



The Pinochet Precedent

By Michael Ratner, Center for Constitutional Rights

On October 16, 1998, former Chilean dictator Augusto Pinochet was arrested in London on an international arrest warrant issued by a Spanish judge. He was accused of crimes against humanity, including genocide, torture, and terrorism. Pinochet was charged with responsibility for: (1) the killing of at least 4,000 people before, during, and after the 1973 coup by which he came to power in Chile, and (2) overseeing Operation Condor, a secret police conspiracy to murder people in Argentina, the U.S., Spain, Italy, and elsewhere.

The British judicial system struggled for months to determine whether Pinochet's arrest was legal. On March 24, 1999, the British Law Lords ruled the arrest valid, but limited the crimes for which Pinochet could be extradited to Spain for acts of torture and conspiracy to torture committed after 1988 (the year Britain signed the International Convention on Torture). Pinochet remains in British custody, facing extradition proceedings.

After Spain requested that Pinochet be extradited, extradition requests from other countries quickly followed—France and Switzerland wanted Pinochet as well. Chile objected strongly. While claiming neutrality, Clinton administration officials clearly tilted toward Chile; according to the British press, Secretary of State Madeleine Albright lobbied the Blair government to return Pinochet to Chile. In response to Spain's request for classified U.S. documents related to the Pinochet case, Washington has so far submitted nothing useful. Clinton did issue a directive in January to initiate a process of declassification of relevant documents, but whether the CIA

and other agencies will cooperate remains to be seen.

The principle of international law underlying Pinochet's arrest by Spain is based on what is termed "universal jurisdiction." Under this precept, national courts can try individuals for genocide, crimes against humanity, and war crimes, even if these acts took place outside the prosecuting country. Perpetrators of such crimes are considered, much like pirates of old, as *hostis humanis generis*, enemies of all humankind, who can be brought to justice wherever found. The exercise of such jurisdiction is recognized under international law and by U.S. courts.

Chile and other critics of the arrest, however, condemned Spain's attempt to extradite and prosecute Pinochet, saying that it interfered with national sovereignty.

Underlying this objection is the notion that the courts of one state cannot adjudicate the legitimacy of the political acts of another state within that other state's borders. Pinochet argued that as a former head of state, he was immune from prosecution and that as a "senator for life"—a title granted by the Chilean government in exchange for his leaving office—he was protected from arrest in England by diplomatic immunity.

The judgement by the House of Lords found these objections were not valid. The international law doctrines that shield officials from suits in foreign courts do not protect those who engage in torture which the court found cannot be a legitimate state function. A former ruler thus has no immunity from prosecution for crimes against humanity committed as a head of state. Nor does the title "senator for life" entitle its holder to diplomatic immunity: only accredited diplomats receive such protection. On this basis the Lords permitted the extradition proceedings to go forward. Chile's objections would be stronger if any efforts had or could be made in Chile to bring Pinochet to justice. But there is no possibility that Pinochet will be prosecuted in Chile, where he has been amnestied for the majority of his crimes and is immune from prosecution under Chilean law.

The other objections to Pinochet's arrest are more political than legal. The U.S. is reluctant to allow international examination of its own role in the destabilization of Chile, its support for Pinochet's coup, and the CIA's close relationship to the Chilean secret police during Operation Condor. Washington fears, furthermore, that exposing Pinochet to prosecution would destabilize Chile, and the U.S. argues that countries making a "transition to democracy" must be able to guarantee immunity from prosecution to human rights offenders in order to make headway. Finally, the precedent set by a Pinochet trial could make it possible for former U.S. officials responsible for crimes against humanity to be arrested and tried in another country.

These political objections are not convincing. Concern about its own reputation should not lead the U.S. to cover up crimes against humanity. Pinochet's arrest did not destabilize Chile; moreover, national political concerns do not override the international duty to prosecute genocide. Furthermore, crimes against humanity perpetrated by American officials deserve prosecution as much as crimes committed by nationals of any country—even though, practically speaking, it is very unlikely that any country would risk prosecuting any U.S. official due to America's influence and power.

Pinochet's arrest will further justice and provide a precedent for the prosecution of other major human rights violators—even if they, like Pinochet, were at one time aided and abetted by the United States.

Key Points

- The British Court found that states have universal jurisdiction over torture wherever committed and that Pinochet has no immunity for his crimes.
- International and U.S. law both recognize that national courts have universal jurisdiction to prosecute perpetrators of crimes against humanity, wherever they are found.
- U.S. opposition to Pinochet's arrest is political rather than legal. Washington fears that the precedent could be employed against American officials or allies and that a trial would reveal U.S. complicity in Pinochet's crimes.

The U.S. reluctance to support efforts to prosecute Pinochet weakens humanity's quest for international justice. It ignores murders carried out in the U.S., disregards the killing of U.S. citizens, and undermines the principle of accountability for crimes against humanity.

The 1976 Washington, DC car-bomb murder of Orlando Letelier and his colleague at the Institute for Policy Studies, Ronni Karpen Moffitt, was a terrorist act by agents of Chile's secret police. To prosecute murders on American soil, no claim of universal jurisdiction need be invoked, just simple criminal law. Yet despite released documents suggesting Pinochet's involvement in the case, the U.S. has failed to actively investigate this murder, provide further documents that would shed more light on it, or request Pinochet's extradition from England.

Nor has the U.S. vigorously investigated the murders of two U.S. citizens, Charles Horman and Frank Teruggi, Jr., killed in Chile in the immediate aftermath of the coup; and it has ignored the illegal detention and torture of other Americans. The U.S. has denied requests by Spanish courts for documents relevant to their cases. This denial contravenes the language of the Intelligence Authorization Act of 1998, which directs the Secretary of State to provide the affected families "information regarding the killing, abduction, [and] torture..." of American citizens abroad.

Spain has also made a formal request to the U.S. under the bilateral Mutual Legal Assistance Treaty (MLAT) for documents relating to Pinochet and Operation Condor. By releasing only worthless documents and failing to provide those that are believed to contain very important evidence against Pinochet, the U.S. is damaging efforts to bring him to justice.

The problems with U.S. policy go beyond the Pinochet case. They are exacerbated by Washington's opposition to the treaty establishing the International Criminal Court (ICC) because the U.S. could not veto the initiation of prosecutions and feared that U.S. soldiers would be subject to the court's jurisdiction. The U.S. has repeatedly rejected any system of international justice it cannot unilaterally control. It does not want its officials, its soldiers, or its allies subject to prosecution. It does not want the crimes of past U.S. administrations laid bare.

By avoiding responsibility for its own crimes, the U.S. insures that there will be no independent accountability for abuses that may be committed by its officials in the future. Those answerable for the Phoenix program—whose agents murdered tens of thousand in Vietnam—for aiding and abetting terror in Latin America, and for supporting the invasion of East Timor will never face justice. American officials will continue to be able to act with impunity. Washington's reluctance to expose its own abuses is demonstrated by its recent proposal to establish an international tribunal to prosecute crimes committed by the Khmer Rouge in Cambodia. The U.S. has requested that charges be limited to crimes committed between 1975 and 1979, subsequent to its carpet bombing of Cambodia and before the U.S. began collaborating with the Khmer Rouge.

At the same time, however, the U.S. seeks to invoke international law to prosecute its enemies, and Washington claims that fighting terrorism is a cornerstone of its foreign policy. This double standard is demonstrated by the case of the extradition from Italy to Turkey of Abdallah Ocalan, a leader of the Kurdish Workers Party. In contrast to its failure to support the extradition of Pinochet, the U.S. State Department announced that Ocalan "should be extradited and brought to justice.... We have no doubt this man is a terrorist, and he, therefore, should receive no safe haven."

Serious problems arise from these attitudes. Not only do they make it difficult for the U.S. to condemn other countries' gross violations of human rights, they also undercut the legitimacy of tribunals supported by the U.S., such as the International Tribunal on the Former Yugoslavia. If the U.S. will not prosecute its own citizens or its allies for crimes against humanity, the prosecution of other international crimes will remain inevitably mired in charges of hypocrisy and political expedience.

Key Problems

- The U.S. has failed to cooperate in the investigation of Pinochet and has refused to furnish essential documents in the case.
 - Washington's reluctance to prosecute Pinochet mirrors its refusal to allow examination of the U.S. role in cases involving crimes against humanity.
 - Such posturing, in the Pinochet case and in others, undermines the legitimacy of international tribunals and makes it difficult for the U.S. to convincingly speak out against human rights abuses.
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The arrest and requested extradition of Pinochet was a watershed moment in the struggle for the protection of international human rights. The exercise by Spain of universal jurisdiction over Pinochet is the culmination of a fifty-year march—that began at Nuremberg—to ensure that persons suspected of committing crimes against humanity can be brought to justice by any country.

The U.S. failure to support the Pinochet prosecution retards this advancement and seriously damages Washington's professed commitment to principles of accountability and justice, as well as its stated concern with countering international terrorism.

Key Recommendations

- The U.S. government should publicly and privately support Pinochet's extradition to Spain.
- All documents held by U.S. agencies regarding the crimes of the Pinochet regime should be released both to the families of those murdered and to the Spanish courts.
- The U.S. Department of Justice should reopen the criminal investigation into Pinochet's involvement in the Letelier-Moffitt murders and should examine the U.S. role in the deaths of Horman and Teruggi.

A new policy with regard to the Pinochet case can remedy these problems and restore, in part, U.S. credibility. The required policy changes are straightforward and have been supported by the families of those tortured and killed by Pinochet, including the relatives of Orlando Letelier and the three murdered U.S. citizens.

The U.S. should: (1) publicly and privately support Pinochet's extradition to Spain; (2) release all documents regarding the crimes of the Pinochet regime, even those that might

implicate the U.S.; (3) reopen and vigorously pursue the investigation of Pinochet's involvement in the Letelier-Moffitt killings and in the disappearance and murder of Charles Horman and Frank Teruggi, Jr., and uncover its own role, if any, in those murders; and (4) initiate its own extradition proceedings against Pinochet for the murders of Letelier and Moffitt.

Publicly and privately supporting Pinochet's extradition to Spain would represent a major advance in the fight to bring international criminals to justice. It would demonstrate that the U.S. can apply justice impartially, even against a dictator it once supported. It would enhance the likelihood that when the U.S. addresses human rights issues in the future, it will be heeded not simply as the world's only superpower, but as a genuine moral voice as well, one that holds itself and others accountable.

The U.S. has made a small step in the right direction with the recent announcement that it has undertaken a search of documents related to Pinochet's crimes and will begin a declassification process. But it has not yet committed itself to releasing all relevant documents fully and expeditiously. One example of the potential importance of documents held by the U.S. comes from a U.S. military attache's report demonstrating Pinochet's control over the secret police (DINA) and its terrorist activities: "[S]ince the promulgation of Decree Law No. 521, officially establishing DINA as the national intelligence arm of the government, Colonel Contreras has reported exclusively to, and received

orders only from, President Pinochet." Colonel Contreras, the head of DINA, was convicted of directing the Letelier-Moffitt murders. Documents like these emphasize the need for an impartial, ambassador-level official to be placed in charge of disclosures to ensure that there is no cover-up.

Finally, the U.S. should demand Pinochet's extradition from England, or from Spain if he is tried there, or from Chile if he is allowed to return there. Even without invoking universal jurisdiction, the U.S. has both the right and the obligation under basic criminal law to bring Pinochet to trial for murders committed on American soil. The U.S. has successfully prosecuted those who detonated the bomb that murdered Letelier and Moffitt, and it has forced the jailing of the head of the Chilean secret police for the crime. But Pinochet, despite the strong evidence against him, was never indicted for his role in the murders. It is time for this to happen. It is also time to solve the murders of Horman and Teruggi.

It will take more than lip service to the prosecution of Pinochet for real changes to occur in U.S. policy. As long as the U.S. holds its officials above prosecution and does not allow international prosecution of crimes against humanity committed by itself or its allies, the case of Pinochet will not yield justice in a broader sense. Real change will come when the U.S. stops aiding and abetting those who commit crimes against humanity and adheres to its United Nations treaty obligations to employ force only when authorized by the Security Council. These are long-term goals that are not easily achievable, but support for the extradition and prosecution of Pinochet can begin to open a new and much-needed chapter in U.S. foreign policy.

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Sources for More Information

Organizations

Amnesty International, USA

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Websites

Amnesty International

<http://www.amnesty.org/ailib/intcam/pinochet/>
(Documents from on the Pinochet case)

BBC Pinochet page

http://news.bbc.co.uk/hi/english/special_report/1998/10/98/the_pinochet_file/newsid_198000/198306.stm

Chilean British Committee for Justice

<http://www.labournet.org.uk>
www.labournet.org.uk/pinochet/index.html
(Updates on Pinochet case and other materials)

Derechos Humanos

<http://www.derechos.org/>
(Human rights site with materials on Pinochet)

National Security Archives

<http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB8/nsaebb8.htm>
(U.S.-Chile documents)

Judgments from the House of Lords

<http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldjudgmt/ldjudgmt.htm>
(Judgments on the Pinochet case)

Redress

<http://www.redress.org/>
Text of Spain's indictment against Pinochet

Transnational Institute

<http://www.worldcom.nl/tni/history/pinochet.htm>
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