conclusion

If measured by the delivery of a final sentence, the case of Augusto Pinochet would seem like an abysmal failure. The General died peacefully in his home in 2006, having being neither convicted by European or Chilean courts. The conclusion to his life most certainly spelled bitter disappointment for the victims of the military years. But the proceedings against Augusto Pinochet achieved what few other international criminal trials have: the discrediting of Pinochet's name and the setting in motion of a new phase of transitional politics in Chile.

The Pinochet proceedings have propelled a new approach in dealing with the military dictatorship in Chile. Whereas in the years immediately following Pinochet's relinquishing of power, the demands of individual victims were traded for a greater project of reconstructing of a stable democracy, this absolute trade-off is not longer deemed satisfactory, nor in fact successful in healing the wounds of the past following the return of Pinochet to Chile. The Pinochet case had the effect of accelerating a new stage in transitional politics in Chile in which there was a notable shift in notions of individual criminal responsibility and a new relationship between the State, the judiciary branch and the victims of the military dictatorship. Successive governments have been forced to adopt a more extensive human rights agenda with and have multiplied the number of symbolic and economic reparation measures. In parallel, the judiciary branch has been more willing to prosecute although justice remains unpredictable and partial with victims continuing to look towards European and inter-regional courts in the absence of favourable verdicts in Chile. These changes were the result were propelled from bottom-up, by civil society along with judges determined to challenge the status quo of impunity which had dominated in Chile during her transition to democracy.

At a global level, the case of Augusto Pinochet constituted a pioneering example. Victims, with the support of NGOs and lawyers, defied the Chilean state and territorial confines by bringing their case against Augusto Pinochet to a global audience. This in turn empowered victims all over the world, from Guatemala to Chad, to challenge the impunity of perpetrators of human rights in foreign courts. But despite the possibilities that universal jurisdiction seemed to be offering at the turn of the century, its scope has been somewhat limited with few foreign leaders actually tried in domestic courts. Does this mean that universal jurisdiction's brief heyday already come to a close? Although universal jurisdiction has not yet become an obsolete tool, it is clear that the globe's most powerful countries- including both the United States and China- have exerted strong diplomatic pressure on realising the damaging implications that these international laws could have for their own politicians. The courts most likely to try non domestic cases of crimes against humanity such as Spain and Belgium have restricted their laws on universal jurisdiction, thus showing reluctance to become global courts open to hearing human rights cases from victims around the world. Faced with this reality, therefore, the possibilities of universal jurisdiction becoming a widespread tool for victims around the globe to gain justice are limited.

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