

Proceedings in Italy against Latin American dictators and military personnel of the 1970s and 1980s

Giancarlo Capaldo¹

(Sostituto procuratore della Repubblica presso il Tribunale di Roma)

1. Under Italian law it is possible to prosecute those responsible for committing crimes outside the country only in certain special cases. One of these is provided for by article 8 of the Italian penal code and comes into effect when the crime in question is of a political nature, when it was committed against an Italian citizen, and when a precise request to proceed is formulated by the Ministry of Justice.
2. On the basis of these provisions, a trial was recently concluded in Italy against certain members of the armed forces, including the Argentine generals Suarez Mason, Riveros and Gerardi, all of whom were sentenced to life imprisonment for the murder of seven Italian citizens in Argentina over the period from 1976 to 1983 (judgment of the Rome *Corte di assise*, December 6, 2000).
3. Three proceedings are also underway in Italy in connection with the kidnapping, torture and killing or disappearance of other Italian citizens. Pinochet is under investigation in two of these cases together with over sixty high-ranking members of the armed forces (including Videla, Massera, Galtieri and Stroessener). For the first time in Italy, the investigation is seeking to ascertain not only the responsibility of the military personnel who carried out or ordered the actual operations during which Italian citizens were killed but also those of the politicians who ordered the violent repression of the opposition.
4. The investigation is also seeking, again for the first time, to ascertain whether the so-called "Condor Plan" actually existed and was put into effect, i.e. to establish the grounds for claiming not only at the political but also at the legal level that in the 1970s and 1980s an agreement was in effect between the South American dictatorships for the kidnapping, torture, transfer and murder of all those suspected of belonging to the political opposition.
5. These trials are clearly atypical in that they are designed to ascertain not only whether certain specific crimes took place but also how the machinery of repression operated in various countries and, indirectly, how the countries themselves were run.

While remaining within the boundaries of penal proceedings, the purpose of which is to ascertain the truth as regards specific episodes, these trials must necessarily examine what took place in Latin America during that period at the historical and political level.

Two consequences follow from this.

¹ Giancarlo Capaldo currently serves as Assistant Prosecutor in the Office of the Public Prosecutor at the Italian Supreme Court of Cassation, Italy's highest court. Capaldo joined the Italian judiciary in 1972, and has worked for the court of Rome and as a consultant to the Minister of Justice and the Italian Prime Minister. Capaldo has participated in a number of cases involving terrorism, international drug trafficking, organized crime, Mafia, money laundering, and corruption. An expert in legislative proceedings, Capaldo has authored a number of articles on criminal law, and has also written extensively on family, environmental, and corporate law. Capaldo currently oversees the investigation of crimes perpetrated by "Operation Condor," including crimes committed by the Pinochet regime in Chile and by the military juntas of other South American dictatorships during the 1970s.

First, if the truth is to be established, it is essential to secure the cooperation of the countries in which the atrocities took place as well as all those which, for various reasons, are in possession of crucial documents or have knowledge of important evidence.

Second, in terms of legal history, the problem arises of a delicate relationship between the judicial authorities responsible for investigating and judging the facts and the political authorities involved (the former and the latter belonging moreover to different countries).

The legitimization of the judges to seek the truth as regards the relations between heads of state and those in charge of bodies responsible for national security (a legitimization that goes beyond the constraints and boundaries normally and legislatively imposed on judicial action) is grounded on the principle that there is an absolute limit also for political action. It must in fact be argued that there are acts of government lying outside any framework of rule or law even though they are formally actions undertaken by the person in whom political power is legally vested and essentially inherent in the exercise of such power. Alternatively, it could be argued that there are acts whose violation of natural law makes them inherently illegitimate for anyone regardless of the reasons for which they may have been committed.

6. These principles have been established over the last decade in response to the need to develop tools making it possible to punish illicit actions that are substantially attributable to states even though performed through the agency of figures exercising governmental responsibility.
7. The first such tool was developed through the creation of an International Penal Court with powers to judge crimes of “genocide” or in any case “crimes against humanity” regardless of who may have committed them. It is not yet possible to assess the real impact of the creation of this court, which took place in July 1998. The international tribunals set up to judge those responsible for the crimes against humanity committed in former Yugoslavia and Rwanda constitute the first concrete test to ascertain the practicability of such mechanisms.
8. The second possible tool is the one used in Spain by the judge Garzón to proceed against Pinochet, Scilingo and others. Garzón argues that crimes against humanity are subject to no statute of limitations and can be prosecuted in Spain on the grounds of that country’s being a party to the relevant international convention. This interpretation has so far been upheld by the Spanish Supreme Court.

At the same time, however, this interpretation clashes with the legislation currently in force in the overwhelming majority of countries and may lead to conflicts of jurisdiction. As it is known, the territorial nature of penal law is the general rule, i.e. the penal law of a country obliges citizens and foreigners to comply with its provisions on national territory, failure to do so making them liable to the established penal sanctions.

9. To conclude on this point, attention must be drawn to the spread of a sort of cultural atmosphere that is inducing the judiciary in many countries to put forward extensive and analogical interpretations of the provisions establishing jurisdiction in such a way as to permit the prosecution of crimes against humanity in any case, no

matter where or when. In this sense, a new dimension of the “rule of law” is being established making it possible to punish those guilty of crimes against humanity regardless of distance or how much time may have elapsed.

10. The proceedings in question are atypical and have to cope with various difficulties. The investigations concern events that took place a long time ago in distant countries. It is necessary to establish the facts both through the testimony of witnesses who live outside the country and were in any case involved as relatives of the victims, as victims of kidnapping themselves, or in other ways, and through the use of documents that are often in foreign languages and in the possession of foreign countries that are not always willing to cooperate in the investigations.
11. One last point. It must be borne in mind that the investigations ultimately come to analyze not only how power was exercised in the countries in which the crimes were committed and in those neighboring or distant countries with an economic interest in the dictatorship, but also the conduct of diplomacies, international organizations and religious hierarchies.

As can easily be imagined, all this gives rise to problems whose solution is a matter of the utmost importance both to jurists and to investigators.

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.