HUMAN RIGHTS QUARTERLY

Prosecuting Pinochet: International Crimes in Spanish Domestic Law

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1. This paper emerges from more than two years of collaboration between the International Human Rights Law Clinic at American University's Washington College of Law, of which the author is the Director, and the team of Spanish lawyers and activists working on the two cases bringing criminal charges against the military leaders in Chile and Argentina during the 1970s and 1980s, now consolidated, discussed herein. Students in the Clinic have provided legal research, primarily on international human rights and humanitarian law issues, to that team since the time the author first met with Gregorio Dionis and Isabelo Herreros, of Izquierda Unida, in Santiago, Chile in December 1996, and later with Juan E. Garcés, in Madrid, in March 1997. It has been an honor to be a part of the team bringing these actions, and to have such open, dedicated, and adept collaboration in Spain. On this side of the Atlantic, inestimable assistance has been given by Margarita Lacabe, Executive Director of Derechos Human Rights and coordinator of the Derechos Human Rights website in which so many full-text court documents and analyses of the cases are found. Her husband, Mike Katz-Lacabe, has also been an invaluable source of information by regularly circulating press clippings from the Spanish, Argentine, and Chilean press. I would also like to express my appreciation for the helpful suggestions, after reviewing early drafts of this article, from my faculty colleagues Diane Orentlicher and Michael Tigar.

   The Spanish translations are by the author and are by no means official, unless otherwise stated. Caution should be exercised in reliance on English-language translations of Spanish-language documents. Any errors of translation are, of course, solely the author's.

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> Augusto Pinochet Ugarte, born 25.11.15 in Valparaiso/Chile, Chilean ID number 1.128.923, appears to be one of the main responsibles within [Operation Condor], and, in coordination with high military officials and civilians from other countries, namely Argentina, he was in charge of creating an international organi-zation that conceived, developed and carried out a systematic plan of illegal detentions (abductions), tortures, forcible transfers of

persons, murders and/or disappearances of many people, including citizens from Argentina, Spain, the United Kingdom, the US, Chile and other countries. These actions were carried out in different countries in order to achieve the political and financial aims of the conspiracy, mainly to exterminate the political opposition and many people for ideological reasons since 1973. These events coincide with similar events [that] happened in Argentina between 1976 and 1983.

From the Second Arrest Warrant for Augusto Pinochet[2]

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2. In re Augusto Pinochet Ugarte, [1998] All E.R. (D) 629 (Q.B. Div'l Ct. 1998), at ¶ 57 (*quoting Ampliación y fundamentación del Auto ordenando la prisión provisional incondicional de AUGUSTO PINOCHET y su detención* [*Amplification and Foundation for an Order of Unconditional Provisional Arrest of Augusto Pinochet and His Detention*], Madrid, 18 Oct. 1998, *available on* <http://www.derechos.org/nizkor/chile/juicio/fund.html> (visited 17 June 1999) [hereinafter *Second Arrest Order*]).

Two arrest warrants were issued by London Metropolitan Magistrates for Pinochet's arrest in England, both at the request of Investigating Magistrate Baltasar Garzón, sitting in the *Audiencia Nacional* of Spain in Madrid. The first, to interview General Pinochet as a material witness in the Spanish proceedings, was issued on 16 October 1998. The second, for his provisional arrest for the crimes described above, was issued on 22 October 1998. The excerpt above comes from the request for the second arrest warrant, apparently translated from the original Spanish, which is set out in paragraph 57 of the opinion of the Divisional Court of the Queen's Bench Division, issued on 28 October 1998. The Court held that General Pinochet enjoyed immunity from arrest or extradition based on his status as a former head of state, subject to review by the House of Lords. The Divisional Court's opinion was part of protracted appellate proceedings in England dealing primarily with the issue of General Pinochet's immunity as a former head of state. The British proceedings garnered international attention and will not be reiterated here, except by reference.

The full text of the Divisional Court's opinion can be found on the Internet at <http://tap.ccta.gov.uk/courtser/judgments.nsf/a15b42141cc540868025656d005dcada/b415b144908598e2802566ad0062261b?OpenDocument> (visited 17 June 1999). The decision of the Divisional Court was reversed by a 3-2 decision of the House of Lords in *Reg. v. Bow St. Metro. Stipendiary Mag. and Others, ex parte Pinochet Ugarte*, [1998] 4 All E.R. 897 (H.L. 1998), *available on* <http://www.derechos.net/doc/hl.html> (visited on 17 June 1999). This decision of the House of Lords, in turn, was vacated when one of the Lords was found to have a conflict of interest. *See* Reg. v. Bow St. Metro. Stipendiary Mag. and Others, ex parte Pinochet Ugarte (No. 2), [1999] 1 All E.R. 577 (H.L. 1999).

The Lords' second decision, rendered by a seven-member panel on 24 March 1999, again concluded, this time by a margin of 6-1, that the General did not enjoy head-of-state immunity from prosecution and was thus subject to extradition to Spain. However, because of its interpretation of England's obligations under domestic legislation on torture adopted pursuant to the Convention Against Torture, the Court limited the scope of the extradition inquiry to alleged crimes of torture and conspiracy to commit torture occurring after 8 December 1988. Reg. v. Bow St. Metro. Stipendiary Mag. and Others, ex parte Pinochet Ugarte (No. 3), [1999] 2 All E.R. 97, 98, 115 (H.L. 1999) [hereinafter Pinochet (No. 3)]. A decision by British Home Secretary Jack Straw permitted the case to proceed into extradition. *Letter from Jack Straw about the Extradition of Pinochet*, 15 April 1999, *available on* <http://www.derechos.org/nizkor/chile/juicio/straw.html> (visited 17 June 1999). Although appealed by Pinochet's lawyers, Straw's decision was upheld, clearing the way, as of this writing, for the extradition process to begin. *See* Clare Dyer, *Pinochet Fails in Latest Bid to Fight Off Extradition*, GUARDIAN (Manchester), 28 May 1999.

En Chile, no se mueva una hoja sin que yo sepa.
In Chile, not a leaf moves without my knowing.
Favorite saying of Augusto Pinochet[3]

Fiat Justicia, Ruat Cœlum
Let Justice Be Done, Though the Heavens Should Fall[4]

I. THE ARREST OF A DICTATOR: AUGUSTO PINOCHET IN THE DOCK

Augusto Pinochet, leader of a military government that ruled Chile between 1973 and 1990, was placed under arrest in England on 16 October 1998. The arrest arose from procedures begun more than two years before in a specialized criminal court in Spain, which now seeks his extradition to Spain for trial. The charges against him, as originally formulated by the Spanish courts, allege violations of the most serious of international crimes: genocide, terrorism, torture, and the various crimes that constitute the practice of forced disappearance.[5] After protracted preliminary questions in the British courts dealing with immunity and the scope of the extradition inquiry, he faces extradition and trial in Spain for torture and conspiracy to torture.

General Pinochet assumed power when the Chilean armed forces violently overthrew the democratically elected government of President Salvador Allende on 11 September 1973. He is now Senator-for-life in a Chilean legislature controlled by a block of Senators named by him or his sympathizers, under a constitution of his own design. He took his seat in the Senate not by popular election, but through his self-appointment to the position, which he moved into on the day after his retirement from leadership of the armed forces of Chile in March of this year. These constitutional "reforms" were put into place in 1980, at a time when the Pinochet dictatorship was in full power. It would take more than a decade before the General foreswore political control of Chile in 1990, and then

3. Isabel Allende, Chilean member of Congress and daughter of murdered president Salvador Allende, argues that this familiar aphorism, attributed to the General, in fact demonstrates the depth of his complicity in the crimes of his era. Francesc Relea, *La hija de Allende penso en todo momento que su padre no sobreviviria* [*The Daughter of Allende Always Thought That Her Father Wouldn't Survive*], El Pais (Madrid), 20 Sept. 1997, *available in* LEXIS, World Library, ELPAIS file.
4. Black's Law Dictionary 623 (6th ed. 1990).
5. *See Second Arrest Order, supra* note 2, at the first paragraph of the section entitled "Razonamientos Jurídicos" [Juridical Foundations]. This and other helpful documents regarding the trials in Spain can be found, largely in the original Spanish, on the Internet at the Equipo Nizkor website at <http://www.derechos.org/nizkor>.

only after massive public protests and a decisive popular vote rejecting his continued rule in 1989.[6]

The efforts to extradite General Pinochet has riveted world attention on the British courts and on the issues of international law and politics which come into play when a former head of state is brought before the bar. The purpose of this article, however, is to focus on the process in Spain that gave rise to General Pinochet's indictment there, to set out the analysis of the Spanish courts as to what crimes are alleged to have occurred, and to summarize the evidence to support those crimes. That process is largely one that focused on the application of domestic criminal law and on a set of objectives that, at least at the outset of the litigation, were quite distant from the arrest and conviction of former dictators.

The combined use of international and domestic criminal law to bring a former dictator to justice brings into focus the difficulty, in any era, of overcoming the limits of the traditional territorial and political sovereignty of nations. If the arrest of Augusto Pinochet teaches us that national sovereignty is eroding, it reminds us as well of why such limits have been so difficult to overcome. Inevitably, they must be. The precepts of international criminal law, in a direct line of precedent with origins in the Nuremberg Trials,[7] provide countries that have chosen to adopt them with the necessary

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6. The Pinochet era is reviewed, summarizing these events and others, in a profile of the General which appeared in the New Yorker magazine, ironically, during the week of his arrest in England. Jon Lee Anderson, *The Dictator*, NEW YORKER, 19 Oct. 1998, at 44, 52. More extensive scholarly treatments include Hugo Fruhling, *Stages of Repression and Legal Strategy for the Defense of Human Rights in Chile: 1973–1980*, 5 HUM. RTS. Q. 510 (1983); Roland Bersier, *Legal Instruments of Political Repression in Chile*, INT'L COMM'N JURISTS REV., June 1985, at 54; William D. Zabel, et al., *Human Rights and the Administration of Justice in Chile: Report of a Delegation of the Association of the Bar of the City of New York and of the International Bar Association*, 43 REC. ASS'N B. CITY N.Y. 431 (1987); Watson W. Galleher, *State Repression's Facade of Legality: The Military Courts in Chile*, 2 TEMPLE INT'L & COMP. L.J. 183 (1988); Thomas Andrew O'Keefe, *The Use of the Military Justice System to Try Civilians in Chile*, N.Y. ST. B.J., Nov. 1989, at 43; Edward C. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973–1995*, 2 TULSA J. COMP. & INT'L L. 253 (1995). There is also a series of reports on the human rights situation in Chile, published by the Inter-American Commission on Human Rights, which accurately document the legal and human rights issues during the years of military rule. *Report on the Situation of Human Rights in Chile*, Inter-Am. C.H.R., OEA/Ser.L/V/II.34, doc. 21, 25 Oct. 1974; *Second Report on the Situation of Human Rights in Chile*, Inter-Am. C.H.R., OEA/Ser.L/V/II.37, doc. 19, corr. 1, 28 June 1976; *Third Report on the Situation of Human Rights in Chile*, Inter-Am. C.H.R., OEA/Ser.L/V/II.40, doc. 10, 11 Feb. 1977; *Report on the Situation of Human Rights in Chile*, Inter-Am. C.H.R., OEA/Ser.L/V/II.66, doc. 17, 27 Sept. 1985.

7. For an excellent insider's account of the Nuremberg Trials themselves, see TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992). A comprehensive review of that book and the literature is available in Jonathan A. Bush, *Nuremberg: The Modern Law of War and Its Limitations*, 93 COLUM. L. REV. 2022 (1993) (book review). The literature on the evolution of the Nuremberg principles from that era to modern war

legal tools to punish, at any time and in any place, the most serious of crimes against the world: terrorism, genocide, torture, disappearance. That the arrest of General Pinochet so took the world by surprise is testimony to how rarely any one country, or one judge, has the rare combination of political will and personal courage to apply those legal tools. It also should remind us of the higher ideal that no crime, and no criminal, are above the law. This article is a tribute to the voices of victims.

Section II summarizes the history of the litigation in Spain and of its accomplishments to date. Section III explains some of the most significant consequences in related criminal matters, matters which have been overshadowed by the events in the Pinochet affair. The article explains, in Section IV, the legal basis for the actions under Spanish domestic law, as well as other legal issues which have arisen in Spain in regard to the prosecution of this and other cases. Section V summarizes the evidence that was filed against General Pinochet in the British courts and that underlies the Spanish charges and request for extradition.

II. A SHORT HISTORY OF THE SPANISH CRIMINAL INVESTIGATIONS ON CHILE AND ARGENTINA

The Spanish court's arrest warrant for Augusto Pinochet was not precipitous. It was the result of a long and meticulous investigation by two Spanish investigating magistrates acting on volumes of testimony from witnesses and documentary evidence slowly accumulated over a period covering nearly two years in cases against the military regimes of both Chile and Argentina, cases now joined though begun separately.

The idea for a prosecution in Spain originally came about as a result of the collaboration of human rights activists and Spanish victims of the Pinochet and Argentine military regimes during the "dirty wars" there. These groups took their example from prosecutions begun in Italy against the Argentine military leadership almost fifteen years before, prosecutions that had garnered little international attention but that had survived efforts to obtain their dismissal. When discussing the idea with Spanish lawyers, the

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crimes contexts is growing constantly. *See, e.g.*, STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (1997); THEODOR MERON, WAR CRIMES LAW COMES OF AGE: ESSAYS (1998); Symposium, *1945–1995: Critical Perspectives on the Nuremberg Trials and State Accountability*, 12 N.Y.L. SCH. J. HUM. RTS. 453 (1995); Symposium, *War Crimes Tribunals, Past, Present, and Future*, 3 HOFSTRA L. & POL'Y SYMP. 1 (1999). *See also* Benjamin B. Ferencz, *The Nuremberg Principles and the Gulf War*, 66 ST. JOHN'S L. REV. 711 (1992); M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997).

activists and victims were originally told that they did not stand a prayer of success in Spain, mostly because Spanish law does not allow trial *in absentia*, and the idea that any military leader would submit himself to Spanish jurisdiction was simply unimaginable. Nevertheless, the activist and victim communities decided to proceed with the prosecutions for reasons completely aside from the possibility of arrest and prosecution of those responsible.

First, the organizers of the litigation decided that, whatever the outcome of any trial, the investigation of the crimes would give victims a unique and historically unprecedented opportunity to tell their stories to the world. Despite the trials of some military leaders in Argentina, their subsequent pardons, as well as the more general amnesties granted in both countries, had prevented the full stories of the victims from being told. Second, the stories would be told publicly and in a protected environment. Witnesses who came forward regularly testified in the *Audiencia Nacional* and, afterwards, held press conferences in which they retold their stories and gave them additional context.[8] Third, the structure of Spanish law permitted the victims to construct a sound legal structure in which to cast their historical truth. Moreover, the existence of a sound legal structure and careful procedures permitted the victims to use exemplary concepts of due process, fair trial, and the rule of law in ways in which such concepts had uniformly been denied to them. A related fourth goal was that of creating legal precedents which might be useful examples for other countries considering similar or related actions. However, the victims and activists were also shrewdly aware of the political consequences of their actions, realizing that the more attention they got, and the closer to actual arrests and trials, the greater their need for political protection and preparation of a carefully constructed legal and political case.

Thus, on 28 March 1996, an association of Spanish prosecutors, acting in their private capacity, filed criminal charges of genocide and terrorism against former military leaders of Argentina and their collaborators.[9] The action, which began with less than ten named victims, now includes more than 600 persons of Spanish nationality or their relations, murdered or disappeared in the years of what is called, by its perpetrators, the Argentine "Dirty War" (1976–1983). During this period, up to 30,000 persons were murdered or disappeared.

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8. While the US press gave little attention to the ongoing investigation of the Argentine and Chilean cases in Spain, the press coverage in those three countries of the trials was massive. Newspaper articles over the two-year period before the arrest of Pinochet averaged at least a score a month and sometimes exceeded one hundred stories a month on the topic.
9. Michael S. Serrill, *"Dirty War" Crimes: A Resolute Spanish Judge Seeks Justice for the Victims of a Shameful Episode in Argentina's Past*, TIME (Int'l Ed.), 21 Oct. 1996; Marlise Simons, *Unforgiving Spain Pursues Argentine Killers*, N.Y. TIMES, 24 Oct. 1996, at A3.

On 1 July 1996, a similar action was undertaken against Augusto Pinochet and other Chilean military junta leaders, which ruled by dictatorship between 1973 and 1989. During their rule, the loss of life exceeded 3,000, by official count.[10] When originally filed, the action named only seven victims of Spanish descent who had been killed or disappeared in Chile.[11] Investigating Magistrates Baltasar Garzón[12] and Manuel García Castellón later took over the investigations of the Argentine and Chilean cases, respectively, in separate courtrooms of the *Audiencia Nacional*, a special national court sitting only in Madrid with jurisdiction over international crimes such as counterfeiting, commercial fraud, terrorism, drug trafficking, and specified crimes which occur outside of Spanish national territory.[13]

The group responsible for the filing of both actions was the Association of Progressive Prosecutors of Spain. The prosecutors were not acting as agents of the State, but as private complainants with particular expertise to judge the merits of the cases. The prosecutors' action set the criminal process in motion, after which lawyers for the victims themselves, using a procedural device known in Spanish law as the *acción popular*, or popular action, took over the private prosecution of these claims.

Popular actions may be brought by any Spanish citizen, regardless of

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10. Tito Drago, *Chile: Pinochet Accused of Genocide Before a Spanish Court*, INTER PRESS SERVICE, 4 July 1996, *available in* LEXIS, World Library, INPRES file.
11. *See* Joan E. Garcés, *Pinochet, Ante la Audiencia Nacional y el Derecho Penal Internacional* [*Pinochet Before the National Audience and International Criminal Justice*], KOAGA ROÑETA, Mar. 1997, *available on* <http://www.derechos.org/koaga/iii/5/garces.html> (visited 17 June 1999). Garcés, one of the principal private prosecutors for Chilean victims, formally spells his first name "Joan" in the style of his Catalan roots. The Spanish spelling is "Juan."
12. Judge Garzón became famous in Spain when he directed investigations into allegations of state involvement in death squad activity against the Basque separatist group ETA and its supporters in the mid-1980s, which led, according to many, to the fall of the government of former Socialist Prime Minister Felipe Gonzalez. *See* Giles Tremlett, *Spanish Party Urges Argentine Prosecution*, U.P.I., BC CYCLE, 7 May 1996, *available in* LEXIS, World Library, UPI file.
13. The basic character of the *Audiencia Nacional* is set out in Articles 62–69 of the Organic Law of the Judicial Branch. Ley Orgánica del Poder Judicial [Organic Law of the Judicial Branch] [L.O.P.J.] arts. 62–69. The *Audiencia* was first created in 1977 on the same day that the Public Order Courts (known by their Spanish acronym, "TOP") were abolished. The TOP were a tool for popular suppression manipulated and controlled by the fascist leader from 1939–1975, Francisco Franco. *See* MARTA VILADOT SANTALÓ, LA AUDIENCIA NACIONAL 1977–1997, at 13, 16–19 (1998). The *Audiencia* has since distinguished itself as an important and distinctive device in crime control, and is widely supported by the full range of political parties in Spain. *See id.* at 169–83. While France had a court of comparable jurisdiction, the Tribunal for Security of the State, that entity was abolished in 1981. In other European countries—Germany, Italy, and the United Kingdom—and the United States, the statutory power to pursue international crimes is largely vested in public prosecutors, not in the courts. *See id.* at 158–65.

injury or other standing, in the public's interest.[14] One scholar notes that the popular action has its roots in the concept of common concern for protection of the legal order rather than the traditionally more narrow judicial concern, and narrower rules of standing, focusing on the injured party.[15] They permit the party filing to continue to pursue the matter as a private prosecutor, whatever may be the public prosecutor's position during the investigative stage. The Spanish public prosecutor's office may, at its discretion, choose to participate in supporting a popular action. If the public prosecutor opposes the action, of course, the chances of successful completion of an investigation are significantly diminished. The prosecutor plays a much greater role in the trial of the case.

The Spanish Board of Attorneys, which oversees operations of the Attorney General's office and makes policy decisions regarding the position of public prosecutors in cases filed as popular actions, initially opposed the filing of the Argentine case but ultimately cleared the way for the popular action by voting to "neither oppose nor support the prosecution."[16] As for the Chilean case, a 1958 Spanish-Chilean convention on dual citizenship permits any Chilean, whether a resident of Spain or not, to file suit in Spanish court with the same rights as any Spanish citizen.[17] In that case, the public prosecutors initially took a position which explicitly approved the litigation.[18] It was only quite recently, when the Pinochet arrest threatened

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14. The popular action is embodied in several provisions of Spanish law. The Constitution, in Article 125, says, "Citizens may exercise popular action and participate in the Administration of Justice. . . ." Constitucion Espanola de 1978 [Spanish Constitution of 1978] [C.E.] art. 125. In the Law of Criminal Procedure, Article 101 provides that "[t]he criminal action is public. All Spanish citizens may exercise it in accordance with the Law." Ley de Enjuiciamiento Criminal [Law of Criminal Procedure] [L.E.Crim.] art. 101. Article 270 states that "[a]ll Spanish citizens, whether or not they are victims of the crime, may file a complaint [*querellarse*] by exercising the popular action established in article 101 of this Law." L.E.Crim. art. 270. Article 20.3 of the Organic Law of the Judicial Branch guarantees that the popular action can be exercised without cost. L.O.P.J. art. 20.3.
15. Lorenzo Bujosa Vadell, La Protección Jurisdicional de los Intereses de Grupo [Jurisdictional Protection of Group Interests] 286 (1995). Bujosa Vadell notes that there are similar standing provisions in the laws of Portugal and Brazil. *Id.* at 287.
16. Tremlett, *supra* note 12. *See also Ejerce la Acción Popular la Coalición Izquierda Unida, en España* [*United Left Coalition Files Popular Action in Spain*], 6 May 1996, *available on* <http://www.derechos.org/nizkor/arg/juicio.html> (visited 2 Aug. 1999).
17. Tito Drago, *Human Rights: Spanish Judges Press Latin American Dictators*, Inter Press Service, 15 Sept. 1996, *available in* LEXIS, World Library, INPRES file.
18. No specific order or pleading contains this information, but a direct reference and quote to the records of two National Attorneys General, D. Carlos Granados and D. Jesus Cardenal, indicates that the public prosecutors formally affirmed the jurisdiction of the *Audiencia* in the Chilean case in July 1996 and September 1997. Electronic mail message from Juan E. Garcés to Prosecution Team in the Pinochet case, 16 Jan. 1998 (on file with author).

amicable relations between Spain and its Latin American colleagues, that the public prosecutors took an active position against the litigation.[19]

The private Spanish lawyers have now consolidated their efforts through the work of two organizations. The Chilean cases are coordinated through the Salvador Allende Foundation, under the direction of Madrid lawyer Juan Garcés. The Argentine litigation is coordinated through the Human Rights Secretariat of *Izquierda Unida* (United Left), a coalition of political parties making up the third largest political force in Spain. These two groups, in turn, have coordinated their fact-gathering in three countries. In Chile, cooperation was provided by a network of a number of the most active human rights nongovernmental organizations (NGOs).[20] On the Argentine case, local cooperation was provided primarily through Peace and Justice Service (SERPAJ Argentina), the well-known NGO in Argentina headed by Nobel Peace Prize-winner Adolfo Pérez Esquivel. Mr. Pérez Esquivel has testified to the Spanish court as to his own story of illegal detention and torture. In Spain itself, support was provided by the Spanish Section of Amnesty International, a private association of progressive judges called Judges for Democracy, and the Human Rights Association of Andalusia.[21]

At the time they were filed, the actions named the highest ranking military leaders of Argentina and Chile and others for their involvement in the kidnaping, torture, murder, or disappearance of Spanish nationals and their families. The Chilean complaint named General Pinochet, as well as retired Admiral Toribio Merino and Generals Gustavo Leigh and Cesar

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19. Public prosecutors filed a series of legal challenges to the actions of the investigating magistrates, beginning with the following: *Recurso de la Fiscalía contra la prisión provisional incondicional de Agusto* [sic] *Pinochet Ugarte* [*Appeal by the Prosecution Against the Unconditional Provisional Imprisonment of Augusto Pinochet Ugarte*], Madrid, 17 Oct. 1998, *available on* <http://www.derechos.org/nizkor/chile/juicio/recurso6.html> (visited 17 June 1999). There was a brief closure of the Chilean case in March 1998, when the prosecutor requested dismissal for lack of jurisdiction after revelations by the DINA's director, Manuel Contreras, that he had taken all of his actions only on direct orders from General Pinochet. After a brief appeal which quickly overturned the trial court's action as inappropriate, the investigation continued. *Spain-Chile: Writ of the Instructing Court Accepting the Jurisdiction in the Pinochet Case*, Madrid, 15 Sept. 1998, *available on* <http://www.derechos.org/nizkor/chile/juicio/jurie.html> (visited 17 June 1999).
20. They included the *Comité de Defensa de los Derechos Humanos* (Committee for the Defense of Human Rights, or "CODEPU"), *Fundación de Ayuda Social de las Iglesias Cristianas* (Foundation of Christian Churches for Social Aid, or "FASIC"), and *Servicio de Paz y Justicia en Chile* (Peace and Justice Service in Chile, or "SERPAJ Chile").
21. For background on the work of these groups, prior to and during the arrest of General Pinochet, see *Special Report on the Preparation and Development of General Pinochet's Detention and Spanish Judges' Ruling Recognizing the Principle of Universal Criminal Jurisdiction for Domestic Courts*, 5 Nov. 1998, *available on* <http://www.derechos.org/nizkor/chile/juicio/report.html> (visited 17 June 1999).

Mendoza, all part of the original junta during military rule.[22] It further accused leaders of the Chilean security police, principally the DINA (National Directorate of Intelligence), of personal involvement in, and responsibility for, the killings or attempted assassinations of such notables as Chilean General Carlos Pratts in Buenos Aires in 1974, former vice-president Bernardo Leighton in Rome in 1975, former senator Carlos Altamirano in Madrid in 1976, former foreign minister Orlando Letelier and his aide, Ronni Moffitt, in Washington, DC in 1976, as well as Spanish diplomat Carmelo Soria, killed in Santiago, Chile in 1976.

The Argentine complaint named, among others, the surviving members of the original military junta—Generals Jorge Rafael Videla and Roberto Viola, and Admiral Emilio Massera—and their successors as military leaders, Leopoldo Galtieri and Reynaldo Bignone, as well as the current governor of Argentina's Túcuman province, retired General Domingo Bussi.[23] The complaints in both courts have been amended as new evidence reveals further complicity of public and private persons. The defendants include not only military leaders of both countries, but also intelligence chiefs, commanders of clandestine jails, and even doctors who attended and monitored victims during torture sessions.[24]

While the military in both countries has generally enjoyed domestic protection from prosecution due to broad domestic grants of amnesty and weak judicial systems,[25] Spanish law recognizes the concept of universal jurisdiction for criminal offenses and codifies international crimes in its domestic statutes. The Spanish criminal code includes the offenses of genocide, terrorism, and torture. Spanish criminal law does not explicitly codify the crime of "forced disappearance," which is the practice of kidnaping individuals, usually from their homes or the street, and then killing them, often after prolonged *incommunicado* detention and torture, and disposing of their bodies in clandestine places or graves without notice to family members as to the fact of the death or the whereabouts of the victim. The kidnaping itself is usually carried out by militarily controlled personnel dressed in civilian clothing and driving nondescript, unmarked cars without

22. *See* Drago, *supra* note 10.
23. *See* Serrill, *supra* note 9.
24. One scholar documents the work of Jorge Antonio Bergés, a physician known as "Dr. Death," for his work in monitoring torture victims and later involvement in the delivery and sale of children of kidnaped women. MARGUERITE FEITLOWITZ, A LEXICON OF TERROR: ARGENTINA AND THE LEGACIES OF TORTURE 238–40 (1998).
25. *See* Jaime Malamud-Goti, *Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina, in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 160 (Naomi Roht-Arriaza ed., 1995); Jorge Mera, *Chile: Truth and Justice Under the Democratic Government, in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 171 (Naomi Roht-Arriaza ed., 1995).

license plates. The practice was widely used in Latin America during military dictatorships.[26] The Spanish complaints, therefore, charged the offenses that make up the components of forced disappearance in the Spanish criminal code: kidnaping, illegal detention, torture, and murder.[27] Both complaints include allegations of "child snatching," referring to the practice by the captors of selling or giving away infants born to disappeared pregnant women. Another innovative charge is air piracy with regard to the Argentine military's practice of pitching political opponents from airplanes over open water.[28]

III. AN OVERVIEW OF THE ONGOING RESULTS OF THE SPANISH INVESTIGATIONS

A. Accomplishments in Cases Other Than That of Augusto Pinochet

The two investigating judges have accomplished more in their work over the last two years—even before Augusto Pinochet's arrest became front-page news throughout the world—than many thought would be possible. They did their work transparently and methodically, with hundreds of witnesses and thousands of documents, adding new victims and additional accused as the evidentiary momentum gathered ground. While press coverage was sparse in the United States, and in the English-language press in general, the press coverage in Spain, Argentina, and Chile was close and heavy. Stories appeared daily, oftentimes in all three countries; an active month easily could produce more than fifty stories in the major papers of the three countries. The small vignettes mentioned here, taken largely from that press coverage, are among the many direct and indirect consequences of the investigations.

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26. The only international treaty on the subject is the Inter-American Convention on the Forced Disappearance of Persons, *adopted* 9 June 1994, O.A.S. Doc. OEA/Ser.P/AG/doc.3114/94, art. 5 (1994), *reprinted in* 33 I.L.M. 1529 (1994), which entered into force in the Americas on 29 March 1991. *See* ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.92, doc. 31, rev. 3, 3 May 1996, at 99, 107. Good academic treatments of the subject of disappearances in the region are Reed Brody & Felipe González, *Nunca Más: An Analysis of International Instruments on "Disappearances,"* 19 HUM. RTS. Q. 365 (1997); Wolfgang S. Heinz, *Motives for 'Disappearances' in Argentina, Chile and Uruguay in the 1970s*, 13 NETH. Q. HUM. RTS. 51 (1995).
27. This practice is by no means unusual, as many countries have no specific offense of "forced disappearance." It is for that reason, for example, that the UN Declaration on Forced Disappearances uses the term "acts of enforced disappearance" rather than making reference to a specific crime. *See* Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. GAOR, 47th Sess., Supp. No. 49, at 207, U.N. Doc. A/47/49 (1993).
28. *See* Serrill, *supra* note 9.

• Retired Navy Captain Adolfo Scilingo broke the traditional military code of silence in 1995 in Argentina. In a great public scandal, he publicly repented of his own involvement in crimes committed by the military during the Dirty War, including the throwing of drugged but still living "subversives" from helicopters into the open waters of Buenos Aires' River Plate. He asserted that "death flights" were a routine rotation in the Argentine military and that about 1,500 soldiers participated in between 250 and 300 flights, during which some 4,400 persons were thrown, alive, into the open waters.[29]

His lucid and articulate public statements provoked a strong response from the armed forces. He was quickly whisked from public view, arrested on direct orders from the Argentine President, Carlos Menem, on charges that he had written bad checks in 1991. The charges silenced him for a time while he fought them and served his time, though the charges were ultimately declared invalid.[30] When released, he resumed his public campaign to expose military atrocities. The "Scilingo effect" produced other public confessions from military personnel.[31] Scilingo was kidnaped in Buenos Aires on 11 September 1997. He reappeared a day later with the initials of three prominent Argentine journalists carved in his cheeks. He boldly told the press that he had been warned to "[l]ay off the subject of the disappeared."[32] Scilingo then decided to go to Spain to give testimony, despite the serious risk that he might be arrested there.

In late 1997, he gave extensive *in camera* evidence to Judge Garzón, describing the leadership structure of clandestine military operations in Argentina. Judge Garzón ordered his arrest and trial in October 1997. He was held in custody for some time, then released on bail, and now awaits trial in Madrid, based primarily on the evidence he gave against himself.[33]

• General Jorge Rafael Videla, one of a series of military caretaker presidents of Argentina during the years of the "Dirty Wars" (1976–1983), is under house arrest in Buenos Aires awaiting a criminal trial on charges of kidnaping and selling the children born to women who were disappeared during the military regime. On the day following the denial of head-of-state immunity to General Pinochet, another of the junta leaders, Emilio Massera, was arrested in connection with a probe being carried out by Judge Adolfo Bagnasco regarding the kidnaping of infants.[34] Days later, yet another of the

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29. *El Juez Garzon Resuelve sobre el Ex Represor* [*Judge Garzon to Decide on Ex Repressor*], CLARIN (Buenos Aires), 10 Oct. 1997.
30. *See* FEITLOWITZ, *supra* note 24, at 197, 254.
31. *See id.* at 194.
32. *Id.* at 254.
33. *See id.* at 255.
34. *See* Clifford Krauss, *Spanish Judge Investigating Rights Abuses in Argentina*, N.Y. TIMES, 29 Nov. 1998, at 4.

leaders of the junta, Reynaldo Bignone, was named as a suspect as the inquiry widened.[35] Many believe that these crimes, though they were exempted from the blanket amnesty granted to the military, would not have been pursued without the impetus created by the Spanish prosecutions. Another case now more aggressively pursued by Argentine justice is that of Chilean Carlos Prats and his wife, Sofia Cuthbert, who were murdered by a bomb placed in their car in Buenos Aires in September 1974. The investigation of Judge María Servini de Cubría is exploring connections of the killing with activities in Argentina of the Chilean-based Operation Condor.[36]

• Arrest warrants have been issued by Judge Garzón for other military junta members during the Dirty War years, Leopoldo Galtieri and Emilio Massera, and additional international arrest warrants, based in significant part on the credible testimony of Adolfo Scilingo, are ready to be carried out by Interpol, the international police, if any of the 11 Argentine military personnel from the highest ranks of the armed services set foot outside of the country.[37] As of January 1998, there were more than 150 additional Argentine military officers under investigation in the Spanish proceedings, of whom at least thirty-six have been formally charged.[38] In Chile, some thirty-eight former or present military officers have been advised by the government not to travel outside of Chile, even though no formal charges have been made by Magistrate Garzón.[39]

• One of the most notorious of the Argentine military's operatives in the Dirty Wars was Lt. Alfredo Astiz, called the "Blond Angel" for his deceptively youthful and handsome appearance, and notorious enough to have been convicted in absentia in France and Sweden. Astiz, among those

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35. *Argentina: Baby-Theft Probe Expands*, N.Y. TIMES, 4 Dec. 1998, at A6.
36. *Dicen que Pinochet fue el responsoble del homicidio de Prats* [*They Say Pinochet Was Responsible for the Murder of Prats*], LA NACION (Buenos Aires), 24 May 1999 (describing testimony in Argentina of Eugene Propper, one of the US Attorneys responsible for obtaining testimony from Michael Townley, a DINA agent accused of the assassination in Washington, DC of Chilean diplomat Orlando Letelier, discussed *infra* text accompanying notes 60–63).
37. *Orden de prisión provisional incondicional de Leopoldo Fortunato Galtieri* [*Order for the Unconditional Provisional Arrest of Leopoldo Fortunato Galtieri*], Madrid, 25 Mar. 1997, *available on* <http://www.derechos.org/nizkor/arg/espana/autogalt.html> (visited 17 June 1999); *Auto de procesamiento y detención del Almte Luis Eduardo Massera y nueve más* [*Order for the Charge and Detention of Admiral Luis Eduardo Massera and Nine Others*], Madrid, 10 Oct. 1997, *available on* <http://www.derechos.org/nizkor/arg/espana/auto.htm?Massera#first_hit> (visited 17 June 1999).
38. Juan Carlos Alganaraz, *Causa por Desaparecidos Espanoles* [*Case on Spanish Disappeared*], CLARIN (Buenos Aires), 11 Jan. 1998. *See also Auto* [*Order*], *available on* <http://www.derechos.org/nizkor/arg/espana/36esma.htm> (visited 17 June 1999) (formal charges brought against 36 additional Argentine military officers).
39. Francesc Relea, *38 amigos de Pinochet recluidos en Chile* [*38 Friends of Pinochet Secluded in Chile*], EL PAIS (Madrid), 3 May 1999, *available in* LEXIS, World Library, ELPAIS file.

charged in Spain, was fired from a position in Naval Intelligence, on direct orders from the government.[40] He was later dishonorably discharged from the army for his unrepentant boasting of his criminal exploits. Astiz is one of the most recognizable, and one of the most loathed, of the defendants in these proceedings. In 1995, he was twice assaulted on the street without any legal action being taken against the perpetrators.[41]

• Retired General Antonio Domingo Bussi, currently the elected governor of the small northen department of Tucuman, one of Argentina's most devastated in the Dirty War, during which Bussi ran military operations, was reprimanded by a court and by the military, suspended from office for several months, and narrowly avoided impeachment. However, he still retains his office after it was discovered, as a result of the Spanish investigations, that he had significant assets in protected Swiss accounts for which he had paid no taxes in Argentina.[42] Magistrate Garzón froze the outsized Swiss bank accounts of several other suspected Argentine military officers,[43] and he has also requested Chile to freeze all accounts in that country in the name of General Pinochet, his wife, and all of his children, apparently without response.[44]

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40. *See* FEITLOWITZ, *supra* note 24, at 254.
41. *See id.* at 246.
42. During the Dirty War, Tucuman reported between 700 and 3,000 disappeared, from a population of 1.3 million. After revelations of his secret accounts, Bussi publicly and tearfully berated his "leftist" pursuers. *See* Andrea Mandel-Campbell, *Where the Ghosts of War Are Rising . . . And May Bring Down a Governor*, BUSINESS WEEK (Int'l Ed.), 6 Apr. 1998, at 4; Clifford Krauss, *An Out-of-Step Kind of Place Stands by Its Man*, N.Y. TIMES, 20 July 1998, at A4; *General Bussi*, LATIN AMERICA WEEKLY REPORT (London), 17 Mar. 1998, at 132.
43. The judge acted as early as June 1997 to request the freezing of Swiss accounts, after information appeared in the press indicating that several trunks of microfilmed records of the Argentine repression had passed through Spain, been copied, then passed on to Swiss banks for safekeeping. *See* Marlise Simons, *Swiss Freeze the Assets of Four Argentines Accused in Spain*, N.Y. TIMES, 4 July 1997, at A4; *Garzon ordena el embargo de las cuentas suizas de varios miltares argentinos* [*Garzon Orders the Embargo of Swiss Accounts of Various Argentine Soldiers*], EL PAIS (Madrid), 27 June 1997, *available in* LEXIS, World Library, ELPAIS file. Later, his formal request for the names of account holders, based on a list of about 100 names he sent to Switzerland, yielded information from the Swiss authorities that accounts were held in the names of Antonio Bussi, Alfredo Astiz and several other Argentine military personnel. *See* Juan Gasparini, *Derechos Humanos: Investigacion de Apropriacion de Bienes Durante la Represion del Estado: Bussi, Astiz figuran en las cuentas suizas* [*Human Rights: Investigation into Appropriation of Property During State Repression: Bussi, Astiz Show Up in Swiss Accounts*], CLARIN (Buenos Aires), 13 Feb. 1998. The revelations began domestic investigations of the soldiers, much like those against Bussi, for alleged tax evasion, illicit enrichment or other financial misconduct. *See* Calvin Sims, *Argentines Press Ex-Soldiers on Swiss Cash*, N.Y. TIMES, 24 Feb. 1998, at A3.
44. Manuel Délano, *La justicia chilena recibe una solicitud de Garzón para bloquear las cuentas de Pinochet* [*Chilean Courts Receive a Petition from Garzon to Block Pinochet's Accounts*], EL PAIS (Madrid), 10 Mar. 1999, *available in* LEXIS, World Library, ELPAIS file.

• Prosecutions against the military in Argentina will go to trial on 21 October 1999 in Italy,[45] where the first such cases were filed in Europe in the early 1980s. The litigation is coordinated by the League for Rights and the Liberation of Peoples, which has been influential in advancing the prosecution of Erik Priebke, the accused Nazi SS officer, for his involvement in the Ardeantine Caves massacre in Italy.[46] Earlier this year, with a flurry of activity, a prosecution commenced in Germany.[47] Other known actions have been begun, reopened, or completed in France,[48] Switzerland,[49] Sweden, England itself, Belgium, Luxemburg,[50] and Denmark,[51] and abroad in Ecuador,[52] New Zealand,[53] Israel,[54] and the United States.[55] Revelations about the activities of Operation Condor have led legislators in Paraguay

45. Laura Termine, *Italia enjuiciará a militares argentinos por los desaparecidos* [*Italy Will Try Argentine Military for the Disappeared*], PAGINA 12 (Buenos Aires), 21 May 1999. There is a website dedicated to the Italian cases at <http://www.derechos.org/lidlip/grusol/> (visited on 17 June 1999). *See also Argentine Junta Accused of Role in Italian's Deaths*, AGENCE FRANCE PRESSE, 7 May 1996, *available in* LEXIS, World Library, AFP file. The government has joined private prosecutors in actions against several of the most serious violators. *See* Claudio Tognonato, *El Gobierno Italiano Contra los Genocidas Argentinos* [*The Italian Government Against the Argentine Genocideres*], PAGINA 12 (Buenos Aires), 18 June 1998.
46. *See* Celestine Bohlen, *Italy Convicts Ex-SS Officers in '44 Killings*, N.Y. TIMES, 23 July 1997, at A4.
47. A good summary of the original German action can be found in Katya Salazar, *Will There be Justice for the Germans Disappeared in Argentina?*, WITHOUT IMPUNITY, July 1998, *available on* <http://www.derechos.org/wi/2/german.html> (visited 17 June 1999). Other, newer actions apparently emerged in the wake of Pinochet's arrest. *See Three Lawsuits Against Pinochet in Germany*, AGENCE FRANCE PRESSE, 2 Nov. 1998, *available in* LEXIS, World Library, AFP file; *Desaparecidos de Origen Germano: Alemania abrirá sus archivos* [*German Disappeared: Germany Will Open Its Files*], CLARIN (Buenos Aires), 4 May 1999.
48. *See Argentine Captain Sentenced in Absentia for Torturing Nuns*, REUTERS, 16 Mar. 1990; Serrill, *supra* note 9, at 1.
49. *See Charges Filed in Switzerland against Pinochet*, SWISS RADIO INTERNATIONAL, 26 Oct. 1998.
50. *See Demands for Pinochet Trial Spread Through Europe*, AGENCE FRANCE PRESS, 3 Nov. 1998, *available in* LEXIS, World Library, AFP file.
51. *See Abren un juicio en Dinamarca* [*Case Opened in Denmark*], CLARIN (Buenos Aires), 12 Mar. 1999.
52. *See Solicitan a Corte Suprema de Ecuador la detencion de Pinochet* [*Detention of Pinochet Sought in Supreme Court of Ecuador*], LA TERCERA (Santiago), 1 Dec. 1997. The action there was short-lived. The Supreme Court ruled immediately that no action could be taken against Pinochet unless he was in custody in Ecuador. *See id.*
53. *See Chileans in New Zealand Seek Action on Pinochet*, RADIO NEW ZEALAND INTERNATIONAL, 26 Oct. 1998.
54. *See Datos para Israel* [*Data for Israel*], CLARIN (Buenos Aires), 4 May 1999 (indicating that Judge Garzón provided testimony of witnesses to Israel on Jews disappeared during the Argentine dictatorship, with "possibility" of trials in Tel Aviv).
55. *See* Kelly Flaherty, *Seeking Redress on U.S. Soil*, CALLAW, *available on* <http://www.callaw.com/stories/edt0323f.html> (visited 17 June 1999) (describing federal court action in Miami by Chilean national, Zita Cabello-Barrueto against former Major Armando Fernandez Larios, one of the defendants in Spain, pursuant to the Alien Tort Claims Act, 28 U.S.C. § 1350 (1988)).

and Bolivia to investigate the roles of their own military leaders of the era, Alfredo Stroessner[56] and Hugo Banzer,[57] in repressing dissent and cooperating with other dictators during the same period of time.

• Earlier this year, in the face of mounting public opposition to continued impunity for the military, Argentina's president, Carlos Menem, always a strong supporter of the military, found that he lacked support for his threatened veto of a repeal of the Argentine amnesty law. The amnesty was thus repealed, though not retroactively.[58] Though symbolic for the victims of the Dirty War because it is not retroactive, the amnesty repeal arguably is a direct outgrowth of the Spanish prosecutions, and has lent further momentum to anti-impunity efforts.

It should not be surprising that impunity has eroded more in Argentina than in Chile. The political atmosphere in Chile has been consistently less open than in Argentina, and more legal actions have thrived in Argentina than Chile, where the amnesty has held up under domestic judicial review. General Pinochet will not be tried in Chile for his crimes.

B. Effects in the United States: The Letelier-Moffitt Murders and Other Legal Actions

Chile's was not the only military government in Latin America during the tumultuous 1970s and 1980s. Generals ruled in most of the Southern Cone: Brazil, Uruguay, Argentina, Bolivia, and Paraguay also were controlled by their national armies. The United States was a strong ally of all of these military governments during the junta years in Latin America; as early as the late 1960s, the Central Intelligence Agency (CIA) promoted coordination among military, paramilitary, and death squad operations in the region.[59] It was not surprising, then, that in the same month in which he came to power, General Pinochet began to organize his own extralegal operation to

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56. *See Paraguay: "Horror Files" Reveal Crimes of Stroessner Regime*, INTER PRESS SERVICE GLOBAL INFORMATION NETWORK, 11 Feb. 1993, *available in* LEXIS, World Library, INPRES file.
57. *See* Clifford Krauss, *Bolivian's Dark Past Starts to Catch Up With Him*, N.Y. TIMES, 14 Mar. 1999, at 3; Fiona Adams, *President of Bolivia Falls Foul of Old Guevara Ally*, GUARDIAN (Manchester), 4 Dec. 1998, at 20.
58. *See* Marcela Valente, *Rights-Argentina: Dissatisfaction with Repeal of Amnesty Laws*, INTER PRESS SERVICE, 25 Mar. 1998, *available in* LEXIS, World Library, INPRES file; *Menem Not to Veto Bill Repealing Due Obedience and Amnesty Laws*, BBC SUMMARY OF WORLD BROADCASTS, 28 Mar. 1998, *available in* LEXIS, World Library, BBCSWB file.
59. In *Dossier Secreto*, Martin Edwin Anderson points to a study of US police training in Latin America that documents that it was a CIA operative who put "a top Argentine Justice Ministry official in touch with authorities in Uruguay to talk about monitoring political exiles in both countries. The agency also brought Brazilian death squad members to meet with Argentine and Uruguayan police." MARTIN EDWIN ANDERSON, DOSSIER SECRETO: ARGENTINA'S DESAPARECIDOS AND THE MYTH OF THE "DIRTY WAR" 113 (1993).

gather intelligence and otherwise deal with perceived "subversives." He used the National Intelligence Division, known by its Spanish acronym "DINA," as cover for his operations. This entity, though organized by law, had an entire substructure that operated outside the law, accountable only to him. That structure's creation, operations, and accomplishments were all shrouded in a system of clandestine, verbal orders. Operations were controlled within a small circle of General Pinochet's top military commanders and, ultimately, by General Pinochet himself.

The DINA and its successor, the more benignly named National Information Center, or the CNI, wrecked havoc on political opponents of the Pinochet government throughout Chile during the time that Pinochet controlled the military and the country, not by waging traditional war, but by artifice, disinformation, violence, and terror. While many have asserted that the General was deeply involved in the illegal activities of the DINA/CNI, no direct evidence of his direct command control and responsibility was known until recently. His willingness to extend the DINA's operations into the United States was one of his most arrogant missteps in the early years of his leadership.

On 31 September 1976, a car bomb exploded in Sheridan Circle, along Embassy Row in Washington, DC. Orlando Letelier, a former minister in the government of Salvador Allende in Chile, and his US aide, Ronni Karpen Moffitt, were killed instantly. Moffitt's husband, Michael, was seriously wounded in the blast but survived.[60] The subsequent international search for the assassins immediately focused on Chile and Augusto Pinochet's military forces. The actual killers were tried and convicted in the United States in 1978. An American named Michael Townley, a long-time agent for the Chilean DINA, was extradited from Chile to face trial in Washington, DC, along with two Cuban nationals who conspired with him to actually carry out the bombings. The three were convicted, with Townley receiving a ten year sentence and release into the witness protection program in return for his implicating Chilean General Manuel Contreras and Brigadier Pedro Espinoza, heads of the Chilean DINA, as the authors of the crime.[61] Efforts to extradite the two military officers were unsuccessful, but the United

60. Sources on the murders and subsequent trials can be found *infra* note 62.
61. Reported decisions on the criminal proceedings are few. *See* United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980); United States v. Esquivel, 755 F. Supp. 434 (D.D.C. 1990). Complete accounts of the assassination, investigation and prosecution can be found in JOHN DINGES & SAUL LANDAU, ASSASSINATION ON EMBASSY ROW (1980); TAYLOR BRANCH & EUGENE M. PROPPER, LABYRINTH (1982). One of the federal prosecutors in the Letelier case recently wrote a compelling editorial about his own view of Pinochet's complicity. *See* Lawrence Barcella Jr., *The Case We Made, 22 Years Ago*, WASHINGTON POST, 6 Dec. 1998.

States did succeed in exempting Contreras and Espinoza from the 1978 amnesty due to their suspected role in the Letelier-Moffitt killings. After recourse to the US courts for civil damages,[62] the Letelier and Moffitt families also successfully negotiated a financial settlement with the Chilean government for its role in the murders.[63]

No criminal prosecutions have been pursued in the United States for crimes committed during the Argentine Dirty War, in part because there was not any known criminal activity by the Argentine military here. However, Argentine victims of that era have made effective use of the Alien Tort Claims Act[64] to prove civil liability and to win large money judgments for damages against Argentine military figures involved in violations of international human rights.[65]

Because of deep US government involvement in the Letelier-Moffitt investigation and prosecutions, at home and in Chile, the Spanish investigating judge in the Chilean case eagerly heard evidence from those in the United States who were closest to the investigation. Testimony in Spain included that of former Federal Bureau of Investigation (FBI) Agent Carter Cornick, who was involved in the Letelier investigations,[66] and that of former federal prosecutor Lawrence Barcella, who was said to have established an intimate relationship with Michael Townley; Barcella's testimony is a key component in the Spanish request for General Pinochet's arrest. The Spanish investigating magistrate also made a formal request to the US Justice Department through letters

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62. *See, e.g.*, Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980); Letelier v. Republic of Chile, 567 F. Supp. 1490 (S.D.N.Y. 1983), *aff'd* 748 F.2d 790 (2d Cir. 1984). The efforts are summarized in Monroe Leigh, *Judicial Decisions*, 79 AM. J. INT'L L. 442, 447 (1985). *See also* Eric H. Singer, *Terrorism, Extradition, and FSIA Relief: The Letelier Case*, 19 VAND. J. TRANSNAT'L L. 57 (1986).
63. *See Chile–United States Commission Convened Under the 1914 Treaty for the Settlement of Disputes: Decision with Regard to the Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt*, 31 I.L.M. 1 (1992). *See also* Miriam Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 86 AM. J. INT'L L. 346, 347 (1992).
64. 28 U.S.C. § 1350 (1994). The statute permits an alien in the United States to bring an action against another alien here, if personal service can be made, "for a tort . . . committed in violation of the law of nations or a treaty of the United States." *Id.* Courts here have applied the statute to find violations of the law of nations when customary international human rights norms, such as the prohibitions on torture, summary execution, disappearance or arbitrary detention, are violated. *See generally* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (1996).
65. *See, e.g.*, Rapaport v. Suarez-Mason, No. C87-2266 JPV (N.D. Cal. 11 Apr. 1989); Forti v. Suarez-Mason, No. C-87-2058-DLJ (N.D. Cal. 25 Apr. 1990); Martinez-Baca v. Suarez-Mason, No. C-87-2057 SC (N.D. Cal. 22 Apr. 1988); Siderman v. Argentina, No. CV 82-1772-RMT, 1984 WL 9080 (C.D. Cal. 28 Sept. 1984). These cases are summarized in STEPHENS & RATNER, *supra* note 64, at 343–45.
66. *See* Giles Tremlett, *Spanish Courts Give Hope to Latin America*, U.P.I., 11 Dec. 1996, *available in* LEXIS, World Library, UPI file.

rogatory, a traditional legal mechanism to obtain foreign evidence,[67] to turn over any information that the US government might have about crimes committed in the United States under the sponsorship of the DINA, particularly information regarding the Letelier and Moffitt murders, as well as information on Operation Condor.[68] Investigating magistrate Garcia Castellon traveled to the United States in late 1997 to meet with Justice Department officials about the evidence he sought. He reportedly obtained testimony from three unidentified witnesses, as well as some written materials, all of which was sufficient for the White House to assert, in a letter to the US Congress in June 1998, that cooperation with the Spanish authorities had been full and friendly.[69]

Judge Garcia Castellon, the investigating magistrate in the Chilean matter, did little to advance his investigation at all in 1998 and asserted that he was happy with the level of US cooperation in providing evidence, despite the fact that much of the classified material had not been revealed. He even ruled that he lacked jurisdiction at one point, a ruling that later was overturned on appeal, after which the judge seemed to reluctantly undertake the investigation again. On 16 October 1998, after the issuance of the arrest warrant for General Pinochet by Judge Garzón, the magistrate in the Argentine matter, Judge Garcia Castellon surrendered jurisdiction over the Chilean case to Judge Garzón.[70]

C. The Letelier-Moffitt Murder Exception to the Chilean Amnesty Yields a Conviction in Chile

The major exception to the amnesty in Chile was that which permitted the potential prosecution of the leaders of the DINA, Manuel Contreras and

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67. *See, e.g.*, 28 U.S.C. § 1782(a) (1994). The United States also has a Mutual Legal Assistance Treaty (MLAT) with Spain, which permits broader investigative requests. Treaty on Mutual Legal Assistance in Criminal Matters, 20 Nov. 1990, U.S.-Spain, U.S. DEPT. OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1998, at 262. *See* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 558 (1996).
68. *See Ampliación de la Denuncia por otros asesinatos cometidos durante la Operación Condor [Expansion of Criminal Complaint for Other Assassinations Committed During Operation Condor]*, Madrid, 20 Sept. 1996, *available on* <http://www.derechos.org/nizkor/chile/juicio/amp.html?Condor#first_hit> (visited 17 June 1999).
69. *See* Press Release, Congressman George Miller, *Members of Congress Call on Clinton to Release Key Information on Gen. Pinochet to Spanish Judge*, 21 Oct. 1998, with attachment of letter from William Clinton, The White House, to George Miller, 3 June 1998 (on file with author).
70. *See Auto de inhibición del Juzgado Central de Instrucción N6 . . . en favor del Juzgado Central de Instrucción N5 [Order of the 6th Central Instructing Court Ceding to the 5th Central Instructing Court]*, Madrid, 20 Oct. 1998, *available on* <http://www.derechos.org/nizkor/chile/juicio/inhibe.html> (visited 17 June 1999).

Pedro Espinoza, for their role in the assassinations of Orlando Letelier and Ronni Moffitt. The prosecutions proceeded nearly fifteen years after the deaths of Letelier and Moffitt, and, on 30 May 1995, the Chilean Supreme Court upheld the convictions of Contreras and Espinoza for their roles in the killings. The two eventually surrendered and are now serving their sentences.[71] The Court explicitly rejected the assertion of Conteras, by way of defense, that the DINA did not resort to murder. The Court concluded that the judge at the trial level had "[a]nalyzed diverse activities of DINA and these led him to conclude that the leadership of the organization accepted terrorist violence as a legitimate method with which to fight opponents and [t]hat DINA had recourse to violence, both in its philosophy and in its actions."[72] Now tired of jail, Contreras is talking.[73]

D. A "Scilingo Effect" in Chile: Testimony from the Military and Others Against Pinochet

As was noted above, the testimony in Argentina of former naval officer Adolfo Scilingo led to a number of defections there from the traditional code of military silence as numerous officers came forward to testify against the junta leaders. A similar effect is notable in the Chilean proceedings, starting with the statements of retired General Joaquin Lagos Osorio.

General Lagos was commander of the region of Antofagosta, an isolated and remote area in the desert north of Chile. About a month after the coup of September 1973, General Lagos was visited by another general, Sergio Arellano Stark, who arrived in an official capacity as a delegate of General Pinochet. To Lagos' shock, Arellano proceeded to remove fifty-three civilians detained in the regional jail and have them summarily executed. When he protested directly to Pinochet, Lagos was ordered to remove all reference to Arellano and actions on behalf of Pinochet from the official records of the deaths. Although he complied, Lagos later gave sworn testimony in a criminal investigation into the deaths of the fifty-three in the Criminal Court of Antofagosta on 2 July 1986. The investigation was closed

71. The judgment of Magistrate Adolfo Banados Cuadra, finding Contreras and Espinoza guilty can be found in FALLOS DEL MES, SECCION CRIMINAL (EDICION SUPLEMENTARIA) [JUDGMENTS OF THE MONTH, CRIMINAL SECTION (SUPPLEMENTAL EDITION)], Nov. 1993 (on file with author). *See generally* Peter A. Barcroft, *International Decisions: Rol. No. 30.174-94* (In re *Letelier*), 90 AM. J. INT'L L. 290 (1996).

72. *Id.* at 292 (alterations in original).

73. Despite his desire for release from Chilean custody, Contreras will apparently be extradited to Italy after completion of his sentence in Chile as a result of his conviction, in absentia, for involvement in the attempted assassination of Bernardo Leighton, a vocal opponent of the Pinochet regime, and his wife, Ana Fresno. *See id.* at 294 n.16.

without further action. In December 1997, Lagos offered his 1986 testimony into the proceedings against General Pinochet in Spain.[74]

Lagos was not the only high-ranking Chilean military official to come out against Pinochet. In January 1998, seventy-seven-year-old General Sergio Poblete Garces, a retired Air Force officer, came forward to testify in the Spanish proceedings. General Poblete, who had retired into the reserves in 1973, graduated from Yale University with a degree in aeronautical engineering in 1943. He was a career military officer. On 18 September 1973, upon refusing to carry out sealed orders containing instructions to arrest and torture certain individuals, Poblete was himself taken into custody and tortured before his release. He has lived in exile in Belgium since 1975. He documented his own experiences, as well as his personal knowledge that some prisoners were tied by their heels to helicopters, which flew low over trees, dragging the hanging individuals through the treetops. He said that his testimony made him feel "enormous shame" and asserted that General Pinochet was the "highest responsible authority" in a rigidly hierarchical military structure in Chile.[75] In a later public letter to General Pinochet, after he had been publicly assailed by the General for his lack of credibility, General Poblete asserted that "the only way in which true reconciliation can exist in our country, and that it might recover the esteem and respect of the Chilean people, is [for you] to have the courage to recognize and ask forgiveness for the wrongs committed during seventeen years of military dictatorship."[76]

Moreover, Catholic Bishops Helmut Frenz, a German national, and Fernando Ariztia, current President of the Chilean Episcopal Conference, appeared in Spain in February and August 1998 to lend further credibility to the accusations against the dictator from the highest ranks of the Chilean elites, normally Pinochet's allies. These two priests aided hundreds of individuals to escape Chile during the dictatorship. When they approached Pinochet himself to denounce the disappearance of a Spanish priest,

74. *See* Francesc Relea, *El testimonio de un general chileno acusa a Pinochet de 53 asesinatos* [*The Testimony of a Chilean General Accuses Pinochet of 53 Assassinations*], El Pais (Madrid), 2 Dec. 1997, *available in* LEXIS, World Library, ELPAIS file.

75. Open Letter from General Poblete to General Pinochet (Jan. 1998) (on file with author) [hereinafter Open Letter]. *See Un general chileno culpa a Pinochet de los desaparecidos* [*A Chilean General Blames Pinochet for the Disappeared*], La Vanguardia (Barcelona), 28 Jan. 1998, *available in* Westlaw, LAVANGURD database; *Un general chileno denuncia a Pinochet y Leigh por torturas y asesinatos* [*A Chilean General Denounces Pinochet and Leigh for Torture and Assassinations*], Agencia Europa Press, 28 Jan. 1998.

76. Open Letter, *supra* note 75. The open letter from General Poblete is contained in an electronic mail message to the author from Juan Garcés, Madrid, 18 Feb. 1998 (on file with author).

Antonio Llido, they were told by the general, "[t]hat man is not a priest, he's a Marxist."[77]

E. The DINA-Condor Connection and the Joinder of the Chilean and Argentine Cases

Observers were initially puzzled when Judge Garzón, the magistrate investigating wrongdoing in Argentina, issued the crucial arrest warrant against Chile's General Pinochet. The reason was the activity, in Argentina, of a multinational rogue operation known as Operation Condor, organized by the military governments in the Southern Cone. Condor operated in several countries—Chile, Argentina, Uruguay, Paraguay, and Brazil—and is believed to have been coordinated by the DINA in Chile. Judge Garcia Castellon, the Spanish judge in the Chilean case, had shown little interest in Operation Condor, but Judge Garzón had done extensive investigation into Operation Condor through the massive archive of more than four tons of documentation making up what is called the Horror Files, located in Asuncion, Paraguay.[78]

Judge Garzón's interest was avid. He filed letters rogatory with the government of Paraguay on 15 January 1998 and repeated the request, in more detail, on 4 September.[79] He also paid a visit to the files in Paraguay in early 1998, after he decided there was enough evidence to open a criminal investigation into the activities of Operation Condor.[80]

Then, on 15 October, lawyers for the victims came forward with a compelling document to supplement Judge Garzón's initial arrest warrant for General Pinochet. The evidence in that document, entitled "Foundation

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77. *Duros cargos de obispo Frenz contra Pinochet* [*Hard Charges by Bishop Frenz Against Pinochet*], La Epoca (Santiago), 9 Feb. 1998; Manuel Delano, *Una autoridad catolica implica a Pinochet en la muerte de un sacerdote español* [*A Catholic Authority Implicates Pinochet in the Death of a Spanish Priest*], El Pais (Madrid), 10 Aug. 1998, *available in* LEXIS, World Library, ELPAIS file.
78. Stella Calloni, *Los Archivos del Horror del Operativo Cóndor* [*The Horror Files of Operation Condor*] (1994). This document, published by Argentine journalist Stella Calloni, can be found in Spanish on the Internet at <http://www.derechos.org/nizkor/doc/condor/calloni.html>.
79. *See Providencia por la que el Magistrado Juez Baltasar Garzón solicita ampliación de rogatoria a Paraguay para la obtención de documentos relacionados con la "Operación Cóndor"* [*Request in Which Magistrate Judge Baltasar Garzón Solicits Additional Letters Rogatory to Paraguay in Order to Obtain Documents Related to "Operation Condor"*], Madrid, 4 Sept. 1998, *available on* <http://www.derechos.org/nizkor/arg/espana/condor.html> (visited 17 June 1999).
80. *See Auto del 27 de Abril de 1998* [*Order of 27 Apr. 1998*] (containing, in paragraph 12, the opening of a new file on the investigation of Operation Condor) (on file with author).

for the Amplification of the Complaint which Permitted the Order of Unconditional Provisional Arrest of Augusto Pinochet Ugarte,"[81] when taken together with the facts alleged in the arrest warrants themselves, the later request for extradition, and the formal criminal charges filed against General Pinochet on 10 December in Madrid,[82] makes out a damning case of complicity by Augusto Pinochet as commander in chief of the DINA, as well as designer and coordinator of Operation Condor. Before going to the evidence, however, it would be helpful to know the crimes on which the Spanish courts based their jurisdiction and request for Pinochet's arrest and extradition.

IV. THE CRIMES CHARGED: GENOCIDE, TERRORISM, AND TORTURE UNDER UNIVERSAL JURISDICTION IN SPANISH LAW

On 22 October 1998, immediately after the arrest warrant was issued for General Pinochet, the Spanish public prosecutor's office took aggressive action in the Spanish *Audiencia Nacional* to challenge the jurisdiction of Spain over the prosecutions against Argentina and Chile, respectively. On 4 and 5 November 1998, in unappealable decisions, the eleven trial judges of the *Audiencia Nacional* unanimously upheld the jurisdiction of the Spanish Courts to hear both the Chilean and Argentine cases.[83] The decisions found jurisdiction to try the three charges of torture, terrorism, and

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81. *Fundamentación de la ampliación de la querella que permitió la orden de prisión provisional incondicional contra Augusto Pinochet Ugarte* [*Foundation for the Amplification of the Complaint Which Permitted the Order of Unconditional Provisional Arrest of Augusto Pinochet Ugarte*], Madrid, 15 Oct. 1998, *available on* <http://www.derechos.org/nizkor/chile/juicio/aplia.html> (visited 17 June 1999) [hereinafter *Foundation for the Amplification of the Complaint*].

82. *Auto de Procesamiento a Pinochet* [*Order Charging Pinochet*], Madrid, 10 Dec. 1998, *available on* <http://www.derechos.net/doc/pino/proceso.html> (visited 17 June 1999).

83. *Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura argentina* [*Ruling of the National Audience on Jurisdiction of Spanish Justice to Pursue Crimes of Genocide in Argentina*], Madrid, 4 Oct. 1998, *available on* <http://www.derechos.org/nizkor/arg/espana/audi.html> (visited 17 June 1999); *Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena* [*Ruling of the National Audience on Jurisdiction of Spanish Justice to Pursue Crimes of Genocide in Chile*], Madrid, 5 Oct. 1998, *available on* <http://www.derechos.org/nizkor/chile/juicio/audi.html> (visited 17 June 1999) [hereinafter *Ruling of the Audencia Nacional*]. Because the other charges were not challenged, it can be assumed that the prosecutions, and perhaps the extradition, could have proceeded even if this appeal was lost, but there is little doubt that an unfavorable ruling in this appeal would have gutted the legal grounds on which the victims sought to establish criminal liability. For an excellent analysis of these rulings and earlier rulings by the Investigating Magistrates in these cases on the same issues, see *The Criminal Procedures Against*

genocide. The court also upheld the investigating judge's interpretation of the statutory provisions vesting the court with universal jurisdiction to try a non-citizen for crimes against non-citizens committed outside of Spain's territorial jurisdiction. This section will briefly review the bases in Spanish law for universal jurisdiction, for the three crimes under review in the *Audiencia*, and other jurisdictional aspects.

A. Universal Jurisdiction in Spanish Law

As originally filed, the complaints for both countries named only Spanish citizens as victims. Thus, they seem clearly to have been grounded in the criminal jurisdictional principle of passive personality: jurisdiction based on the nationality of the victim. Such jurisdiction is grounded in the principle that states have a duty to protect their nationals abroad.[84] While the Spanish law on criminal jurisdiction provides for passive personality jurisdiction,[85] the complaints in both the Chilean and Argentine cases subsequently added non-Spanish citizens, thus forcing the issue into the terrain of universal jurisdiction.

Perhaps the most significant single aspect of the *Audiencia's* appellate review was the finding that the Spanish courts are vested with universal jurisdiction under domestic law. Article 23.4 of the Organic Law of the Judicial Branch permits the exercise of domestic criminal jurisdiction over offenses "committed by Spanish or foreign persons outside of national territory and capable of being proven under Spanish law, such as some of the following crimes: a) Genocide. b) Terrorism. . . . g) and any other [crime] which, under international treaties or conventions, should be pursued in Spain."[86] In reaching its conclusion as to jurisdiction on the offenses in question, the *Audiencia* took special pains to point out that the standard, as expressed in Article 23.4, requires only that the offenses in question be

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Chilean and Argentinian Repressors in Spain: A Short Summary, Revision One, 11 Nov. 1998, *available on* <http://www.derechos.net/marga/papers/spain.html> (visited 17 June 1999) [hereinafter *The Criminal Procedures: A Short Summary*].

84. *See* John G. McCarthy, *The Passive Personality Principle and Its Use in Combatting International Terrorism*, 13 FORDHAM INT'L L.J. 298 (1990); Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1 (1993). Passive personality jurisdiction was the basis for a US extradition request for Muhammed Abbas Zaiden, accused of the terrorist act of hijacking the cruise ship *Achille Lauro* in Egyptian waters and subsequently killing Leon Klinghoffer, a US citizen, in 1985. *See* United States v. Yunis, 681 F. Supp. 896, 900 (D.D.C. 1988).

85. L.O.P.J. art. 23.2.

86. L.O.P.J. art. 23.4(a), (b), & (g). I am told by reliable authorities on Spanish law, although without reference to a specific text, that the phrase "such as some of the following crimes" has been interpreted as exclusive, not inclusive, language. Thus, only those crimes specifically listed in the statute are viable subjects of universal jurisdiction.

"*capable* of being proven," and not that they need to meet any higher legal standard, such as "a likelihood," "accreditation," or "rationality" of indications of guilt, all terms used to express burdens of proof in the Spanish legal system.[87]

The Organic Law, however, became effective only in 1985, so Spanish prosecutors argued that these provisions could not be applied to the crimes committed in Chile and Argentina between 1973 and its effective date, a limitation that would have barred prosecution of some of the worst crimes committed by the regimes. The *Audiencia* concluded that the provisions of the Organic Law are procedural, not substantive in nature: "The procedural norm in question neither punishes anyone unfavorably nor is it restrictive of individual rights. . . . "[88] Thus, the principle of legality found in Article 25 of the Spanish Constitution is met by looking to the effective dates of the substantive crimes listed in the article, not to the effective date of the Organic Law itself.[89] Jurisdiction lies, then, if the offenses in question were codified in domestic law or contained in a ratified treaty at the time of their commission.

B. The Legal Effect in Spain of Domestic Amnesties in Chile and Argentina

Another major issue faced by the Spanish courts was that of the legal effect in Spain of domestic amnesties in both Chile and Argentina. Those governments enacted amnesty laws that amounted to a complete bar on domestic criminal prosecutions of the military leaders, although the way in which the amnesties came about was dramatically different in each country. In both cases, the Inter-American Commission on Human Rights found that the amnesty violated fundamental human rights of the victims and held that the decrees violated international human rights norms. In each case, the Spanish courts rejected the application of the domestic amnesties when they were invoked as a bar to prosecution in Spain.

In Chile, amnesty was decreed by General Pinochet in 1978 for criminal offenses committed while the country was under a state of siege, from 11 September 1973 to 10 March 1978.[90] Although the decree exempted certain

87. *Ruling of the Audiencia Nacional, supra* note 83, at Section Four.
88. *Id.* at Section Three.
89. *Id.* The first subsection of Article 25 of the Constitution states: "No one can be convicted or sentenced for acts or omissions which, at the moment they occur, are not crimes, misdemeanors or administrative infractions, according to the applicable legislation at that time." C.E. art. 25.1.
90. *See* Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence of Amnesty*, 20 Hum. Rts. Q. 843, 847 (1998). For other specific treatments of the Chilean amnesty and how it was dealt with internally, see Jorge Correa S., *Dealing with Past Human*

common crimes and applied to both guerrilla leaders and the military, it was widely viewed as a self-amnesty for the Pinochet forces, and courts of Chile generally have invoked the amnesty to prevent the opening of criminal investigations. Because the democratically elected government, which came to power in 1990, could neither annul nor overturn the amnesty through legislative action, it created the *Comisión Nacional de Verdad y Reconciliación* (National Commission on Truth and Reconciliation, often called the Rettig Commission for its chairperson, Raul Rettig Guissen), which investigated and documented 2,279 deaths and disappearances during the Pinochet years.[91] Later work by a successor entity, the *Corporación Nacional de Reparacion y Reconciliación* (National Corporation for Reparation and Reconciliation), established in 1992, extended the number of official disappearances and deaths to 3,197.[92] Both the Commission and the Corporation, however, were limited in their mandate to cases where death occurred. They could not identify anyone responsible for crimes committed, nor could they recommend sanctions.[93]

The Chilean domestic courts, largely named or indirectly controlled by General Pinochet, proved to be virtually ineffectual in protecting the rule of law. Reports vary on the number of currently pending cases that seek a remedy for deaths during the Pinochet years, or that directly challenge the amnesty law,[94] but Chilean judges have, with few exceptions,[95] uniformly rejected such challenges in the past.[96] The drive for accountability gained international momentum when, in 1996, the Chilean courts applied the

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Rights Violations: The Chilean Case After Dictatorship, 67 NOTRE DAME L. REV. 1455 (1992); José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425 (1992); Robert J. Quinn, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 FORDHAM L. REV. 905 (1994); Kai Ambos, *Impunity and International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina*, 18 HUM. RTS. L.J. 1 (1997).

91. 2 REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 899 (Phillip E. Berryman trans., 1993) [hereinafter THE RETTIG REPORT].
92. Amnesty International, *Chile: Transition at the Crossroads: Human Rights Violations under Pinochet Rule Remain the Crux*, AMR 22/01/96, March 1996, at 27.
93. *See* Roht-Arriaza & Gibson, *supra* note 90, at 847–48.
94. One report in 1995 put the number of pending cases at about 500. Imogen Mark, *Former Security Chief Jailed at Last: Some 500 Court Cases are Still Pending over Chile's 'Disappeared'*, FINANCIAL TIMES (London), 25 Oct. 1995, at 4.
95. In November 1997, the Second Chamber of the Chilean Supreme Court voted 4–2 to revoke the application of the amnesty. Although the case had symbolic importance, the Court's reasoning has limited application to cases in which no defendant is named, therefore making the amnesty formally inapplicable. *See Un tribunal de Chile revoca por primera vez una amnestia dictada por Pinochet* [*A Chilean Court Revokes, for the First Time, an Amnesty Dictated by Pinochet*], EL MUNDO (Madrid), 21 Nov. 1997, *available in* Westlaw, ELMUNDO database.
96. *See* Roht-Arriaza & Gibson, *supra* note 90, at 848–49.

amnesty law to close the investigation into the death of the Spanish diplomat Carmelo Soria, killed in Santiago in 1976, despite strong evidence of the involvement of government agents in his death and the clear legal precedent, asserted by family members, that murder of an internationally protected diplomat was not covered by the amnesty.[97] Then, in 1997, the legal underpinnings of the amnesty were dealt a severe blow when the Inter-American Commission on Human Rights found serious violations of human rights in the domestic application of the amnesty and in the Chilean courts' judgments upholding it.[98] This ruling followed on the groundwork of precedent in the Commission,[99] as well as the UN Declaration on the Protection of All Persons from Enforced Disappearances and the jurisprudence of the Human Rights Committee, which interprets, through its responses to country reports and adjudication of individual complaints, the provisions of the International Covenant on Civil and Political Rights.[100]

The Investigating Magistrate in the Chilean case in Spain never reached

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97. *Chile Closes the Book on Spanish Diplomat's Murder*, REUTERS NORTH AMERICAN WIRE, 23 Aug. 1996.

98. *See* Hector Marcial Garay Hermosilla et al. v. Chile, Report No. 39/96, Case 10.843, Inter-Am. C.H.R. 156 (1997); Juan Meneses et al. v. Chile, Report No. 34/96, Cases 11.228 and others, Inter-Am. C.H.R. 196 (1997). The Commission found violations of Articles 8 (right to a fair trial) and 25 (right to prompt and effective judicial protection) of the American Convention on Human Rights. It further found that the decision by the Chilean Supreme Court upholding the constitutionality of the amnesty law in 1990 violated Articles 1 and 2 of the Convention, which require domestic respect for the human rights in the Convention as well as full domestic legal effect for those rights.

99. The Commission had addressed domestic self-amnesties in three other countries and found all to deny fundamental human rights guaranteed in the American Convention on Human Rights. Alicia Consuelo Herrera el al. v. Argentina, Report No. 28/92, Cases 10.147 and others, Inter-Am. C.H.R. 41 (1993); Hugo L. de los Santos Mendoza et al. v. Uruguay, Report No. 29/92, Cases 10.029 and others, Inter-Am. C.H.R. 154 (1993); Masacre Las Hojas [El Salvador], Report No. 26/92, Case 10.287, Inter-Am. C.H.R. 83 (1993). The substantive grounds for each decision, as in Chile, lay in violations of Articles 8 and 25 of the Convention, having to do with fair trials and access to an effective legal remedy.

100. The Human Rights Committee's first statement on the issue was its General Comment No. 20, on Article 7 of the Covenant, dealing with torture. There, it stated that "[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy. . . ." *General Comment on Article 7*, General Comment No. 20, U.N. GAOR, Hum. Rts. Comm., 44th Sess., 1139th mtg., addendum, at ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.3 (1992). The Committee has reiterated that position in an individual decision, Communication No. 322/1988 (*Rodriguez v. Uruguay*), U.N. GAOR, Hum. Rts. Comm., U.N. Doc. CCPR/C/51/D/322/1988 (1994), *reprinted in* 2 INT'L HUM. RTS. REP. 113 (1995), and in the Committee's response to the country report of Argentina, *Comments of the Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Argentina*, U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1411th mtg., addendum, ¶¶ 3 & 10, U.N. Doc. CCPR/C/79/Add.46 (1995), *reprinted in* 2 INT'L HUM. RTS. REP. 625 (1995).

the issue of the application of the 1978 Chilean amnesty law in his trial court rulings sustaining jurisdiction. The issue was therefore ruled on for the first time in that case when the public prosecutor challenged jurisdiction of the Spanish courts after Pinochet's arrest in October. The eleven-member *Audiencia Nacional* rejected the prosecutor's argument that the Chilean amnesty barred prosecution, relying on a provision in Article 23 of the Organic Law of the Judicial Branch that limits the application of extraterritorial jurisdiction in Spain to those cases in which the defendant has not been "acquitted, pardoned or punished abroad."[101] The court stated that the amnesty law did not apply because it "depenalized" conduct; that is, it made the conduct no offense at all. By requiring an acquittal or pardon, the Spanish jurisdictional statute implicitly requires a determination of guilt or innocence, a process that never happened in Chile.[102]

The Spanish *Audiencia* reached the same conclusion with regard to the application of the Argentine amnesty law. The procedural history leading up to that simple and straightforward ruling in the Argentine case, however, was anything but simple. In Argentina, civilian rule returned in 1983. Newly elected President Raul Alfonsin followed on the momentum created when the courts—initially—struck down the military's self-amnesty. The credibility of the Argentine army had been severely weakened by its humiliating loss to Great Britain in the short-lived war over the Falkland Islands, off Argentina's coast. Alfonsin ordered the creation of a truth commission, as well as the prosecution of nine of the leaders of the military government. The *Comisión Nacional sobre la Desaparición de Personas* (CONADEP, the National Commission on the Disappearance of Persons, popularly called the Sabato Commission for its chairperson, novelist Ernesto Sabato) published its official report in 1984. The CONADEP report, entitled *Nunca Más* (*Never Again*), documented nearly 9,000 disappearances in Argentina during the Dirty War.[103] Later reports indicate that the total loss of life through assassination or disappearance may exceed 30,000 persons.[104]

The prosecutions of the military leaders were largely successful, and several were sentenced to long prison sentences. The Argentine Supreme Court upheld the sentences, but as time went by, continued pressure from the military caused President Menem to pardon all of the military leaders still in prison. The military, particularly the lower-ranking officers who

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101. L.O.P.J. art. 23.
102. *Ruling of the Audiencia Nacional, supra* note 83, at Section Eight.
103. NUNCA MÁS [NEVER AGAIN]: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 447 (1st American ed. 1986).
104. There is no single source to document this number accurately. One reasonable effort to count all murdered or disappeared victims in Argentina arrives at a total of 20,000 to 30,000. *See How Many Desaparecidos Were There; Which is the Right Number?, available on* <http://www.yendor.com/vanished/how-many.html> (visited 17 June 1999).

feared their own prosecution, pressed hard for re-institution of an amnesty, and after an attempt at compromise, a carefully crafted amnesty was passed by the legislature and upheld by the courts.[105]

Before the Spanish courts reached the issue, international law had addressed the legality of the Argentine amnesty. The Inter-American Commission on Human Rights found the Argentine amnesty to be incompatible with human rights concepts four years before its similar conclusion as to Chile, set out above.[106] In late 1997, the UN's Committee Against Torture found that Argentina's ratification of the Inter-American Convention on the Forced Disappearance of Persons was a recognition of its international legal obligation to try or extradite crimes of torture and that the Spanish courts had jurisdiction to proceed in both the Argentine and Chilean investigations.[107] In the Spanish courts, too, Investigating Magistrate Baltasar Garzón squarely addressed the amnesty issue and found, on numerous grounds, that it was no bar to proceedings in Spain. He specifically referred to the Inter-American Commission's ruling and further held that general amnesties were not allowed under Spanish law. He concluded that the exemption from criminal liability of those who had followed superior orders, a hallmark of the Argentine amnesty, was a practice disfavored in many countries of the world.[108]

The International Criminal Tribunal for the Former Yugoslavia recently spoke to the question of the effect of national amnesty laws on the practice of torture. In *Prosecutor v. Furundzija*,[109] the Court first analyzed the state of the

105. *See* Roht-Arriaza & Gibson, *supra* note 90, at 858.

106. *See* Herrera v. Argentina, *supra* note 99.

107. In its report to the Committee Against Torture, the Argentine government agreed that the Inter-American Convention Against the Forced Disappearance of Persons created obligations among States parties to "cooperate with one another in helping to prevent, punish and eliminate the forced disappearance of persons." *Third Periodic Reports of States Parties Due in 1996: Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Argentina*, U.N. GAOR, Comm. Against Torture, addendum, ¶ 7, U.N. Doc. CAT/C/34/Add.5 (1997) (citation omitted). In its final observations on the Argentine report, the Committee stated that Argentina's ratification of the same treaty "establishes obligations, compliance with which will contribute to the prevention and punishment of torture and restitution to the victims." *Conclusiones y Recomendaciones del Comite Contra la Tortura: Argentina* [*Conclusions and Recommendations of the Committee Against Torture: Argentina*], U.N. GAOR, Comm. Against Torture, U.N. Doc. CAT/C/ARG (1997). Finally, the Committee specifically found that Spain had jurisdiction to proceed against military leaders in Chile and Argentina for the crime of torture. *See* Alejandro Alevi, *Espana es competente en casos de tortura en Chile y Argentina, segun el ONU* [*Spain Has Jurisdiction in Torture Cases in Chile and Argentina, According to the UN*], El Mundo (Madrid), 23 Nov. 1997, *available in* Westlaw, ELMUNDO database.

108. *See* Roht-Arriaza & Gibson, *supra* note 90, at 876–77.

109. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (Trial Chamber), *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T, 10 Dec. 1998, *available on* <http://www.un.org/icty/furundzija/judgment/10-12-98JDG.htm> (visited 17 June 1999).

international norm against torture and found it to be peremptory in nature;[110] that is, it has acquired the status of a *jus cogens* norm. Having reached that conclusion, the Court went on to comment on any effort to legitimate torture:

> It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition on torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, . . . would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body. . . . What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle.
>
> Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.[111]

C. The Crime of Genocide Under Spanish Law

The *Audiencia* began its discussion of the substantive issues of jurisdiction with the crime of genocide. It noted preliminarily that "international treaties prevail over domestic law,"[112] citing to both the Spanish Constitution[113] and the Vienna Convention on the Law of Treaties.[114] With this principle in mind,

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110. *Id.* ¶ 153.
111. *Id.* ¶¶ 155–56 (footnotes omitted). The *Furundzija* decision has importance not only as to the application of amnesties, but also as an answer to those Law Lords who limited, unnecessarily in my view, the extradition proceedings against General Pinochet to tortures that occurred after Great Britain had ratified the Torture Convention. *See infra* text accompanying notes 197–98. If torture is a *jus cogens* violation, which it has been recognized to be for many years, the ratification date of a treaty dealing with torture is irrelevant to the susceptibility of the defendant charged with that crime to prosecution or extradition.
112. *Ruling of the Audiencia Nacional, supra* note 83, at Section Two.
113. Article 96 of the Spanish Constitution states: "Validly enacted international treaties, once officially published in Spain, shall form part of the internal legal order." C.E. art. 96.
114. *Vienna Convention on the Law of Treaties*, U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 331, (*entered into force* 27 Jan. 1980), *reprinted in* RICHARD B. LILLICH,

the *Audiencia* concluded that Article 6 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[115] ratified by Spain in 1968, did not prevent the courts from trying crimes of genocide committed outside of the territorial jurisdiction of Spain. Article 6 states: "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction. . . ."[116] The *Audiencia* concluded that "article 6 of the Convention does not exclude the existence of judicial organs with jurisdiction distinct from the territory of the offence or of an international tribunal."[117] In short, it found no specific limitation or exclusion of the possibility of a State Party's legal system providing for jurisdiction for acts of genocide committed outside of the national territory.

The court concluded that

> Article 6 . . . imposes [the principle of] subsidiarity on actions by jurisdictions other than those which its precepts define, in such a way that . . . a State should abstain from exercising jurisdiction over facts giving rise to genocide which have been judged by the courts of the country in which they occur or by an international criminal court.[118]

Stated another way, the court found that the superiority of international treaties over domestic law required that Article 6 be interpreted as a bar to the invocation of domestic jurisdiction only when another State had prosecuted genocide committed within its own territory or when such an adjudication had been completed by an international tribunal.

The prosecutor next argued that the crime of genocide, as defined in Spanish law, can only be committed against a national, ethnic, racial, or

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INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 540.1 (2d ed. 1990). The *Audiencia* cites to Article "97" of the Vienna Convention. Because there is no such article, one can reasonably conclude the Court was referring to Article 27 of the Convention, which states that "A party may not invoke the provisions of the internal law as justification for its failure to perform a treaty." *Id.* art. 27.

115. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* 9 Dec. 1948, 78 U.N.T.S. 277, art. 6 (*entered into force* 12 Jan. 1951) (*entered into force for U.S.* 23 Feb. 1989), *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 297 (Burns H. Weston et al. eds., 2nd ed. 1990) [hereinafter Genocide Convention].
116. *Id.*
117. *Ruling of the Audiencia Nacional, supra* note 83, at Section Two.
118. *Id.* Similar conclusions have been reached by legal scholars in the United States. *See, e.g.*, Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 837 (1988) ("Universal jurisdiction over genocide under customary law can coexist with territoriality jurisdiction under treaty law; the former relates to a jurisdictional right, the latter to a jurisdictional obligation. . . . The parties to the Genocide Convention simply have obligated themselves to prosecute offenses specifically committed within their territory." (footnote omitted)).

religious group and that the repression carried out in Chile and Argentina had political motivations. The *Audiencia*, therefore, proceeded to analyze the evolution of the substantive definitions of genocide in Spanish law over the relevant time frame, from 1973 to 1990.

Following ratification of the Genocide Convention in 1968, Spain first codified genocide as a crime in 1973.[119] Genocide, included in the Spanish Criminal Code as a "crime against the rights of peoples," was committed when the defendant had the intent to destroy a "national ethnic, social or religious group."[120] There are two significant departures from the Genocide Convention's definition of destruction of a "national, ethnical, racial or religious group."[121] First, there is no comma between "national" and "ethnic," and second, the term "social" is used instead of the term "racial." Spanish law, then, explicitly departed from the Convention's definition only five years after its ratification. In 1983, the Criminal Code was partially amended, and the word "racial" replaced "social" in the code, though the comma between "national" and "ethnic" was still not added. The most recent amendment to the Code, in 1995, brought the definition into conformity with the Genocide Convention.[122] The *Audiencia*, then, could draw from several different constructions for its own interpretation of national law on genocide.

The court chose to ground its analysis in the concept of "national group." Rather than give direct significance to the term "social group," as that term was used in the earliest codification, the *Audiencia* used the term "social" as a means of giving context and meaning to nationality. The term "national group," the *Audiencia* concluded, was mediated by the word "social," meaning that genocide had to be interpreted through a broader notion of "social conception and understanding" to avoid a potentially crabbed or narrow legal reading of the genocide definition.[123]

That social understanding of the concept of genocide derives from actions that predate the Convention, asserted the court, in such expressions of outrage by the world community as the U.N. General Assembly's Resolution 96 of 1946, which recognized genocide as a *jus cogens* crime and supported punishment of those who commit genocide against a group for "religious, racial, political or any other grounds."[124] The judges further

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119. Código Penal [Criminal Code] [C.P.] art. 137 et seq., Law 44/71, 15 Dec. 1971 (cited in *Ruling of the Audiencia Nacional, supra* note 83, at Section Five).
120. *Id.*
121. Genocide Convention, *supra* note 115, art. 2.
122. *Ruling of the Audiencia Nacional, supra* note 83, at Section Five. *See* C.P. art. 607.
123. *Ruling of the Audiencia Nacional, supra* note 83, at Section Five.
124. *The Crime of Genocide, adopted* 11 Dec. 1946, G.A. Res. 96 (I), U.N. GAOR, 1st Sess., 55th plen. mtg., U.N. Doc. A/RES/96 (1948), *reprinted in* 1 UNITED NATIONS RESOLUTIONS 175 (Dusan J. Djonovich ed., Series I 1973). *See Ruling of the Audiencia Nacional, supra* note 83, at Section Five.

noted that genocide is a crime against humanity because it "carries out actions seeking to exterminate a human group," as noted in the terms of the Statute of the Nuremberg Tribunal, where crimes against humanity are defined as "assassinations [or] extermination . . . committed against a civilian population . . . for political, racial or religious motives."[125] Finally, the tribunal noted that the Preamble of the Genocide Convention itself expresses the recognition that, throughout history, genocide has inflicted great losses on humanity and that international cooperation is needed to free humanity of its scourge.[126]

The term "national group," the court concluded, "cannot mean 'a group formed by people who belong to the same nation,' but instead, simply, a national human group, a differentiated human group, characterized by something, integrated into a larger collectivity."[127] Any more restrictive understanding of the term would prevent genocide from being applied to such "odious" practices as the killing of all people with AIDS, or all old people, or all foreigners, or even the systematic elimination of the powerful.[128] The *Audiencia* concluded:

> The persecuted and harassed group was composed of those citizens who did not fit the type preestablished by the promoters of the repression as necessary for the new order to be established in the country. The group was composed of

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125. *See Ruling of the Audiencia Nacional, supra* note 83, at Section Five. This usage of the provisions of the international law of crimes against humanity does not, in my view, constitute a statement by the *Audiencia* that the court was formally alleging crimes against humanity under customary international law, but rather that genocide was a variety of crime against humanity.

126. *Id.* Interestingly, in its exegesis of the concept of genocide, the *Audiencia* did not rely on the ideas or legal concepts expressed in the "Whitaker Report," a document relied on heavily both by the private prosecutors and the Investigating Judge in his own ruling upholding his jurisdiction. That report was prepared in August 1985 by Benjamin Whitaker in his role as Special Rapporteur to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, on the topic of genocide. In it, Whitaker asserted that there can be cases in which the aggressor and the persecuted can belong to the same group, as in the case of Cambodia where the concept of "auto- genocide" was introduced. The concept was not his own, but that of an earlier report on the issue from Cambodia. *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, Prepared by Mr. B. Whitaker,* U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prevention and Protection of Minorities, 38th Sess., Provisional Agenda Item 4, ¶ 31, U.N. Doc. E/CN.4/Sub.2/1985/6 & Corr.1 (1985). The report was also cited for its conclusions that the group in question need not be completely destroyed and that even a minority of the group may be sufficient if it is significant, such as its leadership. *Id.* ¶ 29.

127. *Ruling of the Audiencia Nacional, supra* note 83, at Section Five.

128. *See id.* Cherif Bassiouni suggests a similar meaning when, in his treatise on the subject, he suggests that the Convention's meaning of "national group" may be "a group pertaining to a nation" in its territorial sense, as opposed to the common international understanding of "a group of common national origin." 1 INTERNATIONAL CRIMINAL LAW 291 (Cherif Bassiouni ed., 1986).

citizens contrary to the regime, but also of citizens indifferent to the regime. The repression did not try to change the attitude of the group with respect to the new political system, but wanted to destroy the group, through detentions, tortures, disappearances, deaths and intimidation of the members of a clearly defined group—identifiable—for the repressors. It was not an action of chance, indiscriminate. According to the report of the National Commission on Truth and Reconciliation, created by the democratic Government of Chile in 1990, between the 11th of September of 1973 and the 10th of March of 1990, the number of deaths in the country caused by agents of the State went up to 1,068, and the number of disappeared was 957.[129]

D. The Crime of Terrorism Under Spanish Law

The Spanish Criminal Code defines terrorists as those who commit any of a series of violent offenses against persons or property while "acting in the service of, or collaborating with, armed bands, organizations or groups

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129. *Ruling of the Audiencia Nacional, supra* note 83, at Section Five. The reasoning of the *Audiencia* follows closely on the reasoning used by Judge Garzón in his prior rulings in the Argentine cases. In his trial court rulings on jurisdiction, Judge Garzón found, in the Argentine case, that groups were targeted on the basis of nationality and religion. As to nationality, those who did not fit the mold of the "Process of National Reorganization," the name given by the regime to its task, interfered with the redefinition of the nation itself. In religious terms, the definition of that group could be grounded in theistic, non-theistic, and atheistic convictions, and all were targeted as part of the non-acceptance of a perverse Christian ideology. *See The Criminal Procedures: A Short Summary, supra* note 83, at 12–13.

The ruling of the *Audiencia* with regard to the existence of the offense of genocide is, in my view, not as artfully or elegantly articulated in the Chilean appeal as it was in the various and consistent trial court rulings of Judge Garzón, all of which dealt with the Argentine reality. This could have been because his formulation of the argument was more articulate, or perhaps because the Argentine context lent itself more to that particular structure, which the *Audiencia* seemed to apply as a kind of template to the Chilean context. In her book on the Argentine Dirty War, Marguerite Feitlowitz seems to have captured, perhaps inadvertently, the genocidal intent of the military in their rhetoric of radical nationalism grounded in right-wing Christianity:

> The generals arrived with a plan, called the Process for National Reorganization, whose language lent grandeur to an otherwise desperate moment. This was a fight not just for Argentina but, the generals stressed, for "Western, Christian civilization." By meeting its "sacred responsibility" to forever rid the earth of "subversion," Argentina "would join the concert of nations." Argentina was the theater for "World War III," which had to be fought against those whose activities—and thoughts—were deemed "subversive." Intellectual, writer, journalist, trade unionist, psychologist, social worker became "categories of guilt."

FEITLOWITZ, *supra* note 24, at 7. Prof. Feitlowitz notes that one of the junta leaders believed that the repression should be "'directed against a minority we do not consider Argentine,'" *id.* at 24, and that Argentina was seen to be on a quest for recovery of what was called *el ser nacional*, which she translates as "the collective national essence, soul, or consciousness." *Id.* at 21. These dark and brooding definitions go a long way toward more firmly placing the genocidal intent toward elimination of a "national group," that being anyone not fitting the generals' definition of "Argentine."

whose objective is to subvert constitutional order or to gravely alter public peace."[130] General Pinochet is also charged with the closely related offense of "Illicit Association," which makes membership in an armed group, organization, or "terrorist group" punishable if the group has, as its objective, the commission of a crime or, after the group is formed, promotes the commission of a crime.[131]

As to the question of jurisdiction for terrorism, the *Audiencia Nacional's* ruling relied largely on its legal reasoning with regard to genocide, in that both offenses are found on the list of crimes for which universal jurisdiction exists under Article 23.4 of the Organic Law. Although the prosecutor argued that the "constitutional order" in the Code refers to the Spanish constitution, the judges quickly disposed of that argument by noting the existence of universal jurisdiction and concluded that the code refers to "the juridical or social order of the country where the crime of terrorism is committed, or which is directly affected as the target of the attack."[132]

As for the crime of Illicit Association, the *Audiencia* noted that the group organized by Pinochet was characterized by secrecy—"it was parallel to the institutional organization in which the defendants worked, but not to be confused with it"—and it shared the characteristics of all illegal armed bands: "structure (stable organization), ends (production of insecurity, disturbance or fear in a group or in the general population), and teleology (understood as a rejection of the rule of law by the dominant juridical order in the country at the time)."[133]

Here, some reference to prior jurisdictional rulings is helpful. In the trial court, Judge Garzón had rejected a similar attack on his jurisdiction in the Argentine case. His reasoning is also applicable to the Chilean case. The prosecutor had argued to Judge Garzón that the offenses could not have been committed by an "armed band, organization or group" because the Argentine state and its armed forces cannot be considered as such. Judge Garzón responded that the State of Argentina had not been charged with the crime of terrorism, but the highest military authorities of the State were charged with

130. C.P. arts. 571–72. The provisions on the law of terrorism are largely found in Articles 571–580 of the Criminal Code of Spain, but others are scattered about in the criminal law, and are not easily accessible except to the domestic practitioner. In addition to the above sections, General Pinochet is charged under Article 577, which punishes as terrorists even those who are not actual members of the terrorist group or organization but who share the criminal objectives listed in the text above and commit certain listed violent crimes. C.P. art. 577.

131. C.P. art. 515.1. Promoters, directors, leaders, and members of criminal organizations are subject to different levels of punishment depending on their level of responsibility. C.P. art. 516. The penalty is increased if the offender causes injury or if someone dies. C.P. art. 572.

132. *Ruling of the Audiencia Nacional, supra* note 83, at Section Six.

133. *Id.*

personal responsibility. Those authorities had used illicit groups within the armed forces to form paramilitary and terrorist organizations that undertook systematic terrorist actions under direct orders from the highest in command.[134]

To summarize, then, Augusto Pinochet would be guilty of terrorism if he "acts in the service of" or "collaborates with" a paramilitary organization acting outside of the law, when that organization seeks to either "subvert the constitutional order" of any of the countries in which it operates or "gravely alters the public peace" by committing any of a broad group of serious crimes of violence. He would be guilty of terrorism if he carried out crimes of violence with the criminal intent of a terrorist, even if he is not a member of any terrorist group. He would also be guilty of the crime of Illicit Association if he is proven to be a member of any terrorist organization, whatever his specific acts may or may not have been.[135]

E. The Crime of Torture Under Spanish Law

The Spanish Criminal Code defines torture, in Article 174, as follows:

> The public authority or functionary who, abusing his position, and with the objective of obtaining a confession or information from any person, or of punishing him for any offense which he has committed or is suspected of committing, commits torture when he submits that person to conditions or procedures which, because of their nature, duration or other circumstances, cause physical or mental suffering, the suppression or diminution of the person's faculties of understanding, discernment or decisionmaking, or in any manner attempt to compromise [*atentan contra*] his moral integrity.[136]

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134. *See Auto Judicial, en Madrid, a veinticinco de marzo de mil novecientos noventa y ocho* [*Judicial Order, in Madrid, the Twenty-Fifth of March of Nineteen Hundred Ninety Eight*], at section 13.3, *available on* <http://www.derechos.org/nizkor/arg/espana/compe.html> (visited 17 June 1999).

135. A treaty that may assist in the effort to extradite Mr. Pinochet from Great Britain to Spain is the European Convention on the Suppression of Terrorism, *opened for signature* 27 Jan. 1977, Europ. T.S. No. 90 (*entered into force* 4 Aug. 1978), to which both England and Spain are parties. That treaty requires extradition from one ratifying country to another, on request, for offenses such as kidnaping, "serious unlawful detention," or offenses involving the use of bombs that endanger persons. *Id.* art 1. The treaty requires that if the sending State does not extradite, it must, "without exception whatsoever and without undue delay," submit the case for prosecution in its own courts. *Id.* art 7.

136. C.P. art. 174. The crime of torture is condemned in the Spanish Constitution, C.E. art. 15.1, and is codified in the Criminal Code, C.P. arts. 173–177. Spain is a party to both the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1985) (*entered into force* 26 June 1987), *reprinted in* 23 I.L.M. 1027 (1984), *substantive changes noted in* 24 I.L.M. 535 (1985), ratified by Spain on 19 October 1987, and the European Convention for the Prevention of Torture and other Inhuman or Degrading Treatment or Punishment, *opened for signature* 26 Nov.

The problem with this offense is that it did not become part of Spanish law until 1978, and the Torture Convention was not ratified by Spain until October 1987.[137] Thus, much of the torture committed by the Pinochet regime before the earlier of the two dates would be outside of the court's jurisdiction.

The *Audiencia Nacional's* appellate decision did not reach this issue. It simply held, in the shortest of its analytical sections, that the offense is clearly within the court's jurisdiction by virtue of Article 23.4, subsection (g) of the Organic Law, which gives jurisdiction to offenses based in treaties to which Spain is a party.[138] Moreover, reasoned the *Audiencia*, the crime of torture is subsumed in the crime of genocide, for which there is clear jurisdiction. In any event, the appellate ruling found the issue of torture to be "juridically irrelevant" to the appeal, in that the other crimes provided jurisdiction.[139]

F. Related Matters: Customary Law Claims and Other Issues Raised in the Jurisdictional Context

In addition to the arguments about the application of domestic amnesties to the proceedings, discussed above,[140] the public prosecutor also asserted that the cases of certain individuals already were adjudicated by the Chilean courts and were therefore barred from prosecution in Spain under doctrines of res judicata or lis pendens. The *Audiencia* gave this argument short shrift, noting that the Chilean courts had dismissed each of the matters as having been covered by the amnesty of 1978. Having rejected the application of the amnesty, the court could not accept the arguments as to res judicata.[141]

Finally, the *Audiencia* also dealt very briefly with an argument by the prosecutor that Article 2, subsection 1 of the Charter of the United Nations, which provides that the United Nations is "based on the principle of the sovereign equality of all its Members," bars interference by Spain in Chilean

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1987, Europ. T.S. No. 126 (*entered into force* 1 Feb. 1989), ratified by Spain on 28 April 1989. Interestingly, the Committee Against Torture, in responding to Spain's third periodic report to the committee, found that the Spanish definition of torture "not only satisfies the definition of Article 1 of the Convention but expands on it in important aspects which provide citizens with stronger protection against those crimes." *Observaciones Finales del Comite contra la Tortura: España* [*Final Observations of the Committee against Torture: Spain*], U.N. GAOR, Comm. Against Torture, U.N. Doc. CAT/C/SPA (1997).

137. *Id.*
138. *Ruling of the Audiencia Nacional, supra* note 83, at Section Seven.
139. *Id.*
140. *See supra* Part IV.B.
141. *Ruling of the Audiencia Nacional, supra* note 83, at Section Eight.

affairs.[142] The court found that this provision had no legal force as a limitation on the exercise of the domestic criminal jurisdiction covered in Article 23 of the Organic Law and that the principle of universal jurisdiction enunciated in both domestic and international law gave Spain the power to act in the fashion in which it did.[143]

One very noteworthy aspect of both the trial and appellate court rulings is the absence of any reliance upon, or invocation of, customary international law. In this regard, lack of reliance by the judges on another provision of the Spanish Constitution is surprising. In Article 10.2, the Constitution states: "The laws relating to fundamental rights and to the liberties which the Constitution recognizes, shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements ratified by Spain on the same subjects."[144] This provision has led to an interpretation by the Spanish courts that decisions of the European Court of Human Rights, for example, have direct legal effect in Spain.[145] Despite the deep penetration of international human rights law into the domestic legal order through Articles 10 and 96 of their Constitution, however, the Spanish courts were reluctant to apply any concept of customary law. Judge Garzón's Amended Arrest Order of October 18 does make mention of at least two customary law concepts embodied in international instruments other than treaties applicable to the parties here—crimes against humanity and forced disappearances—but there is only a listing of the instruments, with no attempt to provide judicial reasoning to their application. Although the documents published by the parties,[146] by Amnesty International,[147] and by others[148] have consistently provided a structural and analytical framework for these arguments, they have yet to appear in the reasoning of the courts.

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142. U.N. CHARTER art. 2(1), *signed* 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (*entered into force* 24 Oct. 1945), *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 16 (Burns H. Weston et al. eds., 2d ed. 1990).
143. *Ruling of the Audiencia Nacional, supra* note 83, at Section Nine.
144. C.E. art. 10.2.
145. *See* LEYES POLITICAS DEL ESTADO [POLITICAL LAWS OF THE STATE] 37 n.15 (1993).
146. *See, e.g., Foundation for the Amplification of the Complaint, supra* note 81; Garcés, *supra* note 11. It should be noted that although these documents make extensive use of the term "crimes against humanity," neither attempts to argue that, as part of customary international law incorporated into domestic law, such crimes might be charged in Spain as crimes *per se*.
147. *See, e.g., The Case of General Pinochet: Universal Jurisdiction and the Absence of Immunity for Crimes Against Humanity*, 4 November 1998, *available on* <http://www.amnesty.org.uk/news/press/releases/4_november_1998-0.shtml> (visited 14 Nov. 1998).
148. In the International Human Rights Law Clinic's initial lengthy memo on issues of international criminal law, human rights law, and humanitarian law, the use of customary international law was advanced strongly, particularly as to crimes against humanity. *See* Memorandum from Prof. Richard J. Wilson and Students in the International Human Rights Law Clinic to Gregorio Dionis, 7 Mar. 1997 (on file with author).

Issues of humanitarian law have not been raised by the private prosecutors in either case because of strong feeling, common to the Spanish private prosecutors and the NGO communities in Chile and Argentina, that there was no armed conflict during the relevant time period. To argue that there was such conflict would play directly into the rhetoric of the military forces of the era, who originated the term "Dirty War" for their own rhetorical purposes. There was no war, goes the argument; there was a one-sided use of vast and overwhelming military force to intimidate, punish, and kill perceived enemies of the State.

V. THE EVIDENCE UNDERLYING THE WARRANT FOR PINOCHET'S ARREST

The catalog of evidence against the General is not all contained in the arrest warrants and charges filed by Judge Garzón, nor is the whole case cataloged in the extradition request. The standard against which the evidence was measured in the courts of Spain, moreover, was only that which would permit it to meet the most basic requirements of jurisdiction in the Spanish courts, not that which is sufficient to justify an arrest or extradition. The nature and depth of the evidence, as is set forth in this section, however, leaves absolutely no doubt that sufficient cause exists to arrest and extradite the General.

A. The Rettig Commission Report

Judge Garzón made reference to the "Rettig Report" in the opening paragraph of his arrest warrant of 18 October 1998, which he asserts to have established that "the structures of Power . . . had as their firm goal the physical elimination, the disappearance, kidnaping, before which there was a generalized practice of torture of thousands of persons."[149] The Rettig Report is a firm foundation on which to build the evidentiary structure. As mentioned above, it was the official government investigation into wrongdoing by the Pinochet regime and is supplemented by the work of a second national commission called the Corporation for Reparation and Reconciliation. The two bodies operated between the years of 1990, immediately following the return to civilian rule, and 1996. They published official statistics documenting 3197 cases of victims of human rights violations. At the close

149. *Second Arrest Order, supra* note 2, at Facts, Section One. The Rettig Report is discussed *supra* text accompanying note 91.

of their work, more than a thousand of the disappeared had yet to be accounted for.

The Rettig Report was the first public document to more fully document the extent to which the DINA and its successor, the CNI, had engaged in secret campaigns of terror. The Report notes that the DINA was officially created by Decree Law No. 521 in June 1974.[150] There were, however, three "secret" articles of the decree law that were not made public. One of those articles notes that the DINA was to be the continuation of a commission by the same name organized in November 1973, only two months after Pinochet's junta took power by force. Some of its first repressive actions, then, took place before it was formally clothed in some vestige of legality by the junta.[151] Manuel Contreras was the first and only military officer to head the DINA. He directed the construction of a secret operation that grew from 400–500 members at its outset to "thousands of people in different capacities and with different degrees of affiliation."[152] While there was a statutory framework for its operations, the Rettig Report concluded that "[t]he legal framework did not hold the DINA accountable to the law; indeed, in some respects it facilitated the action of a body that in practice was above the law."[153] The Report concluded that the DINA was an entity with "practically unlimited power."[154] This unlimited power was, according to the Report, due to the following:

> In practice the functioning of this agency was secret and above the law, as has been noted. Its internal organization, composition, resources, personnel, and activity were unknown to the public and were not held accountable to the law. In fact, the DINA was shielded from any control: certainly from the judiciary, but also from other sections of the executive branch, from high level officials of the armed forces, and even from the junta. Although the DINA was formally under the authority of the junta, *in practice it reported only to the president of the junta and later the president of the republic.*[155]

The DINA also had foreign operations. The Rettig Report concluded that it had "relationships of coordination with other intelligence services outside the country as well as with terrorist groups. . . ."[156] From as early as April or May 1974, the DINA was creating and implementing a structure of foreign operations.[157] The Report concludes that the murders of Orlando

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150. THE RETTIG REPORT, *supra* note 91, at 472.
151. *See id.*
152. *Id.* at 472, 474.
153. *Id.* at 472.
154. *Id.*
155. *Id.* at 472–73 (emphasis added). The Rettig Report was not permitted to use names in its text. The president of the junta and of the republic, of course, was Augusto Pinochet.
156. *Id.* at 473.
157. *See id.* at 476.

Letelier and Ronni Moffitt in Washington, D.C. were part of the international cooperation enjoyed by the DINA with "foreign extremist political groups," such as, in that case, members of right-wing Cuban nationalist groups.[158] In one of the few references to Operation Condor in the Rettig Report, it concludes the following with regard to the DINA's foreign operations:

> In order to engage in the same kind of political repression in other countries, the DINA took the first steps toward coordinating intelligence services in the Southern Cone, including besides Chile the security services or similar groups in Argentina, Uruguay, Paraguay and Brazil. The group that emerged, which was apparently coordinated by the DINA, came to be called "Condor," although some think that name referred not to the group or community itself but rather to a series of coordinated operations they undertook. The DINA also maintained bilateral relations with various intelligence services, including the CIA.[159]

In 1977, the DINA was dissolved and the CNI, or National Information Center, was created to replace it. While different in name and some functions, the CNI was, in every sense, a more sophisticated and selective terrorist organization set up under the same structure of secret laws and agreements operating within an ostensibly legal State entity. Again, the CNI was created with a formal law—Decree Law No. 1878—but its daily work was governed by "an overall secret set of bylaws."[160] Most of the political repression and counterinsurgency of the period from August 1977 through its dissolution in February 1990, though periodically more or less intense than the first years after the coup, was performed by the CNI.[161] The Report concludes that, "[l]ike the DINA, the CNI systematically committed unlawful actions in carrying out its assigned functions. . . ."[162] The operations of the CNI "required a complex structure," because its mandate shifted to the gathering of intelligence and counterintelligence analyzing the behavior of political and social organizations, the Catholic church, and other religious movements.[163] Its payroll included both known employees in the military and the Interior Ministry, as well as a large-scale apparatus of infiltrators, collaborators, and informers.[164] In summarizing the functions of the CNI, the Rettig Report states:

> The CNI's other significant function, one that touches the purposes of this report more directly, was its specifically operational function, namely to engage in

158. *Id.* at 478.
159. *Id.* at 477–78.
160. 1 REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 88 (Phillip E. Berryman trans., 1993).
161. *See* THE RETTIG REPORT, *supra* note 91, at 635.
162. *Id.* at 637.
163. *Id.* at 638–39.
164. *See id.* at 638, 640.

> direct action against left organizations which had taken the route of armed struggle against the regime. In response it engaged in infiltration, surveillance, arrest, torture, and armed repression. . . . [T]hese means sometimes went to the point of killing people. . . .
>
> In all of these activities [the CNI] had utter assurance of its impunity. Its agents operated with false names, and did not give their identity even to the courts. Nor in practice were they compelled to comply with court orders issued against them. In practice they operated without being held accountable to the law; they enjoyed unrestricted powers of movement and resources.[165]

Thus, during the entire period of his leadership from 1973 to 1990, first as president of the military junta and later as president of the republic, Augusto Pinochet Ugarte sat at the pinnacle of an immense security operation working clandestinely through the DINA and the CNI, although the extent of his knowledge, command, and control over these operations was unverified at the time of the publication of the Rettig Report.

B. Judge Garzón and the Terror Archive: Operation Condor and Its Massive Documentation

In the second paragraph of Facts supporting his arrest order of 18 October 1998, Judge Garzón states: "It is known that there is a coordination of international entities which will be given the name 'Operation Condor,' in which different countries will play a role, among them Chile and Argentina, and that they have the objective of coordinating repressive action between themselves."[166] In criminal law terms, Operation Condor is an illegal international organization, intentionally designed to instill terror, that was headquartered in Chile.

As mentioned above, Judge Garzón had taken an interest in the massive Terror Files in Asuncion, Paraguay, well before the arrest of Augusto Pinochet. The files were first discovered in 1992, when Martin Almeda, a former political opponent of the Stroessner military regime in Paraguay, used a new provision in the post-Stroessner Constitution to compel access to public records regarding his arrest and prolonged detention. He had been informed of the giant collection of documents by the wife of a disgruntled colleague of General Stroessner whom he had met in Paris. When he and a judge who had issued the writ went to execute it, they found a collection of documents that took up entire rooms in two locations. The judge ordered the documents removed immediately to the Palace of Justice, where they

165. *Id.* at 639.
166. *Second Arrest Order, supra* note 2, at Facts, Section 1.

are archived today.[167] The Terror Archive is considered to be the single best source of information not only on Paraguayan internal security, where it has led to convictions of high-ranking officials from the Stroessner regime, but in the international arena, where the files appear to be a primary source for information on Operation Condor itself.[168] Additional information will come to light when the 700,000 documents, and more, of the Archive, covering thirty-five years from 1954 to 1989, are fully cataloged.[169]

Information on the origins of Operation Condor comes from documents in the Terror Archive itself. In 1975, DINA chief Manuel Contreras wrote a letter to Paraguayan General Benito Guanes Serrano, head of that country's security police. In it, Contreras proposed a "first working group on national intelligence" to be held in Santiago, Chile, where he proposed to headquarter "centralized information about prior activity of people, organizations and other activities connected directly or indirectly with subversion."[170] At about the same time as Contreras was convening his group, a memorandum appeared from the US Department of Defense's Defense Attache in Chile, who wrote in an Intelligence Report on the expansion of DINA operations and facilities that Manuel Contreras "has reported extensively to, and received orders only from President Pinochet."[171] This seems to be borne out by another memo that was discovered in the course of the Italian trials of the Chilean military. In that documentation is a memo from Col. Manuel Contreras to General Pinochet, dated 16 September 1975, in which he asked for $600,000 in additional funding for the DINA, based on the

167. *See* Keith M. Slack, *Operation Condor and Human Rights: A Report from Paraguay's Archive of Terror*, 18 HUM. RTS. Q. 492, 493–94 (1996).

168. Fears that the archive might be destroyed, that documents might be stolen, or even that the US Agency for International Development (AID) might take or alter documents, do not seem to be unfounded. Despite initial protests from the Paraguayan government, AID has begun an evaluation process of the documents, and has now sealed off certain military themes from journalists as "only a police matter." *See* Calloni, *supra* note 78, at 1, 10.

169. *See Datos cuantitativos de los archivos: Los Archivos del Horror de Paraguay* [*Quantitative Data from the Archives: The Horror Archives of Paraguay*], 8 Aug. 1998, *available on* <http://www.derechos.org/nizkor/doc/condor/anexo.html> (visited 3 Aug. 1999).

170. Calloni, *supra* note 78, at 7. Another writer on the Archive identifies a letter from Contreras to a Paraguayan police official, Francisco Britez Borges, inviting him to a conference in Chile that was to be kept strictly secret, and that was intended to "be the basis for an excellent coordination and improved action on behalf of the National Security of our respective countries." Slack, *supra* note 167, at 501 (footnote omitted). *See also* Esteban Cuya, *La "Operacion Condor": El Terrorismo de Estado de Alcance Transnacional* [*Operation Condor: State Terrorism of International Dimensions*], KOAĞA ROÑĚĚTĂ, Dec. 1993, at 6–7, *available on* <http://www.derechos.org/koaga/vii/2/cuya.html> (visited 17 June 1999).

171. The document in which this information appears is available as photographed text on the website of the National Security Archive, a library research center in Washington, D.C. that specializes in declassification of documents. The website for this document is <http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB8/ch25-03.htm> (visited 17 June 1999).

"indispensable" need to fund "the neutralization of the [Chilean] government junta's principal adversaries abroad, especially in Mexico, Argentina, Costa Rica, the United States, and Italy."[172]

The United States also appears to have been part of these early discussions. The CIA's then director-designate, Vernon Walters, visited Paraguay in early 1976 and met there with the Commander in Chief of the Army, Conrado Pappalardo. Pappalardo met with the US Ambassador to Paraguay, George Landau, a week later to report that Walters had approved a frustrated attempt to get false passports for two Chilean DINA agents. Pappalardo said that he was trying to get the passports as a favor for Augusto Pinochet, though he was acting on orders from Stroessner. The Chileans turned out to be Armando Fernandez Larios and Michael Townley, both of whom were deeply implicated later in the murder of Orlando Letelier in Washington.[173]

One of the most damning single documents, however, is not from the Archive, but from the US Embassy in Buenos Aires, where, on 28 September 1976, just two weeks after the Letelier car-bombing, FBI agent Robert Sherrer wrote a cable to FBI general headquarters that said the following:

> "Operation Condor" is the code name for the collection, exchange and storage of intelligence data concerning socalled "Leftists," Communists and Marxists, which was recently established between cooperating intelligence services in South America in order to eliminate Marxist terrorist activities in the area. In addition, "Operation Condor" provides for joint operations against terrorist agents in member countries of "Operation Condor." Chile is the center for "Operation Condor" and in addition to Chile its members include Argentina, Bolivia, Paraguay, and Uruguay. Brazil also has tentatively agreed to supply intelligence input for "Operation Condor." Members of "Operation Condor" showing the most enthusiasm to date have been Argentina, Uruguay and Chile. The latter three countries have engaged in joint operations, primarily in Argentina, against the terrorist target. . . .
>
> A third and most secret phase of "Operation Condor" involves the formation of special teams from member countries who are to travel anywhere in the world to non-member countries to carry out sanctions up to assassination. . . .[174]

As will be noted, the quoted memorandum suggests a number of answers in the Spanish litigation: Chile is the headquarters for the Condor

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172. Scott Armstrong & Saul Landau, *Pinochet: Is a Terrorist Hiding in Chile's Senate?*, L.A. TIMES, 17 May 1998, at M2.

173. Calloni, *supra* note 78, at 8. In her article on Operation Condor, Stella Calloni suggests that the CIA did more than facilitate meetings or escapes. The Technical Services division of the CIA provided electric-shock torture equipment to the Brazilians and the Uruguayans and offered information as to how much charge the human body could sustain. At the Office of Public Security (OPS) installation in Texas, CIA agents trained Latin American security agents in the manufacture of bombs. *See id.* at 4.

174. From the website of the National Security Archive, <http://www.seas.gwu.edu/nsarchive/NSAEBB/NSAEBB8/ch23-01.htm> (visited 17 June 1999).

operation; Condor did operate in the international, as well as the local context; Condor explicitly imposed summary execution as its most extreme sanction; and the United States had clear and well-defined knowledge of what the nature and scope of Condor was by this time.

The Chilean DINA and Operation Condor are implicated in several assassinations abroad of prominent officials exiled from Chile and seen as opponents to the Pinochet regime. All of these murders, and more, are alleged in the Spanish pleadings. The first was Carlos Prats, Minister of Defense for Salvador Allende. He and his wife were killed when their car exploded in Buenos Aries on 30 September 1974. Some time later, in a letter made public in Chile, Michael Townley, a US citizen living in Chile and working as a foreign operative of the DINA, said that, as to his role in the murder of Prats, he was acting under orders from Manuel Contreras.[175] The second was Bernardo Leighton, a former vice-president under Allende living in Rome, who, with his wife, was shot in the head while they walked home on a night in September 1975. He survived to name his assailants. The third was Orlando Letelier, ex-Minister of Defense and Foreign Secretary, whose assassination has already been recounted above. Again, at a trial following his extradition from Chile, Michael Townley, who acted as the trigger man in the Letelier bombing, named Manuel Contreras as the person who had given him the assassination order for Letelier.[176]

Finally, in their amended complaint for the arrest of General Pinochet, the private prosecutors make reference to the testimony of Lawrence Barcella, formerly the federal prosecutor for the District of Columbia, who testified in Spain before Judge Garzón as to his own knowledge of Operation Condor. Barcella testified that the DINA committed or conspired to commit, as an organization, terrorist attempts in Spain, France, Italy, Portugal, the United States, Mexico, Costa Rica, Argentina, and Chile, among other countries. He testified, further, that Augusto Pinochet had knowledge of and participated in these events. Operation Condor, he testified, was an operation structured and directed by Augusto Pinochet and Manuel Contreras, with lethal extraterritorial effects. Barcella located the operational headquarters for Operation Condor and the DINA, inside of Chile.[177]

Although the military government of Augusto Pinochet lost power in 1989, and Chile's first democratic government in nearly twenty years was

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175. *Chile: Arrest of Suspected Assassin in 22-year-old Murder Case Brings New Demands for Gen. Augusto Pinochet to Resign*, NotiSur-Latin American Political Affairs, 26 Jan. 1996, *available in* Westlaw, NSLAMPA database.
176. *See* Armstrong & Landau, *supra* note 172.
177. *See Foundation for the Amplification of the Complaint, supra* note 81, at Facts, Section 12.

elected in 1990, there are indications that Operation Condor continued to operate after that time. In 1993, for example, several key witnesses and four defendants fled Chile on the eve of trials. Among the pending trials were those of Manuel Contreras and Pedro Espinoza, for their responsibility in the killing of Orlando Letelier and Ronni Moffitt. Of those who fled, the most notorious was Eugenio Berrios, a chemist who worked for the DINA and developed methods for packaging deadly Sarin gas in spray cans.[178] Sarin, highly lethal but almost undetectable in small quantities, was first developed by the Nazis in World War II and was later used in the Tokyo subways by a radical Japanese religious cult, killing scores. The spray-can method developed by Berrios was said to be used to kill two opposition politicians and was to be used to kill Letelier, a plan that was later aborted.[179] Berrios and the others who fled from Chile were seen in several of the countries participating in Condor, causing one official to call the subterfuge used in the Southern Cone an "*Odessa Chilena*," a reference to the Odessa Plan by which Nazis were smuggled through Europe and on to Latin America following World War II.[180] Another notorious DINA agent who was still awaiting justice in 1996 was Enrique Arancibia Clavel, who was arrested in Argentina in January of that year. Arancibia was said to have directed DINA operations in Argentina in the 1970s and was implicated in the deaths of both Carlos Prats and Orlando Letelier.[181]

The early and sketchy findings of the Rettig Report were being clarified. The combination of documents from the Terror Archive, the other more recent trials and disclosures, the involvement of the DINA, the structure of Operation Condor, and the responsibility of Augusto Pinochet were coming more sharply into focus.

C. The Ninety-Four Named Victims in the Garzón Arrest Warrant and the Thousands Named in the Extradition Request

In the arrest warrant issued by Judge Garzón, he named 94 individuals about whom he had received evidence of disappearance or death as a direct result of the DINA, Operation Condor, or both.[182] Later, on 3 November

178. *See* Nathaniel C. Cash, *Spy Case Fuels Uruguay-Chile Crisis: Network Also Heightens Tension Between Authorities*, HOUSTON CHRONICLE, 25 July 1993, at 24.
179. *See id.*
180. *See South American Suspects Disappearing Before Trials*, ST. LOUIS POST-DISPATCH, 1 Aug. 1993, at 7B; Katherine Ellison, *South American State Terrorists Protecting Each Other*, LAS VEGAS REVIEW-JOURNAL, 17 July 1993, at 14B.
181. Gustavo Gonzalez, *Chile: Army Denies Involvement in Prats Murder*, INTER PRESS SERVICE, 24 Jan. 1996, *available in* LEXIS, World Library, INPRES file.
182. *Second Arrest Order*, *supra* note 2.

1998, Garzón issued a massive request for extradition, containing more than 200 pages, in which more than a thousand individuals were named as victims.[183] The acts in question all took place during the time period between 1976 and 1983 (the period that he was previously investigating, covering the years of the military governments in Argentina). Moreover, all of the alleged wrongdoing was committed against high-ranking, influential, or intellectual leaders of the Chilean national community. This, it seems, was part of a foundation for an assertion that genocide was committed through the "partial destruction" of a "national" group, which would allow for conviction under either Spanish domestic law or international law as expressed in the Genocide Convention of 1948. In each case, finally, the individual named was taken secretly from one country to another, or arrested in one country and found dead in another, thereby proving the international cooperation that could only have been carried out by an entity as sophisticated as Operation Condor. The story of Edgardo Espinoza is typical of the 94 listed in the warrant:

> Edgardo Enrique Espinoza, who is referred to in the prior arrest warrant, a distinguished and militant member of the MIR [an outlawed Chilean political party] and brother of the deceased General Secretary of that Party, is kidnapped on April 10, 1976 in Buenos Aries (Argentina) when he went out that afternoon for a meeting of the Revolutionary Leadership Council. He is taken, successively, to the Argentine concentration camps El Olimpo, Campo de Mayo, and the Naval Mechanic's School (ESMA), near that capital. According to the Rettig Commission, this person, who was [internationally] protected by the UNHCR [UN High Commissioner for Refugees], was taken from the Argentine detention centers to Villa Grimaldi en Santiago, after which there was no further news of his whereabouts.[184]

The judge carefully and painstakingly built a dossier of page after page of such kidnapings and disappearances, often accompanied by torture or prolonged *incommunicado* detention.

D. Ernesto Sabato and "The List of the 119"

In their complaint for the issuance of an arrest warrant, the private prosecutors first made mention of a well-known group of the disappeared known as "the list of the 119." The reason the "list" became so notorious

183. *Auto Pidiendo Extradicion de Pinochet* [*Order Seeking Extradition of Pinochet*], Madrid, 3 Nov. 1998, *available on* <http://www.derechos.net/doc/auto31198/> (visited 17 June 1999).

184. *Second Arrest Order, supra* note 2, at Facts, Section 3.1.

was the fact that all of the individuals involved were taken into custody in Chile, but papers for each were later recovered, after their disappearances, from security forces in Argentina, again demonstrating strong proof of a sophisticated, coordinated operation involving the two countries' clandestine security forces. In summarizing the evidence on the list, Judge Garzón made reference to the Rettig Report, to a comprehensive report published by CODEPU (a Chilean NGO), and to the testimony of the well-known author, Ernesto Sabato, who chaired CONADEP (the Argentine truth commission).[185]

E. Luz Arce Sandoval, Involuntary Collaborator with the DINA

The next relevant section of the arrest request came from direct testimony given to Judge Garzón by Luz Arce Sandoval, a Chilean who was taken into custody and tortured by DINA operatives, after which she ultimately agreed, under duress, to collaborate with them.[186] When she was finally released, she turned her extensive knowledge against her persecutors. Her testimony came from in-depth, personal proximity to the inner workings of the DINA. Moreover, she worked in the program even after it was converted into the CNI and noted that the methods of "kidnaping, torture and assassination" were maintained continuously throughout the relevant time period.[187] She further testified in detail about the foreign operations of the DINA, naming relevant personnel and reiterating the basic structures of Operation Condor.

She described the degrading treatment accorded to one prisoner, Jorge Isaac Fuentes Alarcon, who was taken into custody in Paraguay and then taken to an "extermination camp" in Chile, where he was forced to live in a doghouse, and was called "el pichicho," a term roughly equivalent to "junkyard dog."[188] She retold, from personal experience, the arrest and later death of Edgardo Henriquez Espinosa,[189] related above. She provided detailed diagrams of DINA buildings, as well as schematics of the command structures of the DINA during virtually its entire existence.[190] Her testimony is credible by virtue of its exhaustive detail and specificity.

185. *See Foundation for the Amplification of the Complaint, supra* note 81, at Facts, Section 1.
186. *Id.* at Facts, Section 3.
187. *Id.*
188. *Id.* at Facts, Section 3(e)(1).
189. *Id.* at Facts, Section 3(e)(2).
190. *Id.* at Facts, Section 4.

F. At the Dictator's Doorstep: The Testimony of Manuel Contreras

The last section of the Arrest Warrant is by far the most damning. In it, Judge Garzón reiterated the testimony of Manuel Contreras, who ran the DINA throughout its existence and now is serving a seven-year sentence for his role in the murder of Orlando Letelier and Ronni Moffitt.[191] In his capacity as DINA chief, Contreras reported directly to Augusto Pinochet. The last section of the Arrest Warrant summarizes testimony given by Contreras in the Supreme Court of Chile on 23 December 1997, at a hearing in which he sought his release from prison. In return for his release, he was willing to tell everything about his work in the DINA and his relationship to Pinochet.

Contreras began by testifying to the creation of the DINA and to his nomination by Augusto Pinochet as "Delegate" to the DINA;[192] that is, seemingly, as its director. All of these actions were done by "verbal orders," orders that were not part of the normal command structure and, therefore, presumptively illegal. Contreras said as much when he testified that "Mr. President of the Republic [Augusto Pinochet] . . . never designated me as Director by Supreme Decree as is established in D.L. ["Decree Law," a name given to decisions made without any legislative action, at first by the ruling junta and later by presidential edict alone] 521. I only permanently maintained my position as delegate of the President."[193]

Contreras told of a meeting in Spain between Pinochet and Stefano Delle Chiae in December 1975. Delle Chiae was the Italian terrorist known as ALFA, who had participated, the month before, in the attempted assassination of Bernardo Leighton and his wife in Rome. Delle Chiae was also implicated in other significant terrorist activity in Italy.[194] The most damaging statements, however, are those regarding the chain of command within the DINA, given its history of torture, murder, and terror documented above. Contreras gave these statements with regard to his actions under orders:

> I always acted . . . in conformity with the orders given to me by Mr. President. Only he, as Superior Authority of the DINA, could design and order the missions that were carried out, and I always, in my capacity as Delegate of the President and Executive Director of the DINA, strictly carried out that which I was ordered to do. . . .
>
> [T]he President knew exactly what the DINA and its Delegate and Executive Director did and didn't do. He exercised complete Command in the Military Institution—that doesn't mean it's independent—because all the

191. *Id.* at Facts, Section 11.
192. *Id.* at Facts, Section 11, ¶ 59.
193. *Id.* at Facts, Section 11, ¶ 60.
194. *Id.* at Facts, Section 11, ¶ 148.

> Commanders have a Command Superior to whom they report, to whom they should give permanent and complete account of the completion of their missions and of the orders they receive. In my particular case that was the President of the Republic and it's because of that I say that I didn't give orders alone, and whatever mission that had to be completed had to have come, as it always came, from the President of the Republic.[195]

Contreras, then, was giving a description of the legal front put on by the DINA, with an official Executive Director for public show, while the important work of the DINA was done by a clandestine operation of which he was titular head, as the Delegate of Augusto Pinochet, who, while acting in his role as President of the Republic, controlled all actual clandestine work done by the operation.

VI. CONCLUSION

In its ruling of 24 March 1999, the British Law Lords definitively rejected General Pinochet's claim of immunity as a former head-of-state.[196] Nonetheless, in what can only be described as an attempt at political compromise rather than careful legal reasoning, the Lords limited the scope of the extradition inquiry in England to two offenses, torture and conspiracy to torture.[197] Based on the dates of England's ratification of the Torture Convention and its subsequent adoption as domestic legislation, the Lords also held that the extradition proceedings could consider only torture or conspiracy after 8 December 1988, a date that falls less than a year before the end of the Pinochet dictatorship.[198] The key analysis, however, that of Lord Hope of Craighead, suggests that a conspiracy begun before 1988 might be susceptible to inclusion among the charges. His analysis, on which a majority of the Lords rely, states, in relevant part:

> It appears that the evidence has revealed only these three instances after 29 September 1988 when acts of official torture were perpetrated in pursuance of this policy [of systematic repression through use of torture by the CNI and other entities acting on orders from General Pinochet]. Even so, this does not affect the true nature and quality of those acts. The significance of [the three remaining instances of torture] may be said to lie in the fact that *they show that a policy of systematic torture was being pursued when those acts were perpetrated.*[199]

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195. *Id.* at Facts, Section 11, ¶¶ 260–61.
196. *Pinochet (No. 3), supra* note 2, at 98.
197. *Id.*
198. *Id.* at 115, 153, 170.
199. *Id.* at 145 (emphasis added).

Almost immediately after the Lords' ruling, representatives of the British Crown Prosecution Service, which represents the Crown in support of the General's extradition to Spain, made a request to the Spanish *Audiencia* to provide whatever additional evidence might exist of torture or conspiracy to torture after the relevant date.[200] Judge Garzón responded by submitting 73 new cases of torture and other crimes during the relevant time period.[201]

Never reticent with regard to aggressive use of the law, Judge Garzón used concepts of conspiracy and broad definitions of torture to press the case for expansion of the charges to be considered by the Spanish courts. In addition to the 73 concrete cases added as supplemental crimes committed directly within the relevant time period, he also argued that the 1,198 proven cases of forced disappearance during the Pinochet regime could all be considered within the ambit of torture and conspiracy to torture, on two separate grounds: 1) forced disappearance necessarily includes the practice of torture because, among other reasons, the UN Declaration on Forced Disappearances of 1992 explicitly makes reference to the Torture Conven-

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200. On the day after the Lords' decision, and pursuant to the request of the Crown Prosecutor Service (CPS) for additional evidence, Judge Garzón provided evidence of an additional 33 cases of torture occurring between 29 September 1988 and 11 March 1990. *Auto* [*Order*], Madrid, 26 Mar. 1999, received by electronic mail from Juan Garcés on 26 March 1999 (on file with author) [hereinafter *Order of 33 Cases*]. The use of the earlier date of 29 September 1988 seems to arise from the context of the CPS request, which included both the September and December dates, probably due to a lack of clarity in the Lords' decision. *See also Auto* [*Order*], Madrid, 26 Mar. 1999, received by electronic mail from Juan Garcés on 29 March 1999 (in which Judge Garzón ordered that all relevant evidence be provided to the CPS, pursuant to their request) (on file with the author).

The CPS request was grounded in Article 13 of the European Convention on Extradition of 1957, which requires England to request "the necessary supplementary information" "[i]f the information communicated by the requesting party [here, Spain] is found to be insufficient to allow the requested Party [here, England] to make a decision" regarding extradition. European Convention on Extradition, *opened for signature* 13 Dec. 1957, art. 13, Europ. T.S. No. 24 (*entered into force* 18 Apr. 1960), *reprinted in* HUMAN RIGHTS AND THE ADMINISTRATION OF JUSTICE: INTERNATIONAL INSTRUMENTS 621, 626 (Christopher Gane & Mark Mackarel eds., 1997).

201. *See Order of 33 Cases, supra* note 200; *Auto* [*Order*], Madrid, 26 Mar. 1999 (nine new cases of torture between 27 October 1988 and 28 August 1989); *Auto* [*Order*], Madrid, 5 Apr. 1999 (eleven new cases of torture, all in 1989); *Auto* [*Order*], Madrid, 27 Apr. 1999 (twelve new cases after 27 September 1988); *Auto* [*Order*], Madrid, 30 Apr. 1999 (summarizing the prior orders and adding an additional eight cases) [hereinafter *Order of 30 Apr. 1999*], all received by electronic mail from Juan Garcés, respectively, on 26 March 1999, 29 March 1999, 14 April 1999, 29 April 1999, and 4 June 1999 (all on file with author). Notably, the Chief Prosecutor of the *Audiencia* finally formulated a challenge to Judge Garzón's actions when the Judge filed his *Order of 27 Apr. 1999*. In a preliminary and later final order, Judge Garzón roundly rejected the Prosecutor's challenge as untimely and without merit, in that the court was responding to a specific and legally appropriate request from the CPS. *See Auto* [*Order*], Madrid, 4 May 1999; *Auto* [*Order*], Madrid, 17 May 1999, received by electronic mail from Juan Garcés, on 6 May 1999 and 17 May 1999, respectively.

tion in its preamble; and 2) "situations" (rather than "acts") of forced disappearance constitute ongoing crimes—what the European Court of Human Rights calls "permanent violations"—committed by several criminal enterprises in which General Pinochet was unquestionably a participant, if not the actual leader.[202] These criminal enterprises include the DINA, the CNI, and Operation Condor. At the latest of the hearings on extradition in England, the Crown Prosecutors served the General's lawyers with 36 new individual charges of torture.[203]

As of this writing, the Bow Street Magistrate's Court in London has ordered a continuance until 27 September 1999 for commencement of the extradition proceedings against General Pinochet. The Magistrate suggested that a hearing of five days would be sufficient, at that time, to address the complex legal issues in the cases.[204] Thus, the legal issues remaining in the extradition of Augusto Pinochet are far from over. If Pinochet is extradited, he will face a long trial, given the accumulated evidence against him and the ongoing investigation. That trial might not be for months or even years, during which time he will undoubtedly remain in custody, as is likely to be the case if he is moved to Spain.

And even if the General eventually flies home to the relative safety of Chile, his arrest and detention for what will be substantially longer than a year in England will give pause both to his supporters at home and to all other dictators, present and former, who assume they can operate with impunity. The investigations of other military leaders will proceed, as a principled judge in Spain, now joined by colleagues from around the world emboldened by his courage, continues to investigate and challenge the arrogance of dictatorial power, using the tools that modern international criminal jurisdiction, law, and procedure has provided.

The voices that so shrilly and stridently defend the ruler's uninhibited prerogative have given way to the persistent shouts and murmurs of pain of the thousands upon thousands of victims. They call for truth and justice. Truth and justice will have their day, as is shown by the recent successes by Jewish victims of World War II in their recovery of Nazi plunder in Switzerland. Fifty or more years is too long, but it is not too long to wait for justice.

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202. *See especially Order of 30 Apr. 1999, supra* note 201, at Sections 4–6 of Razonamientos Jurídicos [Juridical Reasoning].
203. David Graves, *Pinochet Will Face 36 New Charges,* Daily Telegraph (London), 5 June 1999.
204. *Date Set for Pinochet Extradition Proceedings,* Guardian (Manchester), 4 June 1999.