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Justice across the Hemispheres:
The effect of the Pinochet arrest on domestic courts in Chile and Spain

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Senior Honors Thesis

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“Write what should not be forgotten.”

- Isabel Allende,
Chilean author and
niece of Salvador Allende¹

¹ (Allende 45)

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INTRODUCTION

On October 16, 1998, Scotland Yard, acting on orders sent from a judge in Spain, arrested former Chilean President Augusto Pinochet in London for crimes of genocide and terrorism. This development sent shockwaves through the international human rights community. Never before had a former head of state been detained for human rights violations, with the possibility of extradition, by the government of another country. This kind of advancement offered hope for countries around the world where past human rights violations had gone unpunished or even uninvestigated.

Two such countries are Chile and Spain, the nations most directly involved in the Pinochet case. Although Pinochet was ultimately sent home to Chile without standing trial in Spain, the ordeal still had some degree of impact in both countries. Before his arrest, the amnesty laws in both countries prohibiting the prosecution of those who had committed crimes in the past had been upheld by the judiciary. What effects did the Pinochet arrest have in the domestic courts of Spain and Chile? This study sets out to demonstrate that after 1998, Chile's judiciary became more open to prosecuting former regime officials. Meanwhile, the Spanish judiciary continued to uphold amnesty, and failed to contribute meaningfully to the discourse on human rights violations committed in Spain's past.

Testing these ideas required a comparative case study of Chile and Spain. This case study examines why the two countries are comparable and conducts an overview of their histories before the authoritarian governments under Franco and Pinochet came to power, while they were in power, and during each country's transition to democracy. It also includes a comparison of the attitudes of each country's domestic courts concerning human rights violations

before and after the Pinochet arrest, as well as a description of the events surrounding the Pinochet arrest itself.

Spain and Chile in comparison

Differences

Other than their shared involvement in the Pinochet case, there are a few other factors that make the comparison of transitional processes in these two countries relevant. First, how do the twentieth-century authoritarian governments and democratization processes of Spain and Chile differ? One of the more crucial differences is the sheer scope and nature of the state-led violence committed in both countries. That is not to say plain numbers of those killed, tortured, or disappeared necessarily have a greater or lesser traumatic impact on the nation's psyche; what is more important is to what extent the violence was committed under the rule of law. Spain's trauma began with the violent internal struggle of ideologies that made up the Civil War (1936-1939), followed by repression that was "largely conducted in public and legal, albeit condemnable, terms" (Aguilar and Hite 204). In contrast to Spain's "explicit fratricide," Chile's war was an underground and officially denied dirty war, whose atrocities proceeded in an illegal and clandestine manner (204).

This distinction has an effect on the variety and compatibility of attitudes during each country's transitional period and whether a not a consensus could be formed regarding the regime's actions. For instance, in today's Chile, no general agreement exists on what the Pinochet regime meant to the country. There is no total consensus about who is to blame for the violence that occurred (Aguilar and Hite 196). On the other hand, in Spain, a consensus exists around certain events, such as the shared blame for the violence committed during the Civil War

and the inability of opposite ends of the political spectrum to compromise during the Second Republic (195). However, there is not a general agreement on who is responsible for the breakout of the Civil War, nor an agreement on the “significance of the forty years of dictatorship” and what it did for – or to – the country (195). Also unique to Spain are the Basque Country and Catalonia regions. These areas of Spain saw much violence in the Civil War and were treated harshly under Franco for their desire for autonomy and for their distinct cultural identity (Aguilar and Hite 195; Harrison 198). The Basques’ perception of the Civil War and Franco are far detached from any consensus that may exist in Spain (Aguilar and Hite 195).

Of course, since Spain’s Civil War started in 1936 and Pinochet overthrew Allende in 1973, the worst atrocities in both countries occurred in distinct global contexts. Some consider the Spanish Civil War as prelude to World War II (Payne 189), while the ideological rivalries of the Cold War contributed to Chile’s political turmoil (*Informe* 28). Significantly, Chile’s transition to democracy occurred during a time when domestic and international human rights advocacy organizations were becoming active and well-organized. They kept pressure on regime officials and pushed for reconciliation policies (Aguilar and Hite 212). Spain did not enjoy this advantage; in contrast, Spain’s “lack of a mobilized constituency to demand truth and accountability for the past, and the lack of international pressure to do so all contributed to the absence of what are termed ‘retrospective justice’ policies” (196). Such human rights organizations simply did not exist during Spain’s transition and were not present in the transition to advocate for the victims.

Another factor that contributed to the level of public mobilization in both countries was the amount of time elapsed between the worst repression and the transition in both countries. In Spain, the transition occurred nearly forty years after the Civil War. There are simply fewer

Spaniards still alive who have first-hand memories of the Civil War and the repression that followed. This lack of direct survivors moderates the demand for justice (Aguilar and Hite 209). In comparison, Chile's wounds were fresher: the coup happened only seventeen years before the transition, and most serious state-led violence occurred in the 1970s. In both cases, family members serve as advocates for their relatives who suffered, but in Chile fewer generations have passed than in Spain. However, it is important to keep in mind that "the relationship between time and memory, particularly traumatic memory, is exceedingly complex" (209). Aguilar and Hite point out that memory is "associational" and memories can resurface at any given time, often "stimulated by otherwise mundane phenomena." No matter how much time has passed, a certain noise or image that triggers a memory can make people feel like the trauma occurred very recently indeed (209).

Similarities

To recap, the authoritarian governments and transitional processes of Chile and Spain differ in the scope and nature of the violence and repression committed, the amount of time that elapsed between the worst repression and the transition to democracy, and the presence or absence of active, organized human rights advocacy organizations. Meanwhile, there are also some striking similarities between the two countries that make their comparison worthwhile, including how much power the regime wielded during the transition, the way the transitional government addressed the traumatic past, and the level of public support for the regime during the transition.

To begin, the authoritarian governments in both Spain and Chile still maintained a great deal of institutional power during the transition. Aguilar points out that the amount of justice

present in the transition is inversely related to the power the authoritarian government maintains in the country. That is to say, the more clout the regime has at the start of the transition, the less justice is pursued via reconciliation policies (Aguilar 316). That statement describes the situation in both Spain and Chile at the moment of their respective transitions. The institutional influence of the military in both countries was still considerable at the time of the transition. In Spain the transition originated inside the authoritarian government, continuity between authorities was valued, and so neither the military nor the government was purged of the old regime's officials (Aguilar and Hite 212). One reason Franco's government did not implement its own amnesty law, as Pinochet's government did, could essentially be defined as confidence; they expected to have a great deal of control in the transition and did not expect any challenges to their legal justifications of the repression (Aguilar 317, 325).

However, Franco was not alive for the most significant advances in Spain's transition, as Pinochet was for Chile's. Pinochet's continued prominence in society during and after the transition was a constant living and breathing reminder of the crimes that remained unpunished. Although Pinochet was voted out of the presidency in 1988, he stayed on as commander in chief of the armed forces even after the democratically-elected Patricio Aylwin assumed the presidency in 1990 (Kornbluh 425, 427). Pinochet retained that position until March of 1998, when he stepped down and assumed the position of senator-for-life (Stern, *Reckoning* 212). Pinochet's continued high-profile presence "contributed to silencing rather than engaging debates on mechanisms for coming to terms with the past" (Aguilar and Hite 213). Additionally, the 1980 constitution can take credit for some of the continuity in the Chilean transition. For instance, thanks to the constitution, the military maintained a position of some autonomy within

the Chilean government, and the electoral system continued to work to the advantage of those who had supported the regime in the past (214).

Along with the continued power of the regime in the government, both countries also hosted some degree of public support for the governments of Franco and Pinochet, respectively. Aguilar and Hite call this factor “pervasiveness of authoritarian values,” pointing out that oftentimes “the residual legitimacy of the dictatorships is related to an obsessive discourse of order and social peace” (216). This description pertains to the section of the population whose lesson taken from years of authoritarian government is that order and rule of law is more important than justice, and far superior to social unrest (Aguilar and Hite 216).

Polls taken during the Spanish transition show a great deal of residual public support for the former government, and also for the maintenance of social order. In addition, Spaniards’ opinions on these topics varied greatly from those gathered in the Basque Country. In the Basque Country in 1975, for instance, 69 percent identified themselves as “liberal,” as opposed to “authoritarian,” whereas in the rest of Spain 49 percent of the population identified themselves this way (Aguilar and Hite 217). In polls taken during Chile’s transition, answers were similarly varied, and “hardly constitute a firm rejection of authoritarianism” (217). Responses still showed considerable desire to maintain “order and peace,” while a low percentage expressed a desire to “return to democracy” (217). During their transitions, neither the citizens of Chile nor Spain displayed overwhelming opposition to the previous government.

Finally, the transitions of both Spain and Chile were characterized by negotiation between the democratic elite and those in the authoritarian government. Both countries’ transitional democratic governments upheld impunity for human rights violations committed in the past (Aguilar and Hite 214). Indeed, Spain’s democratic government itself passed the

Amnesty Law in 1977 and this law was subsequently upheld by Spanish courts (Gil Gil 130). Although Chile's Amnesty Law was adopted under Pinochet's government, the post-authoritarian government upheld it given the strong influence the regime still exerted in government affairs (130).

**PART I: Overview of the ascension of each regime and their time in power;
the transition to democracy; courts during and after the transition**

Spain

Spain's Second Republic

The seeds of the rise of fascism in Spain were sown at the birth of the Second Republic. By the spring of 1931, Prime Minister General Primo de Rivera's supporters – including parts of the military – had lost their faith in his originally military-supported “temporary dictatorship” of nine years (Edles 29). Sensing his decline, Primo de Rivera agreed to resign at the request of King Alfonso XIII, and a left-wing alliance of Republicans and socialists won the elections. Alfonso XIII quickly left Spain, and on April 14, 1931 (Payne 170), in a remarkably peaceful manner, Spain found itself in a position to organize a democracy.

However, the country's short interim of democracy was not characterized by stability. Although the 1931 elections favored the left, this did not mean the right – conservative supporters of the monarchy and the Catholic Church – lacked followers. Rather, the right had solid support but lacked organization at this moment. While the left was more organized at the time, they still suffered from serious ideological divides amongst Republicans, socialists, communists, and anarchists (Edles 29). At first, the Republican-socialist alliance that won the

elections made radical changes in Spanish society: they passed laws to separate church and state, to reform the agrarian system, and to set up an autonomous government for Catalonia. Reforms hit the Catholic Church particularly hard – the Constitution of 1931 made the Church accountable for its finances and for paying taxes, limited its property holdings, ceased financial support to the Church from the government, declared freedom of religion, and eliminated the Church’s role in education (29).

While the Second Republic’s initial period of radical, state-led change galvanized the right into cohesion, two years of being in power weakened the already fragile unity of the left. The 1933 elections put conservatives back in the government, and their attempts to rectify the left’s reforms polarized the country (Edles 30). A revolt in the coal mines of Asturias in October 1934 escalated rapidly in size and scope. The army, led by General Francisco Franco, was called in to address the situation, and around 450 soldiers died as well as about 1,200 rebels (30). The government responded harshly to this display of dissent with imprisonments, censorship, and suspension of local government authority and Catalonia’s autonomy. The repression unified the left yet again and led them to victory in the 1936 elections. With the reinstatement of the left’s reforms, the intensely polarized country only lasted a few months before the military revolt on July 18, 1936 (30).

The Spanish Civil War

For the left, this revolt was a blatant threat to the authority of the Republic and the cause of what would become known as the Civil War. Conversely, according to those who revolted on the right, they intended to “restore a legal order and to put an end to widespread civil conflict” that the left had brought about in Spain (Payne 169). They perceived the rule of law to be

deteriorating around them, and believed their actions made them saviors of the Republic (171). The military contended that it did not intend to begin an extended conflict and instead was aiming for a coup d'état (170) that ultimately did not come off cleanly (Edles 30). Inadequately-timed planning by the military was the problem. The revolt was not particularly well coordinated and the military even acknowledged that any revolt in Madrid was unlikely to succeed. Madrid would probably have to be dealt with later, perhaps requiring "a week or two of military operations," but nothing too drawn out (Payne 176-177).

The Spanish Civil War was marked by excessive violence on both sides of the conflict. In 1936, Spain had a population of 25 million. Estimates vary as to the total number of lives lost, but by 1939, up to 1 million people either died or went into exile. This includes 100,000 to 150,000 killed in battle (Rigby 73). Numbers of those executed by both sides are harder to pin down since a number of them – although not all – were perpetrated without court sentences. Republicans reportedly executed 20,000 and Nationalists 100,000, although estimates of Nationalist executions do run from 40,000 all the way to 200,000 (Rigby 73, Ruiz 176).

Spain under Franco

Part of the reason the Nationalists were more repressive and acted more harshly both during and after the war was due to the need to legitimize their authority, when in reality their own forces constituted the rebellion against the established government of the Republic (Ruiz 174). Indeed, the declaration of martial law just after the outbreak of the war, not just in Nationalist Spain, but throughout the divided country, marked the beginning of a concerted campaign of the provocateur to remake itself into the victim of rebellion (172). This effort included the formation of a commission in December of 1938, "charged with the task of

demonstrating the legality of the 1936 military rebellion,” and consequently concluded that the Republican government’s illegitimacy made it impossible to label the military’s actions as rebellion (173).

After their self-characterization as defenders of rightful authority it logically followed that the Nationalists would punish Republicans for their participation in “military rebellion” (Ruiz 172). That is precisely what they did during and after the war, officially through military tribunals established by martial law, which extended until April 1948 (172). Therefore, the highest rate of extrajudicial executions occurred near the beginning of the war and as the Nationalist (later, Francoist) authority built up their legitimacy, “the bureaucratization of the killing process produced fewer victims” (176). Regardless, between 1936 and 1950, illegal detention, torture, extrajudicial execution, and concealment of graves were still happening, in addition to deaths in prison, detention, and labor camps (Gil Gil 104-105).

Although such human rights violations plagued both sides to different degrees, only the losing side paid for their transgression. The end of the Civil War in April 1939 saw the advent of “the institutionalization of full-scale vengeance against the defeated left” (Edles 32). This vengeance manifested itself in the strict limitation of political rights and liberties, as well as a variety of laws, national holidays and monuments favoring the Nationalists. The 1939 *Ley de Responsabilidades Políticas* (Law of Political Responsibilities) saw to the prohibition of political parties and labor unions (Gil Gil 105) and incriminated those who fought for the Republic *and* those who simply did not join the Nationalist cause (Rigby 73). No fewer than seven major laws were issued by Franco’s government between 1938 and 1959, which suspended public officials from their jobs based on their political background; brought the Supreme Court closer to the regime; enforced political repression of dissenting ideologies; pursued any fugitives who had

gone into hiding; prohibited strikes and protests; and repressed specific groups such as homosexuals and the Roma ethnic group (Gil Gil 105-107). Notably the Basque Country and Catalonia, due to their independence movements and distinct cultural identities, endured more consistently severe repression throughout the entirety of Franco's regime (Aguilar and Hite 210; Harrison 198).

After the end of the Civil War, the Catholic Church regained its former prominence and was again involved in the public and private sphere of Spanish life. Franco had a close relationship with the Vatican while Pius XII held the papacy between 1939 and 1958, and the Vatican's approval lent legitimacy to Franco's government (Edles 33). After Pius XII's death, Popes John XXIII and Paul VI had somewhat more liberal attitudes toward civil freedoms, "including the right of a people to choose those who govern them...[which was] an indirect (if not a direct) criticism of Francoism" (34). This stance – progressive for the Church – was echoed in the Second Vatican Council in 1962, which incorporated religious liberty into Church doctrine. By the 1970s, the Church in Spain was split between younger, more liberal priests and older, more conservative and higher-ranking clergy (34). This division in the religious institution eliminated it as a safe haven for the Spanish government's authoritarian principles.

By the 1960s, dissidents from workers' organizations that Franco had founded began to coalesce into the *Comisiones Obreras* (Workers' Commissions – CCOO), which became linked with the *Partido Comunista Español* (Spanish Communist Party – PCE) (Edles 35). Workers began actively campaigning for better working conditions, but also for democratic reforms in the government. Although strikes were illegal at the time, there were plenty, and in 1975 Spain had the third-most strikes in Europe, losing 14.5 million working hours (35). Students showed their

dissent, too, staging strikes and protests at universities. The government dismissed the Minister of Education and some university faculty, who later went on to lead the opposition (35).

Such activism received harsh responses from the government, and between 1967 and 1973 government repression was at its most severe since the beginning of Franco's government (36). During this period the state laid off or imprisoned many workers and opposition leaders and declared three states of emergency (36). The repression incited militant groups to action, such as *Euskadi ta Askatasuna* (Basque Homeland and Freedom – ETA) and *Frente Revolucionario Antifascista Patriótico* (Anti-fascist Revolutionary Patriotic Front – FRAP). The government responded with harsher repression for those suspected to be involved in such activity (36). The years leading up to the transition were marked by increasing dissidence within the Spanish populace.

Spain's move toward democracy

1973 was both the year that the aging Franco appointed Admiral Luis Carrero Blanco as Prime Minister and the year that Carrero Blanco was assassinated by ETA (Edles 36). Franco was forced to respond quickly to this crisis and chose Carlos Arias Navarro as Carrero Blanco's successor. Arias Navarro served until Prince Juan Carlos made him resign in 1976. His downfall was his signature habit of proposing reform while simultaneously implementing repression (36-37). Meanwhile, Franco died on November 20, 1975, leaving his power in the Spanish monarchy which he himself resurrected in 1947. Juan Carlos, after ousting Arias Navarro, had more success with his Prime Minister appointee Adolfo Suárez (37). In 1976 the parliament passed the Law of Political Reform and it was approved in a public referendum. This law set the

foundations for the first democratic elections in 1977, and the drafting of the new Constitution in 1978 (38).

One of the first pieces of legislation passed by the newly-elected parliament was the Amnesty Law of 1977. It granted a blanket amnesty for all politically-motivated acts committed before December 15, 1976 (“Ley 47/1977”). Supported by over 90 percent of the parliament, it was considered a significant advance in Spain’s reconciliation and transition process. However, in addition to protecting any left-wing political activities from prosecution, a blanket amnesty of course also included any acts of the right-wing and Franco’s regime itself (Gil Gil 108-109). As a result, most Spaniards regarded the law as a mixed success.

A series of other laws chipped away at the strict regulation put in place under Franco. For instance, public officials and army officers who had lost their positions were rehabilitated and reparations or pensions were paid to victims of the Civil War and the ensuing authoritarian government (Gil Gil 109-110). In 2002, the parliament issued the “Declaration concerning the Recognition of the Rights of the Victims of the Civil War and the Francoist Regime” which began the gathering of documents and information concerning the Civil War, the location of mass graves, and the identification of human remains (111). The Inter-ministerial Commission for the Study of the Situation of Victims of the Civil War and Francoism met in 2004 to examine the preexisting legislature on reparations and see what other action was necessary, and their recommendations constitute the *Ley de Memoria Histórica* (Historical Memory Law) passed in 2007 (112).

The Historical Memory Law recognized as unjust and illegitimate any convictions, violence, or repression with the intent to persecute those of a certain political, ideological, or religious persuasion during the Civil War and the following authoritarian government. It

repealed a handful of laws implemented by the regime to promote political repression. It expanded the scope of pensions and medical benefits for families of victims of the Civil War or Franco's government. The law also made an effort to enlarge the Spanish government's involvement in families' searches for the remains of their relatives and provided funding and mandates to carry out this objective. Finally, the law called for the removal of symbols associated with the Civil War and the subsequent regime, prohibited political demonstrations or acts at Franco's gravesite – the *Valle de los Caídos* – and set up an archive to collect documents pertaining to the Civil War and the Francoist government (“Ley 52/2007”).

Spain's narrative of an unstable, polarized democracy leading to military intervention and repression, accompanied by a long period of authoritarian rule, is echoed in Chile in the 1970s. The most important factors that set the two countries' histories apart include the nature of the violence, the discourse concerning justice during the transition, and the time elapsed between the most severe repression and the transition to democracy. Spain's overt civil war, carefully negotiated transition, and lengthy rule of Franco all make a difference in the search for justice in Spain today.

Chile

The end of stability in Chile: 1960s-1970s

Up until the 1970s, Chilean politics enjoyed a well-established democratic tradition. However, beginning in the 1960s, a combination of forces from internal and external sources ultimately led to the country's destabilization. On the world stage, the Cold War was gaining steam and countries were categorized and classified as friend or foe depending on their allegiance to and compatibility with the governments of the United States and the Soviet Union.

After the Cuban Revolution in 1959, both superpowers began to focus much more on the politics of Latin America (*Informe 28*). The Cuban Revolution legitimized armed conflict as a viable path for social change, and in Chile, as in other countries, nearly every political party contained some degree of supporters who favored armed uprising over change through democratic institutions (29).

The acute polarization of world politics followed the polarization of national political parties. Parties tended to have a rigid social model that they aspired to achieve in Chile, although no one party had the power to implement its preferred model in full scale. This coexistence of competing models – which were incompatible, and their adherents were very reluctant to modify them – sharpened the contention in the political arena (*Informe 28*). This inability to cooperate or compromise furthered the possibility of armed conflict as a viable strategy for change. Indeed, amid such contention between extremes, many came to see violence as inevitable (29).

Another factor that contributed considerably to Chile's instability was the intervention of the United States. From the perspective of the U.S, the 1958 presidential election between left-wing Salvador Allende against the ultimately victorious right-wing candidate Jorge Alessandri brought the Chilean government too close to becoming socialist (Kornbluh 3). In order to “hasten the middle-class revolution,” thereby stalling the working-class revolution, the U.S. began directing major funding toward the *Partido Demócrata-Cristiano* (Christian Democrat Party - PDC), led by Eduardo Frei (3). With the help of the U.S, Frei won the presidential elections of 1964 in a landslide, and U.S. aid to Chile continued, increasing U.S. interests in Chile along the way (5-6).

In 1970, despite the U.S. support of the opposition, Salvador Allende and the left-wing *Unidad Popular* (Popular Unity) party won the presidency. Not willing to lose their investment of time and money in Chile, nor willing to take lying down what they perceived as a victory for the Soviet Union, the U.S. swiftly began making plans to prevent Allende from taking power (*Informe* 30). The “Track I” plan aimed at coercing the parliament to prevent Allende from assuming the presidency and ultimately bringing Frei back via peaceful military takeover, but this fell through (Kornbluh 12, 14). Thus work began on “Track II,” the identification of some Chilean military official willing to lead a coup d’état and the facilitation of that individual’s efforts (14). In addition, the U.S. would work to destabilize Chile through “economic, political, and psychological warfare” in order to prime the country for a military coup (ibid 17).

The concerted effort of the U.S. to cut off or complicate all financial relations with Chile, spread anti-Allende propaganda, and incite right-wing terrorism (Kornbluh 18-20) exacerbated the already tense internal political situation in Chile between 1970 and 1973. As a result of some of Allende’s policies and the institutional status quo at the time, the opposition felt its rights were being marginalized. For instance, property rights were violated by multiple takeovers of private and commercial property, sometimes accompanied with violence. Property owners did not receive any help from the government either during the takeover or in the process of getting their property back (*Informe* 31). Also, the *Unidad Popular*, knowing there was not enough legislative support for nationalization of property and businesses to pass proper legislation, abused existing legislation in order to go forward with their plans (31).

Those affected by such policies and takeovers and the political opposition asked the *Unidad Popular* to modify its agenda or to negotiate with the opposition (*Informe* 30). When the administration did not give a satisfactory response, the opposition concluded that the current

government was not protecting its rights and that they needed to defend themselves (31). Both sides' unwillingness to compromise combined with the opposition's resulting determination to be "ungovernable" led to a spiraling escalation of action and reaction (31). Militia groups of the opposition began to crop up, giving the impression that a coup was being plotted, and paramilitary groups in support of the government began to form. Both of these groups began to disobey the law in response to the opposition's perceived legal transgression (32).

Pinochet in power

The coup took place on the morning of September 11, 1973, a date that marked the beginning of state-led human rights abuses in Chile. Within six weeks, the military was responsible for the deaths of about 1,500 people. Of those deaths, between 320 and 360 people were executed by firing squads. A total of over 13,500 people were arrested and taken to detention camps around the country. After seventeen years in power Chile's military-run authoritarian government claimed the lives of 3,197 Chileans and the detention and torture (physical or psychological) of countless others (Kornbluh 153-154).

The *Informe de la Comisión Nacional de Verdad y Reconciliación* (Report of the Chilean National Commission on Truth and Reconciliation – commonly referred to as the Rettig Report, after the Commission's chairman), outlines the methods typically employed by the military in its quest to rid the country of political dissidents. Those suspected of subversive activity were first arrested, and this was sometimes accompanied by a search and confiscation of their belongings (*Informe* 96-97). They were taken to detention centers located around the country. Even if their families knew which center they were in, they were prohibited from contacting them and were usually not given the whole truth about their relative's condition or circumstances (97-98).

Torture, both physical and psychological, occurred in custody and was utilized during interrogation. Electric shock, beatings, sexual abuse, and various other excruciating and degrading techniques were commonly applied to the prisoner (*Informe* 98-101). Of those who were killed – usually without any semblance of a trial – some were shot during arrest and some were executed in custody by gun or knife (103-104). Others died during brutal torture sessions (105-106). The authorities offered inadequate explanations for these deaths, or often none at all (104-105). Usually the government did not return the bodies to the families but rather buried them in mass, unmarked graves, or threw them in the river or ocean (106). Again, families were frequently led on by the government and generally misinformed about the status of their incarcerated relatives (106-107).

After the coup, the military spread their authority and terror systematically with the “Caravan of Death.” General Augusto Pinochet, one of the leaders of the coup who would soon become the head of the authoritarian regime in Chile, sent a death squad, led by General Sergio Arellano Stark, to the northern provinces to swiftly execute “justice” to political prisoners there. Over four days in October 1973, 72 people were taken from prison, executed and buried in mass graves (Stern, *Reckoning* 13). This type of systematic violence formed the basis of the *Dirección de Inteligencia Nacional* (DINA – Directorate of National Intelligence), a secret police force accountable only to Pinochet and responsible for a great deal of the regime’s terror (Kornbluh 157). DINA was responsible for most of the 1,100 Chileans who disappeared without a trace under the authoritarian government (163). Another example of the institutionalization of violence by Pinochet’s government was Operation Condor, the coordination of intelligence services of governments around the Southern Cone to facilitate the elimination of subversive elements in their respective countries (ibid 323-324).

The regime began to institutionalize its authority around 1977. As a result of pressures after DINA's involvement in the 1976 assassination of former Chilean diplomat Orlando Letelier and his American colleague Ronnie Moffitt in Washington, D.C, DINA was replaced by the *Central Nacional de Informaciones* (National Center for Information - CNI) (*Informe* 44). The CNI was more focused on containing the opposition rather than pursuing and destroying it, and rates of violent aggression, although still present, dropped accordingly (Hawkins 77). The military junta further protected itself from future entanglements like those that occurred in the wake of the Letelier-Moffitt affair with the Amnesty Law of 1978 (Stern, *Battling* 147-148). The law stated that it sought to reconcile and unify all Chileans by putting aside old hatreds. It granted amnesty for crimes committed in the state of emergency between September 11, 1973 and March 10, 1978. Included in the law are those who were found guilty by military tribunals, but not those who were already involved in judicial proceedings at the time of the law's passage, nor those involved in proceedings surrounding the Letelier-Moffitt case ("Decreto Ley 2191").

To lend legitimacy to both the coup and the continued hold on power by the military regime, they began to institutionalize their authority and actions "in a legal framework of new laws rather than relying strictly on the politically costly logic of war" (Hawkins 77). A plebiscite was held in December of 1977 to vote "yes" or "no" to Pinochet becoming president. In polls riddled with election fraud, Pinochet won the presidency with 75 percent of the vote (Londregan 62). Pinochet and his supporters played an integral role in the drafting of the Constitution, and the document that resulted ensured the power of Pinochet and the military for the foreseeable future. For instance, the 1980 Constitution allowed the military junta to amend the Constitution. Such changes could only be overridden by three-fifths of the legislature, which was largely appointed by Pinochet in the first place. In addition, the Constitution made it much easier for the

junta to make laws than it would be for any future government to repeal or amend them, at least under the same constitutional operating procedure (63-64).

In 1988, when Pinochet's constitutionally-mandated term as president was over, a plebiscite was held to approve or disapprove Pinochet for another term. No fewer than fourteen Chilean political parties banded together in a coalition called *La Concertación de Partidos para el NO* to support the NO vote and ousted Pinochet from the presidency (Kornbluh 422). Despite the obvious advantages the military possessed – control of the media and polling centers, not to mention intimidation – the opposition ran an extremely effective campaign. Their voter registration drive signed up over 92 percent of eligible voters, 98 percent of whom turned out to vote (ibid 422, 425). The NO vote won with the support of nearly 55 percent of the electorate compared to Pinochet's 43 percent (425). Despite Pinochet's intense reluctance to let the vote stand – there were plans made to upset the vote and keep Pinochet in power – he had lost fair and square (425-426). Soon after, Chile's transition to democracy would begin.

Walking the tightrope: Chile's transition

Of course, after seventeen years of a repressive, divisive authoritarian government, the transition to democracy was not an easy one. Primary on the list of concerns was how to deal with the coexistence with those who committed human rights abuses against fellow citizens. In order to begin the process of reconciliation, an overwhelming desire to set the record straight and to better understand the trauma that the country suffered led to the formation of the *Comisión Nacional de Verdad y Reconciliación* (National Commission on Truth and Reconciliation) (*Informe* xiv). Supreme Decree No. 355 established the Commission and tasked it with the investigation of the recent human rights violations. Crucially, it stipulated that its role was not to

take on the responsibilities of the judiciary, so it would not judge the guilt of any actor, but rather would compile evidence and report the facts. The Commission was given six months to complete this considerable task and thereafter published the Rettig Report (xviii-xx). This report was a success on many fronts, including its formation of a basis for national dialogue and “future truth-and-justice struggles,” as well as its influence on Chilean and international society’s perception of human rights. On the other hand, as a result of its inability to judge or even name the perpetrators of human rights abuses, many considered it to be a job halfway done (Stern, *Reckoning* 94, 98).

This delicate balance between justice for crimes committed and moving on to the promise of the future characterized Chile’s transition. Unlike in Spain, human rights organizations played a role during and after Pinochet’s government, and they were vocal with their demands for justice. This activism, combined with the clandestine nature of the state-led violence and the close proximity of the harsh repression of the 1970s, allowed for limited investigations such as the Rettig Report. However, Pinochet’s grip on the country at the moment of the transition was still too strong to hope for much more in the way of justice or reconciliation.

Courts before the Pinochet arrest

Forget and move on: the pursuit of justice in Spanish courts

The Spanish transition to democracy simply did not include justice for the victims of violence and repression during and after the Civil War. The main aim of the Spanish transition was to move forward and leave the past behind, unimpeded by any efforts to forgive or assign blame for past repression. Most political actors and many Spanish citizens themselves subscribed to the belief that the only chance the country had of peacefully and successfully moving forward was to forget the controversial past (Aguilar 318). This sentiment is aptly

summed up by the very passage in 1977 of the Amnesty Law – overwhelmingly supported by the newly elected parliament (Gil Gil 108) – which by granting amnesty for politically-motivated crimes committed both by Franco’s government and the opposition encouraged society to forget the human rights violations of the past and focus on working together for a better future for Spain.

History credits a great deal of the Spanish transition’s renowned success to the Amnesty Law. It is considered a central pillar in a transition that, at least on the surface, managed to leave the past behind and advance. This legal manifestation of forward motion easily thwarted human rights violations cases in the Spanish courts. Between the immunity granted by the Amnesty Law and the anxiousness to move on, initially the courts saw very few legal efforts to pursue justice for past crimes, none of which achieved success (Gil Gil 114).

In 1995, one notable case, concerning the death of Enrique Ruano, did seek the reinterpretation of the Amnesty Law to at least allow for investigation of the crime committed. The accusing lawyer did not contest the application of the Amnesty Law, but merely sought an inquiry to positively determine that the law applied to the particular crime. Because the accused denied both committing the murder and acting on political motivations, the Amnesty Law could not be used to further investigate the incident and the case did not move forward (115). Such reluctance even to investigate the *Ruano* case demonstrates the gaping absence of initiative and willingness to investigate Francoist crimes of repression typical of the political elite and the judiciary in transition and post-transition Spain (Aguilar 331).

Testing the limits: The pursuit of justice in Chilean courts

The judiciary was the institution that responded slowest to the ripples of change in Chile’s transition to democracy, surpassed only by the military. In the first few years of the

transition, the courts, justices, and precedents remained about the same as they had during the Pinochet years (Garretón 88). Just before the transition, Pinochet encouraged some judges to retire, replacing them with judges who would “safeguard the imposed legal order and...preserve impunity” (Ensalaco 122). Pinochet’s government left Chile with a conservative judiciary, one that quickly received criticism in the transition for its behavior during and after the authoritarian government. In its report, the Rettig Commission condemned the judicial branch for its failure to investigate human rights violations during the regime (*Informe* 85). According to the report, the judiciary’s “failure as guardian of law had compounded Chile’s human rights failure” (Stern, *Reckoning* 113). Clearly the institution was in need of serious changes.

In 1991, Patricio Aylwin, Chile’s first democratically-elected president after Pinochet left office, pushed the Supreme Court to sanction the active investigation of human rights violations (Stern, *Reckoning* 113). This interpretation of the 1978 Amnesty Law came to be known as the Aylwin doctrine, and shares the same logic that the prosecuting party wished to apply in the 1995 *Ruano* case in Spain. According to the Aylwin doctrine, in order to determine that amnesty could be applied to a crime, that crime must first be investigated thoroughly, even to the point of determining who was responsible (113). Because this progressive attitude towards the role of justice in democratization provided an avenue for determining the truth of past offenses, even if it didn’t ultimately allow for punishment, it presented a compromise that was attractive to many victims of the regime and their families, but struck too close to home for former authoritarian officials.

At least for the first few years of the transition, the courts did not follow Aylwin’s suggestion of investigation, opting instead to simply apply impunity without first clarifying the facts (Ensalaco 123; Aguilar 324). During Pinochet’s government and also during the transition,

cases considering human rights violations would oftentimes be transferred to military justice courts, where impunity would unequivocally be applied (Garretón 84). For instance, in 1992, a high-profile case concerning the disappearance of Alfonso Chanfreau was transferred to military justice following a Supreme Court vote. Those justices in the majority who voted to transfer the case were appointed by Pinochet, while those who voted against the transfer were appointed by Aylwin (Stern, *Reckoning* 117).

Despite the judiciary's role in the first few years of the transition as a shield for the military, by 1993 serious cracks were beginning to appear in the bastion of conservatism and impunity. The political environment created by the Aylwin administration and those relentlessly advocating for human rights began to chip away at the staunch positions of the court (Stern, *Reckoning* 117). Enough time passed for some turnover to occur amongst the civil justice judges (Garretón 90). In 1993, the Supreme Court finally accepted and implemented the Aylwin doctrine – supporting the investigation of the crime in order to apply amnesty accordingly – and even began to consider disappearance as a kidnapping crime. This meant that unless the court could determine the date of death or release, the crime was still ongoing and amnesty would not apply without further investigation. These new interpretations initiated a wave of reopened cases (Stern, *Reckoning* 117-118). It became very clear that Pinochet and the military were beginning to lose their grasp on the judiciary and that their impunity was no longer as secure.

Another significant development demonstrating the breakdown of the military's security from prosecution played out between 1993 and 1995. In 1993, retired General Manuel Contreras and active General Pedro Espinoza were convicted of the 1976 Letelier-Moffitt murders by the Supreme Court (Stern, *Reckoning* 150). However, due to intense pressure from the United States – where the assassinations occurred – the Letelier-Moffitt case was specifically excluded

from amnesty in the text of the 1978 Amnesty Law (Sugarman 108; “Decreto Ley 2191”), so it did not signify a radical departure from the application of impunity. In addition, Contreras and Espinoza were not found guilty for the various atrocities committed by DINA in Chile, but rather for assassinations committed on foreign soil (Kornbluh 467). Like any other occurrence in the post-authoritarian reconciliation process, the convictions were a mixture of advances and shortcomings. Most importantly, though, these convictions demonstrated that military officials were no longer untouchable. They brought the validity of the Amnesty Law under scrutiny and widened the scope of those who could possibly be brought to justice (Sugarman 108; Stern, *Reckoning* 196).

PART II: Pinochet arrest and its effect on domestic courts

Pinochet arrest: London, 1998

The formation of the case against Pinochet began concretely in 1996 in a court in Valencia, Spain. Joan Garcés, Spanish lawyer and former adviser to Salvador Allende, filed an *acción popular* (popular action) case against Pinochet and other regime officials for crimes of genocide and terrorism that resulted in the deaths of Spanish citizens after the coup in Chile (Kornbluh 458; Sugarman 108). Proceedings against military officers in Argentina for genocide and terrorism were filed just a few months before, and Judges Baltasar Garzón and Manuel García Castellón took over the cases from Argentina and Chile, respectively (Kornbluh 458). For the next two years, both judges gathered evidence from around the world implicating Pinochet and other military officials in the human rights violations that occurred in Chile after 1973 (Sugarman 108). The case grew from concerning just Spanish citizens to concerning all

victims of the authoritarian government (Kornbluh 458). The case seemed a promising possibility to circumvent the impunity preventing the prosecution of Pinochet and his companions in Chile. But how could Pinochet possibly be brought to Spain for trial? Chile certainly would not extradite him (458).

Then Pinochet made a trip to London in September of 1998 for a mixture of business, tourism, and medical reasons (Stern, *Reckoning* 213). Amnesty International let Garcés know Pinochet was in the United Kingdom, and Garcés asked the Spanish courts to send an order to the U.K. to detain Pinochet so he could be questioned and extradited to Spain (Kornbluh 459). On October 16th, Judge Garzón sent a request to Scotland Yard for the detention of Pinochet for the murder of Spanish citizens, his involvement in Operation Condor and other crimes of genocide and terrorism (Stern, *Reckoning* 213). The authorities in the U.K. complied, and suddenly the heretofore untouchable General Pinochet found himself in custody for crimes committed at least a decade ago.

Certainly Pinochet's unprecedented international arrest made for a captivating news story, but serious legal maneuvering made it possible. First of all, how could Spain charge Pinochet for crimes committed outside of Spain against non-Spanish citizens? Spain's legal system has unique elements that made this possible. Firstly, Garcés' *acción popular* or popular action suit allows "any Spanish citizen, not necessarily the injured party, to file charges in the public interest" (Sugarman 109). During the preliminary investigation, the *acción popular* does not need the support of the public prosecutor, and once initiated, is difficult for the public prosecutor or state to halt. Chile and Spain also happen to have a dual citizenship agreement wherein Chileans may file cases in Spanish courts with the same rights as a Spanish citizen. The

case against Pinochet was lodged in the *Audiencia Nacional*, part of Spain's superior court which is competent to deal with grave crimes even if committed outside of Spain (109).

Because the case expanded to concern non-Spanish citizens, Garzón claimed that the principle of universal jurisdiction could be applied. Universal jurisdiction means that anyone who commits certain grave crimes, regardless of whether the person is Spanish or committed the crimes in Spain, may be prosecuted in Spanish courts (Wilson 951). Crimes of genocide and terrorism are specified in Spanish law as crimes that fall under the purview of universal jurisdiction (951). In an appeal initiated by the public prosecutor contesting Garzón's ruling, the *Audiencia Nacional* upheld Garzón's application of universal jurisdiction (Sugarman 110). As for the definition of genocide, the *Audiencia Nacional* considered the text of Spanish penal law and the 1948 Geneva Convention and interpreted the definition of genocide as the destruction of a "national group," which can be characterized by political ideology, as it was in Chile (Wilson 959; Sugarman 110). This interpretation agreed with Garzón's application, and in this way the way was virtually clear for legal proceedings against Pinochet in Spain.

Meanwhile, in London, British courts and government officials were weighing their options and the myriad political and legal consequences of each possible outcome. First, British courts granted Pinochet "immunity as a former sovereign," meaning he was protected from extradition because former sovereigns could not be held accountable for "criminal acts committed in the course of exercising public functions" (Kornbluh 460). A month later, the Law Lords ruled that Pinochet could be extradited because genocide, torture and terrorism did not in fact fall within the legitimate functions of a head of state. The decision had to be reconsidered in March 1999 when a conflict of interest was found with one of the original judges. The second time the Lords still found that Pinochet could be extradited, but narrowed the reason to only

crimes committed after the U.K. signed the U.N. Convention against Torture in 1988 (Kornbluh 461).

All the while, Pinochet was held under house arrest near London. Anti- and pro-Pinochet protesters abounded in Chile, Spain, and the U.K. The Chilean government launched a public and private campaign to get Pinochet back to Chile before he could be extradited to Spain. Mario Artaza, the Chilean ambassador to the U.K, claimed that British courts had “violated the sovereignty of Chilean law and diplomatic immunity for legislators” (Stern, *Reckoning* 214). Indeed, to those who had misgivings before, entertaining the possibility of trying Pinochet in Chile started to look like a more attractive option than having him brought to court in a foreign country (Sikkink 241). However, Pinochet’s lawyers could not find fault in the legal reasoning behind Pinochet’s detention. They began to argue that his mental health at the advanced age of 83 rendered him incapable of participating in a trial. British Home Secretary Jack Straw issued the decision on March 2, 2000 that Pinochet was definitively “unfit to stand trial” due to health reasons (Kornbluh 461-462). Pinochet returned home to Chile, overall none the worse for wear after his 504 days of detention in a foreign country, with the Spanish charges of human rights violations against him dropped.

Courts after the Pinochet arrest: Chile

Institutional reform already in motion before Pinochet’s arrest

Before delving into the slew of changes wrought in Chile after the Pinochet arrest, it is important to understand how the tides were changing even before October 1998. Institutional shifts in the judiciary and military had been in the making a few years prior to Pinochet’s detention, and laid the foundation that facilitated the tidal wave of changes following 1998. The first change in these institutions was simply brought about by time and the corresponding

turnover in leadership positions (Stern, *Reckoning* 216). New members were more likely to support reconciliation policies that would move Chile forward and less likely to feel loyalty to Pinochet.

The clearest institutional shift in the military occurred when Pinochet stepped down as commander-in-chief of the army on March 11, 1998. This meant a new officer, General Ricardo Izurieta, ascended to take his place, bringing with him “revised sense of [the military’s] corporate interest” – that is to say, in contrast with the past, the military’s interests would henceforth be independent from the interests and legacy of Pinochet and his fellow officers (Stern, *Reckoning* 216). Pinochet maintained his power and influence when he was sworn into the Senate the next day as senator-for-life, a position granting him parliamentary immunity (212), but it was significant that he no longer served as the official head of the armed forces. The military began to focus on “modernization and professionalization,” including an emphasis on healthy cooperation with the civilian government (216).

The judiciary also began a concerted effort to modernize in 1998. The minister of justice, Soledad Alvear, initiated reforms to “remake a judiciary notorious for lenthitude and lack of transparency [and] inconsistent and mediocre jurisprudence” (Stern, *Reckoning* 216). For their cooperation, judges knew the courts would receive much needed state funding. Supreme Court reforms included an expansion of justices from seventeen to twenty one, mandatory retirement at age 75, and the inclusion of five justices who had not come from within the courts’ promotion system. Immediately, this resulted in ten new justices and diminishing support for decisions that transferred cases to military tribunals or applied amnesty (216-217).

Such reforms made way for the increased legal complaints against Pinochet that followed his stepping down as commander-in-chief. Even before that, proof of shifting rhetoric was

demonstrated in the first complaint against Pinochet for kidnapping, genocide, and homicide, filed in January 1998 by activist Gladys Marín and the Communist Party. Judge Juan Guzmán Tapia let the case go forward based on the interpretation of disappearance as a kidnapping whose unresolved state means the crime continues into the present and isn't covered by amnesty (Stern, *Reckoning* 217). On September 4, 1998, just over a month before Pinochet's arrest, the Supreme Court reversed the dismissal by military court concerning the murder of three members of the left-wing *Movimiento de Izquierda Revolucionaria* (Movement of the Revolutionary Left or MIR) by CNI secret police agents, questioning the grounds on which the case was dismissed. On September 10, the Supreme Court invoked an international treaty, the Third Geneva Convention of 1949, to invalidate the application of amnesty to the disappearance of Pedro Poblete Córdova in 1974, during a time when the junta had declared an internal state of war (217).

The willingness to incorporate international law into domestic law, including the use of international law to circumvent domestic law, would soon become crucial in breakthroughs in human rights prosecutions. It is also important to remember that although the first tangible advancements in prosecuting Pinochet came from a foreign source (Spain), no progress at all would have been possible without the relentless activism of human rights advocates (usually associations of victims and their relatives) in Chile (Davis 250). Their efforts also set the stage for what would follow Pinochet's arrest.

Welcome back to the new Chile: Pinochet in the altered political landscape

When Pinochet returned home to Chile on March 3, 2000, the political landscape of Chile had evolved dramatically. He no longer exerted the same influence in public life that he used to enjoy (Stern, *Reckoning* 226). Indeed, a "great majority" of Chilean citizens "wanted Pinochet

to be brought to justice” (Garretón 92). In addition to losing the support of domestic public opinion, the international arena was more hostile for him than ever. Partially this was a result of his high-profile arrest, but other contemporary events – such as events in the Balkans and Rwanda and the 1998 Rome Statute founding the International Criminal Court – conspired against him to create a decidedly anti-genocide and terrorism atmosphere (Stern, *Reckoning* 228). By June 2000, even the U.S – historically unhelpful in contributing evidence to the case against Pinochet, especially considering their own incriminating role in his government – had finally released substantive documents condemning Pinochet and Chile’s human rights record (Kornbluh 472-473).

An even more significant breakdown in support was taking place in Chile’s military. Manuel Contreras, Pinochet’s right hand man, while serving his sentence for his role in the Letelier-Moffitt assassinations, came forward with evidence naming Pinochet DINA’s highest authority (Wilson 976-977). Even before Pinochet’s detention and Contreras’ testimony, other former army officers filed cases against Pinochet for torture and unfair discharge after they refused to carry out orders that would result in human rights violations (Sugarman 117). Pinochet used to maneuver with the military solidly behind him but less than a decade after the transition, times were changing.

If Pinochet imagined that he would return to Chile and live out his years comfortably protected by the immunity afforded to him by his position as senator-for-life, he could not have been more wrong. In fact, he would face legal proceedings all the way up until December 10, 2006, the day he died. As part of their campaign to secure Pinochet’s release and return, the Chilean government had to give some indication that he would be tried in his own country (Sugarman 117). In 1999, the government started to promote the Chilean judiciary as

independent enough to be able to deal with trials against Pinochet, and pointed out that it should have first claims to such a task anyway (Stern, *Reckoning* 247). Judge Guzmán followed through on such government assertions just a few days after Pinochet landed in Chile, beginning the legal process to remove Pinochet's parliamentary immunity so that he could be tried.

Guzmán had been working on cases against Pinochet for nearly two years, and was gathering evidence on Pinochet's involvement in the Caravan of Death (Ensalaco 117). This would be the first case in a protracted legal battle that played out in Chilean courts between 2000 and 2006.

Some proceedings against Pinochet had begun even before his arrest. From December 1997 to October 1998 (the month of his arrest), Guzmán received twelve cases against Pinochet, about one a month. From October 1998 to August 1999, the rate of cases filed increased to nearly two a month, and during which time Guzmán received twenty-three more cases. Between September and December 1999, the rate doubled again to four cases filed per month, making sixteen new cases for a grand total of fifty-one cases by December 1999 (Stern, *Reckoning* 248). By 2002, two hundred fifty cases had been filed against him (Sugarman 117).

Not only were the cases piling up, but Chile's courts were making some progress at giving them a chance of being considered. The Santiago Court of Appeals stripped Pinochet twice of his parliamentary immunity, once in June 2000 and once in May 2004, and the Supreme Court upheld the decision both times. Guzmán indicted him a total of three times: in December 2000, January 2001, and December 2004. The Supreme Court dismissed the first indictment on a technicality, the second based on health grounds (until late in 2003, the second dismissal in July 2002 was widely considered to be the end of proceedings against Pinochet), but upheld the third in January 2005 (concerning his involvement in Operation Condor) (Ensalaco 118-120). Pinochet was ordered twice to submit to medical examinations. The results of his examination in

2001 ultimately led to charges against him being dismissed, but his charges were upheld after his examination in 2004 (118-119). Guzmán ordered Pinochet under house arrest once, along with his January 2001 indictment, and two other judges on separate cases did the same in October and December 2006 (Stern, *Reckoning* 348). Additionally, in 2004, the Santiago Court of Appeals stripped Pinochet's immunity twice more on separate cases concerning "money laundering and tax evasion" and the 1974 assassination of the former Chilean army commander Carlos Prats and his wife (Ensalaco 119).

Suffice it to say that these numerous legal proceedings significantly contributed to the annihilation of Pinochet's legacy after his return from London. Had he not died of heart failure at age 91 in December 2006, and barring another medical examination declaring him medically unfit, it is altogether possible he could have stood trial. After stripping him of immunity multiple times, the courts had no convincing *legal* reason to keep him from trial (virtually all of his lawyers' exit strategies revolved around his failing health), and had he reached a courtroom, there was no shortage of damning evidence against him. Although Pinochet was never actually punished for his actions in a court of law, his reputation in history, already deteriorating by 1998, unraveled at an unprecedented speed after his arrest in London.

Increase in prosecution of cases concerning human rights violations

The dogged legal pursuit of Pinochet was not the only difference in the Chilean courts after Pinochet's arrest. Guzmán's interpretation of disappearance as an ongoing crime (first presented in January 1998) inhibiting the application of amnesty was unanimously upheld by the Supreme Court in July 1999, affirming that the crime was unresolved until the death or date of release of the disappeared was determined (Stern, *Reckoning* 247). This ruling resulted in the

possibility of reopening some two hundred cases. It also allowed for the advancement of cases leading to the arrests of high-ranking military officials like retired General Arellano Stark for his role in the Caravan of Death, and former CNI directors Humberto Gordon and Hugo Salas (247). An evolving attitude towards human rights violation cases in the Supreme Court increased the chances of formerly untouchable officials being held accountable for their actions.

Before Pinochet's arrest, former generals Contreras and Espinoza were the only regime officials convicted, and (at that time) only for a fraction of their crimes. After Pinochet's arrest, with the help of the judicial and military reforms set in motion early in 1998, the floodgates opened for the prosecution of former repressors. Consider the statistics Garretón offers dating from the end of June 2010:

...432 criminal proceedings concerning crimes against humanity are open, a number that reflects the new admissions as well as the closing of cases that have ended in convictions and, occasionally, in acquittals, as well as in some dismissals due to the death of the accused. The number of prosecuted and convicted has risen to 782 (that is, by 23 percent in two years), 64 of whom have been deprived of their liberty (which is 68 percent more than in 2008). ...The 551 sentences have affected 291 repressors...[this] number of repressors convicted for such crimes is the highest in Latin America (96).

These numbers demonstrate that not only have prosecutions risen since the late 1990s, but they continued to rise a decade after, between 2008 and 2010. In fact, in 2005 the Supreme Court voted to enact a deadline of six months, after which no more human rights investigations would be considered in the courts. In response to the ire of human rights associations who saw the deadline as another way to impose impunity, the Court ended up suspending the deadline

indefinitely (Davis 250). Although much progress has been made, the actions and initiatives of the Chilean people indicate that they are not through with the judiciary as a reparation strategy.

Response to polarization: Mesa de Diálogo

Pinochet's arrest fed off of lingering tensions in Chile and caused a veritable societal uproar, polarizing both human rights advocates and Pinochet supporters. It was clear that there was still no common ground between the two sides that would allow them to coexist at least a little more harmoniously. With the military at the center of this maelstrom, its new leadership saw an opportunity to participate in the human rights dialogue. Defense Minister Edmundo Pérez Yoma initiated the *Mesa de Diálogo* (Dialogue Table) in August of 1999. The *Mesa de Diálogo* brought together spokespersons from opposite sides of the issue to locate the remains of the disappeared and determine their fate as best possible, and to "review the past more mutually, in a manner that respected distinct visions yet recognized historical responsibilities" (Stern, *Reckoning* 239). The initiative resulted in a tangible increase in cases filed against military officers: the sum doubled from 45 to 79 over the 10 months the *Mesa* was in session (Garretón 93). The participation of the military in the *Mesa de Diálogo* was of paramount significance, indicating a departure from its previous refusal to listen to a version of history that conflicted with its own.

Progress in Chilean judiciary's ideology

Between reforms and the effects of the Pinochet arrest, the search for justice in Chile – although incomplete – has made a great deal of progress. Among the advancements are the precepts related to human rights violations that Chile's courts now accept as true, but which in

the time between the 1973 and the present were in no way taken for granted (Garretón 94).

Contention over all of these points served as the basis for the unjust dismissal of many a case.

Now the courts and judges agree that:

- Amnesty cannot be applied until an investigation – which includes the identification of all parties involved – determines that it can be applied.
- The disappeared were real, were captured alive, and their deaths were not a result of any of the variety of excuses provided by the regime (suicide, escape, etc.).
- Kidnapping is a permanent crime, and as such, cannot have amnesty applied.
- Civil courts, not military courts, should judge human rights violations trials, because said violations cannot occur under legitimate military authority.
- If a trial claims that a state of war was formally declared in Chile after the coup, then international treaties concerning armed conflict are applicable and invalidate the amnesty law or time limit for filing judicial complaints (94-95).

Pinochet's arrest as a catalyst for justice

It would, of course, be far too simplistic to attribute the innumerable changes that took place in the Chilean government, military, judiciary, and civil society after October 1998 solely to the arrest of Pinochet. Clearly, the culmination of arduous work by human rights activists, as well as the effects of institutional reforms and generational turnover in leadership, coincided with the cataclysm of the former general's detention abroad. However, Pinochet's arrest undeniably served as a powerful catalyst that sped up the progress to come.

Any semblance of consensus on the role of the authoritarian government or the success of the transition that existed before October 1998 was obliterated at the time of the arrest (Garretón 92). Pinochet's arrest in another country put pressure on Chile to address the shortcomings of their own judiciary (Davis 251). It drew the judiciary and other state institutions into an active role in the discourse on reconciliation policies (Stern, *Reckoning* 252). In the case of the judiciary, increased prosecution rates after the arrest demonstrate its increased participation in human rights discourse. Of course, the continued legal pursuit of Pinochet himself after his return to Chile also exhibits a shift in attitudes in comparison with pre-October 1998 norms. Pinochet's arrest was a major advance for the cause of human rights, and Chile's reconciliation process would not have been the same without it.

Courts after the Pinochet arrest: Spain

In Spain, Pinochet's arrest did not have the same effect on the judiciary as it did in Chile. Attitudes and policies regarding human rights prosecutions committed by the Franco regime in Spanish courts have not changed a great deal between 1998 and the present. There are a few differences between the two countries that quickly come to mind to explain this, some of which have already been discussed. For instance, in 1998 the Spanish were further away from both the worst repression and the transition to democracy than were the Chileans. The Spanish transition went a lot "smoother" than the Chilean transition, in that the Spanish transition witnessed no effective calls for accountability for the crimes of the former government; didn't include any attempt to settle the truth like Chile's Rettig Commission; and was characterized by a social "consensus" that emphasized the importance of progress for the country while leaving old

injustices behind². Finally, even though Pinochet's arrest warrant originated in Spain, Pinochet was Chile's former president, not Spain's, so it makes sense that his arrest would have a diminished effect in Spain.

At the same time, the irony of the possibility of Pinochet being tried in Spain, a country that had barely begun to address its own rough human rights history, was lost on few. Gil Gil points out that

...the Spanish courts have been criticized for acting in a politically incoherent manner: while upholding the Amnesty Law and thus not insisting on the need for criminal justice for serious human rights violations committed on Spanish territory, they have opened criminal proceedings in relation to such violations when committed abroad (130).

The judiciary's credibility and the validity of the country's transition based on impunity was damaged by this double standard of pursuing justice for other countries that was barely considered in Spain itself (Tamarit 78). Davis even suggests the presence of a "psychological transference factor" that motivated Spain to hold Pinochet accountable for his crimes as Franco never was (252). The two countries are undoubtedly linked by both their recent repressive experience and subsequent frustrated search for justice.

In addition, as a result of Chile's status as a Spanish colony until the early 19th century, the histories of the two countries are also intertwined. Sugarman points out that Chile inherited

² However, it is important to note that although the Spanish transition progressed in an orderly and rational manner from a government perspective, at the time Spanish culture was anything but orderly and rational. *La movida madrileña* (Madrid's Movement), beginning in the late 1970s and reaching its peak in the 1980s (Stapell 1), was an explosion of counterculture manifesting itself in art, music, fashion, film, literature and experimentation with drugs and sexuality (Marí 128). In the transition, a country that had spent nearly forty years under the very conservative partnership of Franco's government and the Catholic Church had the chance to explore a new and unrestricted identity (Stapell 1). So although Spaniards were not rejecting the authority of the former authoritarian government with demands for justice, there was certainly a rejection of Franco's constrictive social values going on in popular culture.

“constitutional, legal, and military” elements from Spain that “impeded democratization, elevated the military’s participation in domestic politics, and legitimated regimes of impunity for crimes committed by civilian and military government” (119). Spain and Chile, then, share more than the same language and some determination to bring human rights violators to justice – they share a colonial history that went on to contribute to the advent of repressive regimes in both countries.

An important feature that sets Spain apart from Chile is that the political, academic, and civil actors who continue to bring the issue of forced disappearances to the forefront are not aiming to achieve actual criminal prosecutions, but rather the appropriate recognition of the injustices committed in the country. The families of the victims of the worst repression under Franco are searching for “moral reparation” and the state’s involvement in the search for and exhumation of their relatives’ remains (Gil Gil 127). This goal – limited in comparison to Chile – is likely a reflection of the impracticality of substantive legal proceedings in Spain due to the non-retroactivity of law embedded in the Spanish penal code and the fact that virtually all of the perpetrators of repressive activities are dead. This precisely-specified objective later became crucial in the fate of Spain’s most serious judicial foray to date concerning the investigation of crimes under Franco.

Those engaged in the quest for recognition and involvement of the state in the exhumation process had their hopes raised and then dashed by Spain’s unfulfilling Historical Memory Law in 2007. Although it attempted to widen the state’s role in exhumations and related activities, this legislation did not include recognition of state responsibility to investigate the crimes and make reparations to victims’ families (Chinchón Álvarez 139). Tired of pursuing

state responsibility in vain, families and human rights organizations decided to try their luck in Spanish courts (Tamarit 78; Chinchón Álvarez 140).

Judge Garzón takes on the judicial investigation of crimes under Franco

In December 2006, associations whose purpose is to locate and carry out exhumations of mass graves in Spain filed complaints in the *Audiencia Nacional* concerning crimes against humanity (specifically, illegal detentions and disappearances) committed during Franco's regime (Aguilar 333). The crimes were described as being committed by forces engaged in rebellion against the legitimate authority. Crimes of rebellion and crimes against humanity fall under the jurisdiction of the *Audiencia Nacional* (Tamarit 78). Exactly a decade after the arrest of Pinochet, Judge Baltasar Garzón formally assumed the case on October 16, 2008. Those accused of the cited crimes included the late General Francisco Franco himself and thirty-four of his fellow officers and ministers (Guarino 61). Over the next few years the case would prove to be a flash point for opposing political ideologies and attitudes about Spain's human rights history.

To clarify, Judge Garzón is no stranger to controversy. Usually described as an international human rights crusader or a "superjudge", Pinochet's arrest was not his first highly divisive case, although it is probably his most well-known in the international arena. In 1988 Garzón became the examining magistrate of the *Audiencia Nacional's* Central Criminal Court No. 5 and there dealt with various high profile cases inside and outside of Spain (Lázaro). In Spain he has investigated cases concerning both the terrorist activities of the Basque separatist group ETA and the Spanish government's illegal activities to combat this group. Coupled with the investigation of various narco-trafficking and money laundering schemes, what we find is a man with many political enemies (Junquera). Although Garzón's professional baggage certainly

played a role in the Spanish judiciary's consideration of the case concerning crimes under Franco, it is also important to remember that the case was initiated by the hard work of human rights associations and victims' families, not Garzón himself (Chinchón Álvarez 140).

Garzón employed some serious legal maneuvering to present this case in the face of many challenging obstacles. His classification of the illegal detentions and disappearances as crimes against humanity is central to his argument. According to international treaties and laws Spain has signed, such as the Inter-American Court of Human Rights, amnesty (as it is conceived in the 1977 Amnesty Law) cannot be applied to crimes against humanity (Tamarit 79). He also employed the interpretation of kidnapping as a permanent crime that cannot be deemed imprescriptible until the fate of the victim is determined. Finally, Garzón invoked the International Covenant on Civil and Political Rights (ICCPR), adopted by the UN in 1966 and ratified by Spain in 1977, which obligates signatories to investigate disappearances that may have resulted in torture or death (79).

Of course, the most practical issue in Garzón's legal argument is that all of those accused of the crimes are dead. This was the most criticized aspect of the argument, and ultimately the reason why Garzón himself withdrew the case on November 18, 2008. He indicated that the individual cases fell under the jurisdiction of the provincial courts where the crimes occurred, and in this manner some cases were investigated (Tamarit 79-80). Garzón was supported by like-minded colleagues and political and civil actors who prioritized human rights, but he also received criticism across the board for using the judicial system for a purpose other than what it was intended for: cases based in agreed-upon law that result in concrete criminal prosecutions, which were impossible in this situation (79).

Although Garzón withdrew the case, the *Audiencia Nacional* affirmed the discontinuation of the case in their decision on February 2, 2009. The *Audiencia* did not uphold Garzón's classification of the crimes as crimes against humanity because such a thing did not exist at the time in either the Spanish penal code *or* in international law (Tamarit 79; Gil Gil 117). This alone unraveled a great deal of Garzón's reasoning; it meant the *Audiencia* did not have jurisdiction over the case and also that international law regarding crimes against humanity could not be invoked (Tamarit 79). Next, the disappearances in the case could not be considered as ongoing crimes because this concept was not introduced in the Spanish penal code at the time that the crimes were committed (Gil Gil 119), and because the disappearances were known to end in death (so ultimately the case would be dealing with death, not disappearance) (Tamarit 80). Finally, the *Audiencia* upheld the 1977 Amnesty Law, rejecting as invalid the argument that it violated international law prohibiting amnesties because such laws were not in place at the time of the passage of the Amnesty Law (80).

By July of 2009, Garzón had three formal complaints filed against him for "the crime of breach of official duty" for pursuing the investigation of crimes under Franco (Chinchón Álvarez 152). All of these complaints came from far right-wing groups, including the *Falange Española* (Spanish Phalanx) political party and two labor unions called *Manos Limpias* (Clean Hands) and the *Unión Nacional de Trabajadores* (National Workers' Union) (152). These complaints became the basis of a case against Garzón that claimed he knowingly misinterpreted the law (Tamarit 80). In May 2010, Garzón was suspended from the court pending the resolution of this case (Junquera). Finally, on February 27, 2012, the Supreme Court acquitted Garzón of the charges against him.

Garzón could not return to business as usual after the February 27th decision, however, because in the meantime he was accused of ordering illegal wiretapping in the Gurtel case, which dealt with corruption in the financing of Spain's major right-wing party, *Partido Popular* (Tremlett, "Spain's 'Superjudge'"). In a February 10, 2012 Supreme Court decision on this case, Garzón was prohibited from serving as a judge for eleven years (Lázaro). Between Garzón's disbarment as a result of the Gurtel case and his suspension from the courts for abuse of power initiated by multiple right-wing groups, the ulterior motives of Garzón's opposition inevitably came into question. Were those who pursued Garzón in court – and even the judges that passed his sentence – motivated by legitimate legal concerns? Or were they motivated by a desire to prevent digging into Spain's past or the ruffling of the conservative party's feathers? It would be difficult to definitively determine the answer to this question, but the fact remains that Garzón's fate is covered in political fingerprints.

Nonetheless, all of Garzón's adventures serve as an indicator of the Spanish elite's attitudes toward truth and justice in the 21st century for crimes committed under Franco. Pinochet's arrest did not result in an increase in legal cases filed, let alone any evolution in judicial rulings; parliament's contribution to the issue was the 2007 Historical Memory Law, which fell short; and Garzón was chastised by his own branch of government for attempting to draw such a complicated legal issue into the judicial process. Indeed, the February 27, 2012 decision acquitting Garzón of his breach of duty charges pointedly adds that this type of search for truth is the job of neither the judicial process nor the judge (Comunicación). It would appear that the *pacto de olvido*, or "pact of forgetting," said to dominate the Spanish transition, holds firm within the branches of Spanish government.

A reluctant judiciary

Aguilar suggests that a judiciary unwilling to investigate the past contributes considerably to the absence of truth and justice in Spain (335). This proposal is supported by the courts' reaction to Garzón's attempt to investigate crimes under Franco, specifically in the way the justices treated the use of international law and the concept of disappearances as a continuing crime. As for international law, some argue that Spain's worst repression can't be tried because it happened before the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966. Still others argue that certain offences could still be prosecuted via the application of natural law or by focusing on human rights violations that happened after 1948 (333).

As for the attitude towards disappearance as a permanent crime, according to the Inter-American Court of Human Rights, the state is obligated to investigate disappearances until the fate of the person has been determined, even if those responsible cannot be punished (Chinchón Álvarez 155). The same interpretation is also upheld by the European Court of Human Rights and invalidates the application of the Amnesty Law (157). At the heart of the problem in Spain is the question of how to incorporate international criminal law into domestic law. If international law is considered superior to domestic law, Spanish courts cannot apply the Amnesty Law and would at least have to initiate investigations.

Finally, it is worth noting that a 2009 reform also disabled Spain as an actor in transnational justice, or justice across sovereign borders. At the time, there were eleven human rights violations cases filed in Spanish courts from places like Rwanda, Gaza, Tibet, El Salvador, and Guantánamo, and it was clear that the caseload would not diminish any time soon. Removing the broad jurisdiction of the *Audiencia Nacional*, the legislature altered the

competence of Spanish courts so that they could only hear cases if the victims or perpetrators were Spanish; if the crimes were committed in Spain; or if the cases were not already brought before domestic or international courts (Ferrándiz 46). This change in competence effectively sidelined Spain as a haven for trials concerning human rights violations committed in other countries, regardless of their gravity.

Epilogue to state silence in Spain

Although it is not the focus of this study, it is important to recognize that the Pinochet arrest did have effects in Spain outside the judicial realm. Of course, as in Chile, the arrest was not the sole cause of change in Spain, rather a contributor. The awareness of human rights violations raised by Pinochet's arrest in turn raised questions about Spain's own history. The paradox of arresting Pinochet for the same crimes that had gone unpunished for years in Spain was hard to ignore, and since around 2000 awareness and recognition of crimes under Franco have been gaining speed in the civic sphere (Davis 252). This initiative was spearheaded largely by the *Asociación para la Recuperación de la Memoria Histórica* (ARMH or the Association for the Recuperation of Historical Memory). ARMH is leading the way in locating mass graves and identifying the human remains within, as well as campaigning for government support of these activities (Davis 252; Sikkink 57).

This increased awareness coupled with the reluctance of the judiciary or the legislature to meaningfully contribute also brings into question the degree of success that the transition really achieved. At the time it appeared peaceful and successful, but Gil Gil argues that its flaws continue to manifest themselves in Spanish society today (127). The negative effects the transition had on today's Spanish democracy include "oligarchic behavior of...political parties,

corruptions...and democratic cultural deficits” (Gil Gil 127). Spain, of course, is sailing through rough economic waters at the moment, and Spaniards have an entrenched mistrust of their politicians. Some of these troubles could certainly be traced back to the restricted nature of the transition.

A glimmer of possibility for justice in Spain appeared in October 2010 in the form of a rogatory letter sent by Judge María Servini de Cubría of the Argentinean Federal Court requesting information about the status of an investigation concerning human rights violations committed between the beginning of the Spanish Civil War and the end of Franco’s government (Chinchón Álvarez 132). If it is proved that these crimes cannot be prosecuted due to Spain’s Amnesty Law, the Judge Servini could announce her own court’s competence to investigate these crimes based on universal jurisdiction (Tremlett, “Argentinean Judge”). Spaniards brought the complaint to Servini after Garzón’s attempt to investigate crimes under Franco stalled, and the letter was sent after Garzón’s suspension from court. Spain already has a history of judicial intervention in Argentina: in 2005 Argentine navy captain Adolfo Scilingo was tried, convicted and jailed in Spain (Tremlett, “Argentinean Judge”), and just before Judge Garzón picked up the Pinochet case he was investigating human rights crimes in Argentina (Kornbluh 458). Could Spain benefit from a taste of its own transnational justice medicine? Even if Servini’s case faced as much opposition as Garzón’s did, the Argentinean investigation could be the catalyst Spain needs to spur its government to address these long-standing issues.

CONCLUSION

Clearly there are dozens of variables – other than those mentioned here – working together to influence the attitude towards human rights in both Chile and Spain, inside and

outside the courts. Human rights, in both countries, have been a complicated issue since the atrocities were committed, although over the years the two nations have dealt with them in different ways. Chile's violations, committed secretly and never officially recognized by the authoritarian government, also occurred closer to the transition to democracy. For both of these reasons, the violations played a larger role in Chile's transition, allowing for such facets as their truth and justice commission and the evolving judicial attitude towards conducting investigations before applying amnesty.

Spain's repression, borne of what was considered by the regime to be "mutual responsibility" in the Civil War and concentrated in the post-war years, were built into law under Franco and were strictly enforced over decades. The Spanish transition, regarded as a success for its peaceful transfer of power, in reality did not address at all the people who had faced repression in past years. Nor did the Spanish transition benefit from the active human rights community that existed during Chile's transition, and even Chile's repression. The Spanish judiciary upheld amnesty and refused to investigate any human rights violations.

With Judge Garzón's arrest of Pinochet, justice no longer was limited by borders. This event – coupled with institutional reforms predating the arrest – catalyzed prosecutions in Chile. The Chilean judiciary forged ahead on prosecutions not just of Pinochet, but of various other members of the regime. As a result of Pinochet's detention in London, the untouchable had been downgraded to the same level of legal accountability as that of any other Chilean. Justice could, and did, make a great step forward in Chile.

Even though Spain is home to the crusading Judge Garzón, the rest of the judiciary does not share his concern for digging into the past. Despite the irony of Pinochet being tried in a country where the very same crimes have gone unpunished, the Spanish judiciary and other

government branches have largely remained silent on this issue. Garzón's 2008 attempt to delve into Spain's human rights violations was met with backlash from his colleagues and from the political arena. In the aftermath of Garzón's legal ordeals, the Supreme Court made it clear that the courts were not the place to investigate such crimes. Currently, Spain's search for justice maintains the same form it has for over a decade: exhumations led by civic associations looking for their missing relatives. Although Chile and Spain don't have exactly the same story to tell, citizens in both countries share the same pain of lives cut short or altered forever by state-led repression. They won't rest until history, at the very least, is able to judge their repressors.

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