



Now We Know About Pinochet, but Where Do We Go From Here?

By Gerald Robert Pace

A review of Chile Under Pinochet: Recovering the Truth. Philadelphia: University of Pennsylvania Press (Pennsylvania Studies in Human Rights), 1999. 296pp.

General Augusto Pinochet, who served as military and civil leader of Chile from 1973 until 1990, forged perhaps one of the most authoritarian regimes ever to govern in the Western Hemisphere. Spearheading the violent coup d'état that ousted socialist President Salvador Allende, Pinochet not only achieved power, but also created a personalistic dictatorship bolstered by a military run governmental bureaucracy to secure his rule. And indeed, this combination perpetuated Pinochet's seventeen-year tenure.

In the years following the coup, Chile's military, under orders from Pinochet, embarked on a violent purging of the nation's remaining leftist movements as well as indiscriminately targeting those deemed as sympathizers to the former Allende regime. During this period thousands of dissidents fell under the category of what would become known as the "disappeared." Much as the name suggests, the disappeared were those individuals targeted by the Pinochet regime, abducted, often held for indefinite periods without charges and then silently murdered, either buried in unmarked graves or their bodies dumped into nearby waterways to be forever lost or to float down the river as a lasting, bloated sign of what will come to those who challenge his regime.

Yet, just as other authoritarian regimes across the globe had done, the Pinochet regime came to end in 1990 with a slow transition towards democratic rule. But this transition did not begin with death of Pinochet, indeed, not even his total abdication of power. Under the 1980 Constitution, Pinochet is allowed to fulfill the office of senator for life. With this office, Pinochet is granted "parliamentary" immunity for any crimes that he or his regime committed while in office. In essence, by a constitution of his own design Pinochet would forever be beyond the grasp of justice. And here lies the dilemma.

In 1990, Pinochet's successor President Patricio Aylwin publicly declared a National Commission for Truth and Reconciliation to help account for the atrocities committed under the Pinochet era. The findings of this commission, as well as other human rights organizations become the subject of a new work by Mark Ensalaco, Chile Under Pinochet: Recovering the Truth. In his

work, Ensalaco presents a historical narrative of the actions of the Pinochet regime as well as efforts made by human rights organizations to counter, and hold them accountable for, these actions. This fascinating account paints a vivid picture of the conditions that made Chile susceptible to a military coup and the years of tyranny that followed, as well as the chain of command that places Pinochet personally responsible for many of the crimes committed under his rule.

As a glimpse into the harrowing conditions of life under Pinochet, Ensalaco's account is not an ideologically biased work singularly motivated by a desire to demonize Pinochet. Rather, it is an evenhanded account of a regime born and maintained through violence, and a stunning description of the terrifying long-term impact of human rights abuses not only on those who suffer the injustice but family members who must suffer the legacy of never knowing what happened to their loved ones. This is perhaps the greatest asset of Ensalaco's work, to offer an account of the full impact of the disappeared on the people of Chile. As he puts it, "A disappearance does not end with the murder of the victim and the concealment of his or her body. A disappearance has a destructive legacy; it is a continuing crime."

So now that we know what happened under the Pinochet regime, how could the international community use this knowledge and can we ever hold Pinochet accountable for the crimes he has committed? The shrewd move on the part of Pinochet to secure for himself parliamentary immunity within Chilean law seems an impenetrable roadblock to ever holding him accountable for his crimes. But this legal technicality does not seem wholly satisfying as a justification for keeping him above the law—and the Chilean Supreme Court finally lifted Pinochet's immunity in 2000. As Ensalaco points out "The failure to prosecute the guilty because of debilitating political and legal constraints has disturbing implications in terms of the rule of law, and the anguish of the families of the 'disappeared' constitutes a perpetual injustice."

But the Pinochet case presents a Pandora's box when it comes to international law. In order to justify their actions, at least in the early stages after the coup, the Pinochet regime argued that they were in a state of civil war. While largely fabricated, the pretense of a civil war gave the actions of the Chilean military a veil of legitimacy, at least for a while. Soon, however, their actions, whether committed under the auspices of war or not, violated the Geneva Convention and were, undoubtedly war crimes. But still, these were crimes committed by a state on the people of that state, thus bringing forth the sticky issue of state sovereignty and to what degree state action, particularly those actions towards its own population, can be considered legitimate.

This is the conundrum faced by the international community: how do we hold Pinochet responsible for the crimes he may have committed if the Chilean courts refuse to hold him accountable? And, if we were to hold him responsible, what would be the precedent set by such action and what would that mean for future cases in international criminal law? Indeed, this cuts at the heart of the issue: is there such a thing as international criminal law? Historically, international law was limited to the actions of states. Should we now acknowledge that states act in ways that their leaders dictate? Must the leaders of states who issue orders, despite positions of power, be held accountable for crimes committed by their orders, even if done in the name of state interests?

Perhaps the difficulty of these questions would be lessened if we already had a functioning international criminal court. The Rome Statute, the founding charter for the International Criminal Court (the Court) created an institution that, once functioning, will be able to address criminal

actions undertaken by individuals, no matter what their office may be, in any of the Court's four areas of automatic jurisdiction: war crimes, crimes against humanity, genocide and crimes of aggression. Based on this treaty, if the Chilean courts were unwilling or unable to prosecute Pinochet (a possible example being his political immunity) then the Court would be able to initiate a trial of its own.

Obviously the Pinochet case is moot under the Court, but it could prosecute future dictators and their human rights violations based on that case. The Court would have tremendous advantages over national courts in that it only would have jurisdiction over codified international law, which in many ways will de-politicize the adjudication process and allow for an unprecedented degree of transparency within the deliberations. However, the reality of the Court may, unfortunately, be quite different. Although the Clinton administration signed the Rome Treaty (one of its last acts), the likelihood of Senate approval and formal ratification seems highly improbable. Without the support of the United States, the Court may lack the political clout needed, not to mention the financial resources, to adequately investigate and prosecute suspected violators.

But, there is a larger issue of state sovereignty here that is exacerbated by the unwillingness of the US to join the Court and the justifications for their decision. Sovereignty is a locus of ideas pertaining to the rights of states. As such, conceptions of state sovereignty will evolve over time, and what is considered an aspect of state sovereignty at one juncture in history may not be viewed so at another. The key to understanding this is that sovereignty is a conception based on a general consensus of the actors in the international system. The unwillingness of the United States, as well as others, to participate in the Court indicates a lack of consensus towards the priority of human rights above and beyond a state's right towards unimpeded sovereignty.

Unfortunately, even if the United States were in support of the Court, none of this would have any bearing on Pinochet or the crimes he committed some twenty-five years ago. Crimes prior to the signing of the Rome Treaty are not within the Court's jurisdiction. However, a clear international consensus that such crimes were and are prosecutable, and that it is appropriate to bring to justice individuals no matter rank or title, would create an climate where Pinochet could be held accountable for his crimes and that perhaps an international tribunal should be called for such an action. Ensalaco has brought the truth behind the atrocities of the Pinochet regime before us; it is now time for us to decide if we will now bring Pinochet to justice.

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