

The Pinochet Arrest and Possible Extradition to Spain

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On the basis of an arrest warrant issued by a judge in Spain, British authorities are holding General Augusto Pinochet, the former head of state of Chile, on Spanish charges of crimes against humanity, including genocide and terrorism, that are alleged to have occurred during Pinochet's rule in Chile. It is anticipated that a request to extradite him to Spain will be forthcoming.

Any Spanish request to extradite Pinochet would have to be considered under any extradition treaty in force between Spain and the U.K., and would be subject to British law at least to the extent that it does not conflict with the U.K.'s international obligations. In addition, British authorities considering a request for extradition presumably would take into account any limitations imposed by general international law on Spain's authority to prosecute Pinochet.

Pinochet was detained while he was in London for medical treatment. He holds a diplomatic passport, but that does not necessarily mean that he has diplomatic immunity. Such immunity stems from the Vienna Convention on Diplomatic Relations, which provides that "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention." But a "diplomatic agent" under the Vienna Convention is defined as "the head of the mission or a member of the diplomatic staff of the mission." It does not appear that Pinochet currently serves as the head or member of the diplomatic staff of any Chilean mission. Nor does it appear that he was serving in any capacity as a diplomat when he was detained.

During his time as head of the Chilean state, Pinochet would have been entitled to head-of-state immunity, which would have much the same effect outside his own country as diplomatic immunity. It is arguable that former heads of state retain their immunity even after they no longer serve in that capacity. On the other hand, as Professor Michael Reisman of the Yale Law School has said, international law is moving in the direction of non-immunity for particularly grave human rights abuses and serious violations of the law of war for which the head of state is accountable.

Under general international law, any right of Spain to prosecute Pinochet (should he be extradited) would depend in part on whether Spain had jurisdiction to prescribe the rules that would form the basis of the charges against him—rules governing his conduct while he was the head of state in Chile. The basis for jurisdiction to prescribe rules of conduct is strongest when the conduct, or in some instances the effect of the conduct, is in the territory of the prosecuting country. Another strong basis arises when the accused is a national of the prosecuting country. Neither of these bases would justify Spain's prosecution of Pinochet.

Another arguable basis for Spain's jurisdiction to prescribe rules of conduct would center on the nationality of any Spanish victims of Pinochet's actions or executed policies. This basis is quite controversial, however, unless the victims were singled out *because* of their Spanish nationality.

Spain's strongest argument appears to be that it has jurisdiction to prescribe rules regarding conduct that is universally condemned, including genocide and some forms of terrorism, no matter where the conduct occurred. The international community has recognized universal jurisdiction in such cases, meaning essentially that whichever government obtains custody over the accused may prosecute him. But it would not be enough simply to allege genocide or terrorism as a basis for universal jurisdiction, without being more specific than that as to what constituted the alleged genocide and what specific terrorist acts were involved.

The Genocide Convention (to which Chile, Spain and the U.K. are parties) does not cover murder or other widely condemned acts, even on a large scale, unless they are committed with a specific intent. The Convention defines

genocide only to mean certain acts committed with intent to destroy, in whole or in part, a national ethnical, racial or religious group, as such. If committed with the requisite intent, the acts include killing members of the group, causing serious bodily or mental harm to members of the group, and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. Although some political crimes are generally treated as non-extraditable, genocide is not considered a political crime for extradition purposes.

Any allegation of terrorism against Pinochet would need to specify the particular acts of terrorism involved, if a convincing case for universal jurisdiction short of genocide is to be maintained. One specific form of terrorism that has been discussed in connection with Pinochet is systematic torture of political opponents. Chile, Spain and the U.K. have all ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It requires each state party to take effective measures to prevent and punish acts of torture in its territory. A state such as the United Kingdom, which finds the alleged offender in its territory, is required to establish its own jurisdiction over the offense unless it extradites the accused to the state where the offenses were committed, the state of the alleged offender's nationality, or the state of the victim's nationality if that state considers it appropriate. Thus, if some victims of torture in Chile were Spanish nationals and if Spain requests Pinochet's extradition in those cases, the U.K. would be required by the Torture Convention to extradite him or to establish its own jurisdiction over him. (To establish its own jurisdiction does not necessarily mean that the state holding the individual must prosecute him, but it does require that the decision on whether or not to prosecute must be made in the same manner as in the case of ordinary offenses of a serious nature under the law of that state.)

There also may be a basis for Spanish prosecution of Pinochet for crimes against humanity, which could include torture, but which could encompass other acts as well. Until recently it was widely thought that crimes against humanity included only acts directed against a civilian population during wartime. It is increasingly arguable that customary international law now may not require a connection between crimes against humanity and any armed conflict. In any event, for such acts as murder, arbitrary imprisonment and torture to be crimes against humanity, they must be directed against a civilian population and must be widespread or systematic. This implies that there must be a policy of committing such acts, but according to the Yugoslav War Crimes Tribunal, the policy need not be formal and may be inferred from the manner of carrying out the acts.

Even if there are persuasive reasons to believe that Pinochet committed crimes against humanity during his time as head of state in Chile, it is not certain that international law would authorize a domestic tribunal in Spain (as distinguished from a properly constituted international criminal tribunal) to prosecute him for those crimes. The question again would be whether such acts fall within universal jurisdiction. There is little precedent, but legal opinion increasingly accepts universal jurisdiction for indiscriminate violent attacks on people at large. Whether that includes focused attacks on political opponents is yet to be decided.