

Truth, Accountability, and the Dynamics of Change in Chile

Naomi Roht Arriaza¹

I'm going to try and focus on two pieces. One is taking off from some things that Rick was talking about-- what *kinds* of circumstances made the Spanish cases able to succeed in both having this enormous impact on international law and also having a significant effect within both Chile and Argentina. That's the first thing I want to do. Then I want to talk a little bit about the demise of low-intensity democracy as a result of this kind of litigation. I'll explain what I mean in a second.

But first, what are some of the factors that made these cases able to have a significant impact, both internationally and also within Chile and Argentina, which was, of course, part of the point. One, which I think has been mentioned, is an independent judiciary in Spain. The Spanish government, like the UK government and like the Chilean and Argentine governments, hated this litigation and really wanted it to go away. But they weren't able to make it go away, because that would have meant overriding very strong views about the independence of the judiciary.

There were attempts at one point in the litigation to take the case away from the courts. The Chilean government proposed an arbitration, for instance. They said, "Let's handle this state-to-state," and there was an incredible outcry within Spain, saying, "You can't do that, that would override the norms of judicial independence," and they had to back down. So independent judiciaries, clear separation of powers rules, the inability of the executive to step in. Notice that when the executive *does* step in, in the form of Jack Straw, you get a step back— you get the liberation of Pinochet and his being sent home.

Second, in Spain, the ability of the plaintiffs to proceed without the state prosecutor. Here in the U.S. when we think about criminal prosecutions, we think that you need the U.S. Attorney, you need the District Attorney, you need *some* government official to go forward. In Spain the law allows much more autonomy on the part of plaintiffs—private plaintiffs—to initiate criminal investigations, as long as they can get a judge to go along. And, in effect, as some of the speakers mentioned, the state prosecutor in Spain has actually been one of the fiercest opponents of this litigation and has spent much of his time writing briefs about why this is a bad idea.

Related to that-- broad standing requirements in Spanish law for public interest organizations. Spanish law allows public interest organizations like the Union of Prosecutors or like the Fundación Salvador Allende to be parties in the criminal litigation without showing that they are directly affected, just because they represent the public interest. That has made it possible for human rights organizations, lawyers organizations and the like, to play a central role in this

¹Naomi Roht Arriaza is a professor of law at the University of California Hastings College of Law, Ms. Roht-Arriaza teaches International Human Rights, Torts, and Environmental Law. Professor Roht-Arriaza received J.D. and M.P.P. degrees from the University of California, Berkeley. Her writings, which include the book *Impunity and Human Rights in International Law and Practice* as well as numerous articles, concern issues of accountability for violations of human and environmental rights. She is currently working on a book about the connections between the European court cases against South American military officials such as the Pinochet case and the legal cases being brought in domestic courts against the same actors. She spent the first six months of 2000 in Chile researching these issues.

litigation and have access to all the files, be able to talk to the judge, etc. And then, of course, a judge that is willing to go somewhere that hasn't been gone to before. There *are* judges like that- they are generally a minority. And it was very important for the litigation that they were assigned a judge who was willing to do the work.

And national law had explicitly provided for universal jurisdiction; some national laws don't, lots of national laws don't. One of the tasks, as Rick said, in going forward: you need to have universal jurisdiction legislation in every national law. It is absolutely essential to the ability to move this kind of litigation forward and to be able to do this in other places.

Another factor that I think is absolutely essential is the role of human rights groups and lawyers' groups in three continents. Rick talked about the role of the WCL human rights clinic here in the U.S. Chilean and Argentine human rights groups were providing information, providing documentation, putting together lists of victims, providing witnesses, sometimes on very short notice. Just to give you an example: when the UK House of Lords decided that the only charges that could go forward were charges that concerned torture after 1998 because that was what was required under UK law, there was a scramble. It was possible to go back to the Chilean groups and say, "We need a list of people who were tortured from 1988 and we need it tomorrow." And that list came up and was provided. And this couldn't have been done without a large amount of coordination work, and incredible leadership shown by the human rights organizations and lawyers in many different places working together.

Finally, two other things. There was a fairly large community of Argentine exiles and Chilean exiles in Europe who were able to play somewhat of a bridging role. They knew what had happened, they had a personal experience of it in many cases, but they'd also learned how things worked in Spain or in the other countries where cases were brought. So they were able to play this role of working in two societies and basically bridging them, and that was really important for making the cases work.

And finally, it's a somewhat perverse factor, but I put it out here anyway, the fact that there was a clear decreed amnesty. In both Chile and Argentina, there were amnesty laws that said you absolutely cannot bring these cases. This was a challenge for the cases, but it was also, in retrospect, something that made it easier for the Spanish courts to say, "Okay, we can take jurisdiction because there is no chance that these cases can be brought in the home country. We don't have to worry about whether the Chilean judicial system is a good system, bad system, mediocre system. It doesn't matter we don't have to think about that, because there is absolutely no way these cases can be brought there." And at the beginning of the litigation, people were going to Spain and saying, "Look, you know, we know these cases can't be brought."

This brings me to my second point, which is what happened between the beginning of the litigation, when it was perfectly clear to everyone that these amnesties were absolutely tight and would not permit any cases to go forward within the home country, to the situation we have now, where in both Chile and Argentina, there are a number of very high profile cases that are going forward challenging the amnesties or proceeding in the face of them. I think this has to do with some of the things that Mireya was talking about, in terms of this model transition democracy or limited democracy or democracy under tutelage -- which came out of the military dictatorships in

Latin America. And one of the things that has happened is the beginning of the end of that model of transition. In both Chile and Argentina, what we had was an amnesty that had been put in place by the military or had been put in place by the civilian government under military pressure, by a military which said that you can go back to having civilian government, but there are rules to this game, and the rules are: you don't come after us.

When the Spanish cases happened, one of the major contributions to international law of the Spanish cases, is that they basically said, "We don't care that there is an amnesty in place in your domestic law. It doesn't matter to us because, number one, Spanish law doesn't allow for general amnesties, and number two, these are amnesties that are contrary to international law. And because they're contrary to international law, we don't need to give them any credence. So even though you may not be able to prosecute the military, we have no trouble with it." And you see this tears apart, in a sense, this deal because it means you can come in from the outside, and overturn the deal between the political elites of the country with their military, that says "We won't go after you in exchange for letting us run the government." If somebody can come in from the outside and undo that deal, it's not such a good deal any more. So that's one of the things I think these cases have been very important in doing.

Now, how does this work? It has worked differently in both countries, but there was a real underlying, similarity in something that Rick mentioned. That is the emboldening of judges (Roberto Garretón talked about this at one point as the "Garzón effect"). All of these judges start looking at what's happened in Spain and looking at how far Garzón is going to be able to get with these cases. And they say "Wait a minute, maybe this isn't such a crackpot idea after all, maybe this isn't such a laughing stock set of issues. Seems like some serious judge in a serious country seems to think there's something to it, right? So maybe we should start looking at it."

Now, in the two countries there have been different ways in which this has happened. Let me talk about Chile first and then about Argentina. In Chile, there's a 1978 amnesty, as Mireya mentioned. There have been two responses. The first response has been to go after it directly and say this amnesty violates international law. And that is a theory that has been raised since 1973, on the grounds that Chile was a party to the Geneva Conventions. The military had said this was an internal war, even though it really wasn't, but if the military said it was, then they were not complying with the Rules of War. And this had been an old theory going on for a long time, but courts had never bought it. Until 1996, you get the first case where the Chilean Supreme Court buys this theory of international law. Is the case, it's a disappearance case, called Poblete. Other countries don't follow that strand.

The second way this has happened in Chile, is through the idea that although the military may have thought they were placing a blanket amnesty that would preclude investigation altogether, and even though the Supreme Court has many times upheld that view, we are starting to get a change in the composition of the Supreme Court. And cases have started to come out saying, "Wait a minute, in order to know whether the amnesty applies, we have to know who it applies to and what crimes it applies for. And in order to do that, we need to investigate. And it's only at the very end of the line, once we've investigated, we've charged, we had a trial, so we know number one, who the guilty people are and, number two, that they are guilty and number three, what they're guilty of. Only then we can apply the amnesty.

Now this gets you quite a way down the line in being able to carry out investigations, and that is the theory on which the courts are proceeding. There is a variant of this theory that applies specifically to disappearances, which says that disappearance is a continuing crime--we don't know when the person was actually killed and even if the person was actually killed. Since we don't know that, there is no stopping point to the crime: it continues to this day. 1978 isn't the stopping point therefore you can't apply the amnesty. The problem with all this is that eventually, you're going to get to the end of that line, eventually the investigations are going to get as far as they're going to get, you're going to need people charged. There are going to be trials, and at the end, the Chilean Courts are going to come right back up against the question of, "Now what?" And they're going to have to figure out whether they apply the international law argument or say that the amnesty is valid. What these interpretations have done is buy the courts and the government some time, to be able to change the political context, to see if they can get rid of the amnesty once and for all. But for now it says you can investigate, you can arrest, you can hold, you can try.

In Argentina it's worked a little differently. In Argentina, the big issue has been the kidnapped children, the disappeared. There are amnesty laws in effect in Argentina as well. Once the Spanish trials were under way, and the same process of emboldening started happening. Investigations that had been stalled in the courts for years all of a sudden started gaining some momentum. Most of these cases have to do with children of the disappeared who were given to other families, mostly military families. There have been a number of high level arrests as a result of the kidnapping cases specifically including some of the members of the junta who had been pardoned in 1990. This has included several of the most high ranking military commanders, commanders of zones have been held under arrest for these kidnapping charges.

In March, just two or three weeks ago, there was a very important case, a judge, for the first time, said, in the context of a child kidnapping case, "look, once I've looked at the kidnapping, I have to also look at the context. This a context in which the parents of this kidnapped child were disappeared and probably killed. And it is ridiculous to look at what happened to the child and not look at the crimes committed against the parents. So I'm going to look at that, and I'm going to find that the Argentine amnesty laws can not get in the way of those prosecutions, because the amnesty laws violate customary international law, which is incorporated into Argentine law, through the specific provisions of the Argentine Constitution.

That decision is of course on appeal. It is not clear what the Argentine Supreme Court will do with it. But it has created an enormous stir in Argentina and has created this momentum that may lead to a Supreme Court finding that the amnesties violate international law and thus the demise of this limitation on prosecutions. I think that when we look at what have been the effects of the Spanish cases, clearly one of the lines of impetus that these cases started is the demise of this idea that you can negotiate a limit to democracy, you can keep out the nasty problematic prosecutions of the military and buy a deal among elites. I think that these cases have signaled at least the beginning of the end for that theory. And I'll end by saying that I think if you were to sum up what the Spanish cases have done in Chile and Argentina, it's about changing the limits of what's possible. It's about changing people's perceptions of what and

where those limits are, and opening up the unimagined to be imaginable. Thank You.
(Applause).

Transcript of remarks presented at THE PINOCHET PRECEDENT: Individual Accountability for International Crimes, sponsored by American University Washington College of Law and the Institute for Policy Studies. March 26, 2001.