
Book Reviews

Naomi Roht-Arriaza. ***The Pinochet Effect: Transnational Justice in the Age of Human Rights***. Philadelphia: University of Pennsylvania, 2005. Pp. 272. \$55. ISBN 978-0-8122-3845-7.

Roger Burbach. ***The Pinochet Affair: State Terrorism and Global Justice***. London: Zed Books, 2004. Pp. 192. £14.95. ISBN 1-84277-435-2.

Juan Guzmán Tapia. ***En el borde del mundo: Memorias del juez que procesó a Pinochet***. Barcelona: Editorial Anagrama, 2005. Pp. 240. €14. ISBN 84-339-2570-9.

The death of Augusto Ugarte Pinochet on 10 December 2006, Human Rights Day, triggered debates around the world about the dictator's legacy: Had the London arrest in 1998 of this former head of state changed the future course of universal jurisdiction or did his ultimate escape from punishment establish the limits and futility of international law? Three books written before Pinochet's death provide answers to these focal questions: *The Pinochet Effect* by Naomi Roht-Arriaza; *The Pinochet Affair* by Roger Burbach; and the legal memoir *En el borde del mundo* [*The Edge of the World*] by Juan Guzmán Tapia, the judge who prosecuted Pinochet in Chile.

Contributing valuably to previous book-length works on 'one of the most intriguing international human rights cases of the past half-century' (Burbach, at 6), these books move beyond earlier chronologies and documentary compilations to offer a more comprehensive and analytic perspective on the Pinochet case.¹ In this regard, *The Pinochet*

Effect is the most factually detailed and analytically sophisticated of the three books, written by a Berkeley international law professor specializing in issues of accountability. Both Roht-Arriaza and Roger Burbach draw on interviews with many of the key players, including legal experts and rights activists. Burbach's concise volume is written for a less specialized audience, focusing on the Pinochet case per se only in the second half. Burbach, who heads the Center for the Study of the Americas and was conducting doctoral research in Chile when Pinochet seized power in 1973, openly admits his commitment to leftist politics and emphasizes above all Pinochet's sociopathy. While his tone is more polemical and the arguments more superficial, the book offers a concise introduction to anyone wanting an overview of the Pinochet case in the context of post-1973 Chilean history. Judge Guzmán's memoir, in turn, is an unprecedented glimpse into a key personality in the Pinochet case, most useful in describing the legal scene in Chile.

All these books, moreover, chronicle a world transformation. For Roht-Arriaza, the shift toward transnational prosecutions features most prominently, as she documents national and global legal changes. Burbach, in contrast, situates the Pinochet case and its global repercussions in the political context of post-1973 Chilean history, including

¹ The principal book-length works include M. Davis (ed.), *The Pinochet Case: Origins, Progress, and Implications* (2003); A. Dorfman, *Exorcising Terror: The Incredible Unending Trial of General Augusto Pinochet* (2003); R. Brody, *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (2000); D. Woodhouse (ed.), *The Pinochet Case: A Legal and Constitutional Analysis* (2000); A. Remiro Brotons, *El caso Pinochet: Los límites de la impunidad* (2000); and J. Lagos Erazo, 'Caso Pinochet' ante las cortes británicas (1999).

the country's democratic transition. Judge Guzmán's memoir traces the personal journey of a member of the judiciary, who initially supported the military regime but gradually awakened to the dictatorship's crimes. This is indeed a rare glimpse into a judge's admission of how his own social circumstances and the regime's propaganda machinery led him and his colleagues – and much of the middle class – to oblivious and tacit complicity. For students of international law, the memoir sheds light on the possible reluctance of the judiciary to prosecute human rights crimes.

Despite their differing perspectives, these books all highlight several factors underlying the Pinochet case: the importance of individual actors and networks, the role of specific legal strategies in delimiting the boundaries of universal jurisdiction, the relationship between international law and national courts, and the case's complex global reach.

The books all emphasize the fundamental role of human agency, or the power of individual actors to change legal outcomes. Lawyers and judges of course play a pivotal role, depicted most fully by Roht-Arriaza. The story typically begins with lawyer Joan Garcés. A 20-year-old adviser to Salvador Allende in 1973, he fled the burning presidential palace in Santiago and escaped to his native Spain, where two decades later he filed the first case against Pinochet. As the Spanish investigating judge who requested Pinochet's extradition from Britain, despite intense opposition, Baltazar Garzón played a path-breaking role, building on his longstanding commitment to prosecute controversial cases and promote human rights. Back in Chile, Juan Guzmán Tapia took centre stage, pursuing Pinochet's prosecution despite a 'political uproar', limited resources, intense pressure, and even threats (Burbach, at 132). Without these particular personalities, the authors all intimate that the Pinochet case would have unfolded quite differently.

If individual actors shape transnational prosecutions, it is only because they network creatively across state borders. Roht-Arriaza recounts how lawyers and judges across Europe informally contacted one another, bypassing more cumbersome and sluggish

formal processes. Similar network dynamics were evident among international governmental bodies, such as the European Parliament and the United Nations Committee on Torture, which issued strong statements reminding states of their legal obligations to prosecute or extradite egregious human rights offenders. The accounts are reminiscent of Anne-Marie Slaughter's work on transgovernmental networks, applied to the emerging area of transnational prosecutions.²

Beyond state-level networks, all three books highlight the role of non-state groups. Two sets of actors are particularly noteworthy: exile groups and international advocacy organizations. Transnational justice relies first on the contacts, publicity and information generated by exile groups like the Argentine Human Rights Association in Madrid, which played a crucial early role in the Spanish litigation by facilitating information flows from Latin America and forging alliances with progressive groups in Europe. Exile groups also mobilized public support by disseminating stories in the media and protesting publicly, including holding daily vigils outside Pinochet's London hospital.

International advocacy groups played an equally essential role, serving as a bridge between victims and lawyers. For example, Amnesty International had been tracking Pinochet's visits and contemplating his arrest since 1991; they were the first to notify Spanish lawyers that Pinochet was in London for surgery. They subsequently advised Spanish lawyers not to charge genocide, a crime absent from Britain's penal code. More generally, international NGOs sponsored visits by witnesses from abroad, and they participated actively in legal proceedings. Human Rights Watch, for instance, sent delegates to court hearings and conducted legal research. The Pinochet case in fact marked the first time that human rights organizations formally intervened in a case before the House of Lords. Roht-Arriaza sums it up best, when she describes these groups as occupying a unique

² A.-M. Slaughter, *A New World Order* (2004).

position, alternating between engaged advocates and detached experts (at 214).

These books also contribute to a richer understanding of contending legal strategies for pursuing transnational justice. A key initial decision in the Pinochet case, for example, concerned the nationality of victims: Should Spain focus exclusively on its own citizens? The decision to focus initially on Spanish victims was partly an attempt to generate support from political parties, absent in other European countries where similar efforts to prosecute crimes committed during Argentina's dirty war had failed. After the first complaints took shape, Roht-Arriaza contends, other dilemmas quickly surfaced. Should a national penal model – in line with earlier French and Italian cases against Argentinians – or an international legal model, inspired by Nuremberg, be followed? The Spanish opted for a hybrid approach, emphasizing national prosecution on the basis of universal jurisdiction. Another source of divisiveness revolved around the number of victims: while focusing on a smaller number of victims would be more efficient, it would also entail more costs, including reconstructing the chain of command. Legal strategies therefore required navigating these competing claims, sometimes leading to contradictory approaches.

At the most basic level, Roht-Arriaza describes how the Pinochet case built on earlier cases. The first legal breakthrough came when a Spanish prosecutor drew on an obscure statute to claim that Spanish courts had universal jurisdiction to try Pinochet. Somewhat reminiscent of the story of the Alien Tort Claims Act in the United States, Carlos Castresana invoked Article 23.4 of Spain's Organic Law of State Power, dating to the 1870s but incorporated into domestic criminal law in 1985 and used to prosecute drug dealers. Another breakthrough occurred accidentally when one of Pinochet's trusted advisers appeared in a Spanish court in October 1997 to defend the former dictator; in responding to the court's questions, Pinochet's adviser unwittingly validated Spain's jurisdiction over the case. The arrest warrant itself, issued on 16 October 1998, centred on

Pinochet's involvement in Operation Condor, a case connecting Spanish investigations into crimes committed in Chile and Argentina.

The Chilean government was involved in deploying its own legal strategies. Rather than arguing defensively that transnational cases assaulted national sovereignty, the government shifted to a positive discourse of commitment to human rights, vowing to try Pinochet at home. The commitment seemed credible, given a rise in criminal cases against high-ranking military officers in Chile. At the same time, diplomatic channels also were used to convince foreign governments to abstain from prosecution. Judge Guzmán of Chile confirms these dynamics: in one incident, two prominent Pinochet allies urged Guzmán to issue an arrest warrant for Pinochet in London, with the goal of having the general returned home.

Guzmán's own account reveals the nuts-and-bolts of seeking human rights accountability, including the importance of collecting evidence. As the judge investigating Pinochet, a team of forensic scientists, investigative police, anthropologists, and even a chaplain joined him. In an interesting anecdote, he recalls how a dissenting general, following the Caravan of Death – a killing spree shortly after the 1973 coup, ordered by Pinochet and serving as the basis of legal cases – kept a memo with handwritten notes by Pinochet in the margin in a safety deposit box for over 20 years until he turned it over to Guzmán.

Judge Guzmán's principal innovation may nonetheless have been his portrayal of disappearances as ongoing crimes, essentially bypassing Chile's amnesty law and influencing legal strategies in Spain. It remains unclear from the books, however, whether Guzmán's strategy inadvertently shaped the influential Aylwin Doctrine – determining the fate of the disappeared, in exchange for no punishments. In a climate where securing investor confidence loomed large, government admissions about past abuses promised two simultaneous rewards: appeasing human rights demands while foregoing punishment of the armed forces. Partial accountability would be the price of stability, what Burbach

describes as the iron cage left behind by Chile's negotiated democratic transition.

Despite political attempts to foreclose cases dealing with crimes committed during the amnesty period, Guzmán's efforts were vindicated in 2004, when the Santiago Court of Appeals issued its first sentence on forced disappearances – until then protected by the amnesty law. In its judgment, reminiscent of the Spanish court's own non-recognition of Chilean amnesty laws, the Court drew heavily on international law. It cited the Inter-American Convention on Forced Disappearances, signed by Chile; the *Barrios Altos* case of the Inter-American Court of Human Rights, finding that forced disappearances constitute crimes against humanity; and Pinochet's 1980 constitution, ironically granting human rights treaties constitutional status. In the end, creative legal strategies may have carried the day, given the decentralized nature of transnational prosecutions. As Roht-Arriaza describes it, 'The cases stirred imaginations and opened possibilities precisely because they seemed decentralized, less controllable by state interests, more, if you will, acts of imagination' (at 204).

The role of international law in transnational prosecutions inevitably is mediated by the domestic context. More directly than the other two authors, Roht-Arriaza identifies the importance of national factors, both national legal systems and domestic politics. While she does not theorize explicitly about these factors, her work raises promising avenues of exploration for future researchers, especially those at the intersection of international law and international relations, seeking to determine the conditions under which transnational prosecutions are most likely to succeed.

Consequently, both legal and political conditions are deemed significant. Legally, Roht-Arriaza argues that monist-civil law systems are most receptive to transnational prosecution, versus countries with dualist-common law systems. While no systematic evidence is presented to support this assertion, the claim is consistent with studies showing that countries under civil law systems are more likely to ratify human rights treaties. Politically,

Roht-Arriaza notes how Spain was ripe for the Pinochet case in 1998; overcoming a string of scandals, a new government was unlikely to risk meddling with the judiciary. Likewise, a new Labour government in Britain included numerous opponents of Chile's military regime who favoured arresting Pinochet. Such governments, Roht-Arriaza suggests, can be a powerful precondition for transnational prosecutions.

These factors, in turn, shaped legal developments. A second arrest warrant, issued in October 1998, was intended to accommodate British law. The charge of genocide was dropped, and charges of torture hinged on when Britain had incorporated relevant international treaties into domestic law. British courts subsequently reaffirmed the centrality of national laws, including the importance of double criminality. Assuring that extraditable offences were crimes at the time of commission limited jurisdiction to crimes after 1998, when Britain ratified the Convention against Torture.

Another key domestic factor identified by Roht-Arriaza concerned the status of crimes against humanity, evident in the legal strategies deployed across European countries. Belgium was highly activist partly because crimes against humanity already were recognized in national law. In contrast, crimes against humanity could not be pursued in French courts, except for crimes committed during World War II or after 1994. In Spain, the courts recognized jurisdiction only over genocide and terrorism, not crimes against humanity. European countries pursuing transnational prosecutions therefore framed their arguments depending on their national laws, explaining why similar cases were prosecuted differently.

Domestic legal conditions also influenced the Pinochet case in Chile. All three books discuss how a series of reforms in 1998 expanded the size of the Supreme Court and made retirement of justices aged 75 mandatory. This led to a generational shift in about half of the justices, moving the court to a post-Pinochet era where rule of law outweighed political allegiances.

In general, the authors depict domestic conditions as both constraining and enabling transnational prosecutions. Political factors, including new left-leaning governments, can facilitate transnational prosecution. Legally, the scope of prosecutions is inextricably limited by national legal systems. These preconditions aside, an advantage of transnational prosecutions is that they rely on existing structures, rather than requiring actors to build costly new mechanisms.

All the books reviewed emphasize that the Pinochet case has had far-reaching repercussions in international law. From the former head of state's arrest in London, based on a Spanish indictment, to a panel of British Lords' determination that Pinochet did not enjoy immunity to Chilean courts, stripping Pinochet of his immunity on multiple occasions, the case was marked by dramatic turns. Judge Guzmán in his memoir even describes Pinochet's interrogation in Chile as a historic moment. More specifically, these books discuss this landmark case's legacy in four areas: truth and accountability in Latin America, transnational human rights prosecutions in Europe, debates about transitional justice, and evolving conceptions of global justice.

In Chile, the case proved deeply consequential. According to Burbach, the case had far-reaching effects, above all empowering the human rights movement. As a Chilean sociologist and rights advocate described it, 'We finally felt free to discuss and say things that were considered taboo even after years of civilian rule' (Burbach, at 124). Furthermore, the case broke 'a pact of silence' and lifted 'a wall of impunity' (Roht-Arriaza, at 96). By the time Pinochet landed on the tarmac in Santiago, over 60 complaints had been filed against him in Chilean courts; two months later, there were about 100 cases. By 2003, a Pandora's box had been opened, with over 200 people being imprisoned or indicted for human rights crimes (Burbach, at 144). In short, the case altered perceptions about the use of international law, even in a country like Chile that operated under the Napoleonic tradition. 'With Pinochet's arrest, a new wave of cases swept through the courts' (Roht-Arriaza, at 122).

The authors further concur that transnational prosecutions in Europe were essential to the cases in Chile. As Roht-Arriaza emphasizes, the transnational prosecution 'affected the government, the judges and lawyers, the human rights groups, the press, and the military' (at 86). Once the government committed itself to national trials, it was somewhat bound by its own rhetoric. Consequently, even when Chile's Supreme Court closed the principal case against Pinochet in July 2002, due to the defendant's dementia, Roht-Arriaza maintains that 'rough and partial justice' still may have been served (at 95).

Beyond Chile, the effects of the case were evident in a 'justice cascade' across Latin America.³ The Pinochet case energized activists and courts around the region to pursue human rights accountability. Thus, Roht-Arriaza devotes a full chapter to human rights trials in Argentina, describing the Spanish case as an 'opening' that changed judges' ideas about the possibilities of international law (at 105). And in Uruguay, it 'reopened the issue of immunity' (Roht-Arriaza, at 154). Nor did many countries want to be seen as harbouring human rights violators post-Pinochet. Mexico, for example, became the first country to extradite a non-national to a country (Spain) for crimes committed in a third country (Argentina).

The juridical effects in Europe were very pronounced. Not only did countries like Belgium, France, Switzerland, Sweden, Germany and Italy bring charges against Pinochet, but they unleashed a broader wave of transnational prosecutions adeptly described by Roht-Arriaza. Unlike past attempts to focus only on victims of European nationality (i.e., passive personality), the Pinochet case revealed the possibilities of universal jurisdiction. Thus, Belgium convicted in 2001 four Rwandans for genocide, while cases in Europe extended the Pinochet precedent to rights violations in Guatemala, Chad,

³ Lutz and Sikink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America,' *Chicago Journal of International Law*, 2 (2001) 1.

Congo and Suriname. Spanish courts also continued to prosecute transnational human rights crimes, particularly in the Latin American context (including the recent indictment of Guatemalan Ríos Montt), though they too have begun limiting universal jurisdiction to their own nationals.

Likewise, the Pinochet case challenged the place of national amnesties in international law. Creative lawyers took advantage of loopholes (for instance, the exclusion of minors in Chile or civil servants in Uruguay), and foreign courts failed to recognize the legitimacy of amnesties for human rights crimes. Foreign investigations also revealed information about crimes previously silenced by amnesty, exposing violators and their atrocities to public opinion. Legal struggles, in turn, challenged the prevailing view that amnesties and peace are necessarily intertwined in post-conflict settings.

Roht-Arriaza, in particular, links the Pinochet case to broader issues of transitional justice. Challenging conventional views, she observes: ‘The question for transitional justice then becomes, not whether or not to prosecute or compensate, but in what time frame and under what conditions, and in what combination of national, transnational, and international forums’ (at 223). Roht-Arriaza further intimates that transnational prosecutions can complement truth commissions. Prosecutions are mostly legal exercises, involving the collection of evidence and targeting of individuals, while truth commissions are inherently political and concerned with exposing an overall record of abuse.

On a global scale, the authors emphasize the case’s impact on ‘the judicialization of interstate relations’ (Roht-Arriaza, at 138). Roht-Arriaza describes a new three-tiered system of global justice in which domestic courts are the courts of first resort, transnational courts act as a ‘second line of defense’, and the ICC is the court of last resort (at 201). While new global institutions like the ICC reflect a top-down institution-building approach emblematic of globalization, transnational prosecutions represent a more decentralized, victim-driven approach emphasizing

networks. Similarly, Burbach pits a globalist and a unilateralist trend, or the globalization of justice versus state prerogative. Echoing the other books, Roht-Arriaza credits the Pinochet case – perhaps prematurely – with creating a ‘universal judicial consciousness’ (at 107). Without fully addressing countervailing trends, including ongoing *political* obstacles to global justice (for instance, resistance to the ICC), these authors’ claims about the legacy of the Pinochet case remain largely speculative.

The authors, however, are not naïve about the consequences of transnational prosecution. Even international lawyer Roht-Arriaza concedes that despite the importance of investigations, full justice requires convictions. She further notes that the ‘ups and downs are the price to be paid for a decentralized, global process largely driven by victims’ groups. The very nature of transnational prosecutions makes them opportunistic, supplemental, ad-hoc’ (at 198).

The future of universal jurisdiction indeed appears uncertain. While Justice Guzmán concludes optimistically about events in Chile, Roht-Arriaza warns that the initial enthusiasm unleashed by the Pinochet case led to a global overload of cases and a backlash of opposition. Also uncertain is the relationship between the ICC (not ratified by Chile due to fear of US retaliation) and national courts pursuing transnational prosecutions: Will they view each other as allies or competitors? (Roht-Arriaza, at 206) Furthermore, new challenges will have to be faced, including determining when national courts are unable or unwilling to try a case. Is court inactivity a sufficient indicator of incapacity or unwillingness? How many cases will national courts have to pursue; and what happens if most cases focus on the rank-and-file, as they did in Guatemala? Another ongoing dilemma is the issue of retroactivity. Should transnational prosecution be limited to crimes committed after a country ratified the relevant treaties or after it adopted implementing legislation? The books reviewed ask but do not answer these pertinent questions.

Significantly, the most recent wave of books on the Pinochet case – all written before

the dictator's death – depict the impact of transnational prosecutions along a spectrum of influence. Punishment is not the only or even primary touchstone of success. For these authors, the Pinochet case was influential because it drew attention to a set of crimes, contributed to the factual record, empowered victims to tell the truth, and demonstrated how international law can be used in national struggles for justice. Perhaps most importantly, it increased pressure on Chile and other governments to take legal action.

Contrary to conventional arguments, which support transnational prosecutions and global justice mechanisms on the basis of their presumed deterrent effects, these books emphasize the potentially *catalytic* effects of trying human rights violators. Certainly, post-Pinochet, the possibility of universal jurisdiction appears to have curbed the travel itineraries of those fearing prosecution. And as the potential for prosecution in geographically dispersed forums grows, the role of deterrence also may rise. Authors like Roht-Arriaza, however, do not appear optimistic about these trends, given the political underpinnings of transnational prosecution – an area that scholars should now explore more systematically. Rather, the most important effects of the Pinochet case and transnational prosecutions may be indirect, sparking local trials and invigorating public discourse about past abuses.

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