

The Pinochet precedent and the 'Garzón effect': on catalysts, contestation and loose ends

by David Sugarman



Professor David Sugarman, Judge Garzón, Dr Mads Anenas, Director British Institute of International and Comparative Law

The author delivered a public lecture at the Institute of Advanced Legal Studies on 22 October 2001 drawing upon his forthcoming book, *Pursuing Pinochet*, on the effort to bring Pinochet to justice in Chile, Argentina, Spain, France, Belgium, Switzerland, the Netherlands, Italy, Britain and the United States, and its implications. The following is an abbreviated version of that lecture, which was jointly sponsored by the IALS and the Institute of Latin American Studies (also of the School of Advanced Studies, University of London) and attracted a capacity audience

'SUPERJUDGE'

Balthasar Garzón is undoubtedly a phenomenon. In Spain he is popularly known as *superjuez* (Super judge). He has pursued, amongst others, international drug traffickers, Arab gun-runners, money launderers, terrorists (ETA), state terrorists (GAL) under the former Socialist Government, and mass media monopolies (SOGECABLE and Silvio Berlusconi's involvement in the Spanish media). This has polarised Spanish public opinion, with a majority supporting his audacity and courage and a minority regarding him as a publicity-obsessed hijacker of the law. Beyond Spain, especially since he sought the extradition of former Chilean dictator Augusto Pinochet from Britain, he is seen almost exclusively as a superhero in the defence of human rights. Love him or loathe him, he has rapidly become Spain's, and probably the world's, best-known living judge.

Is Garzón simply an anti-establishment champion of human rights? Not necessarily. While he exposed the unlawful state violence against ETA, his attacks on ETA and its support structure – closing a newspaper that acted as its mouthpiece, rounding up the entire leadership of its political wing, cutting off its sources of cash – have served Spain's current centre-right government well, while problematising, at least in Spain, his reputation as a

defender of human rights. On the other hand, the case that made him an international name – the Pinochet case – also gave Spain's centre-right government a huge diplomatic headache. In short, Judge Garzón transcends easy labelling.

THE 'PECULIARITIES OF THE SPANISH'

In most countries, the state could (and probably would) have strangled the Spanish cases that gave rise to the Pinochet litigation at birth since the discretion as to when to prosecute crimes is normally vested in the public prosecutor or the state, not the courts. However, the effort to bring Pinochet to justice was facilitated and legitimated by the quirks of the Spanish legal system. The cases in Spain used a procedure known as *acción popular* that permits any Spanish citizen, not necessarily the injured party, to file charges in the public interest without cost and without (during the investigative stage) the support of the public prosecutor. Thus, Spain's rules governing legal standing are exceptionally expansive.

The position of the plaintiffs in the Chile case was also sustained by a 1958 Spanish-Chilean convention on dual citizenship, which permits Chileans, irrespective of whether they are resident in Spain, to file charges in a Spanish court with the same rights as any Spanish citizen.

The prosecution of Pinochet was further assuaged by the distinctive character of Spain's national superior court, the *Audencia Nacional*, which has universal jurisdiction to investigate and prosecute certain serious crimes committed outside Spain, including genocide and terrorism. By endorsing a broad interpretation of universal jurisdiction and genocide, the *Audencia Nacional* provided crucial backing for Garzón's efforts to arrest Pinochet in London and extradite him to Spain.

CREATING GLOBAL JUSTICE: ON THE COLLISION AND CONVERGENCE OF LEGAL CULTURES

The activities of Continental European (Civil Law) investigating magistrates like Garzón seem remarkable when approached from the standpoint of the situation in Britain. It is not only that senior professional judges in Britain are almost always in late middle age. Britain and the rest of the common law world regard judges in cases of crimes as referees in a contest between the prosecution and the accused. Within the Civil Law tradition, however, the state has a major role in the criminal process, and the judiciary is part of an investigative process concerned to ascertain the truth.

Of course, few continental magistrates court the media (and controversy) with such apparent relish and persistence as Garzón. Yet Garzón is not unique. He is simply the current leading light of an important (but much neglected) transnational movement: namely, the increasing number of activist investigating magistrates prepared to confront organised crime and political corruption. In the 1980s and '90s, Italian investigating magistrates – the likes of Giovanni Falcone, Paolo Borsellino (both of whom became national folk-heroes following their assassination by the Mafia) and Antonio Di Pietro, whose efforts to 'cleanse' Milan's 'bribe city' culture resulted in the imprisonment of numerous politicians and businesspeople – have served as role models for a younger generation of magistrates in the Civil Law world who have increasingly asserted their independence from the executive and legislative arms of the state.

In France, too, investigating magistrates have recently become more active and assertive in the probing of government and allied public scandals. The Argentine and Chile cases in Spain were inspired, in part, by the efforts of the Italian prosecutors dating from 1982 to bring Argentine military leaders to justice in Italy. With his aggressive tactics, Garzón stepped forward as a kind of Spanish counterpart to the Italian judges. Like those investigative judges, Garzón has put his life at risk by venturing beyond the prosecution of common crimes to the murky world where criminals and national security operations intersect.

Other aspects of the Pinochet case in Spain highlight the

apparent cultural chasm between the common law and civil law. Take the activism of associations of prosecutors and judges in support of the anti-Pinochet forces. The *Unión Progresista de Fiscales* (UPF), who initiated the Argentine case in Spain, is one of several private associations in the Civil Law World that have no direct counterpart in the Common Law sphere. During the Franco period, the UPF sought greater autonomy for the Spanish legal profession from the state, acting as a clandestine critic of Franco's record on human rights. With the return to democracy in Spain, it and allied associations became an important force in the administration of justice. Likewise, associations of European magistrates had no compunction in supporting the effort to prosecute Pinochet.

But it is Garzón's alleged injudicious conduct that has attracted most attention. His intense relationship with the media; his preparedness to attend and participate in public meetings and seminars involving or organised by those concerned to prosecute Pinochet; his high-profile appearances in London during the Pinochet case; his newspaper articles on politically sensitive issues; and the claims that lawyers acting on behalf of the plaintiffs assisted Garzón in his chamber with the preparation and dispatch of the request for Pinochet's arrest and extradition have raised questions as to the legitimate province of the investigating judge.

No doubt, some of the criticism of Garzón in Britain during the Pinochet case stemmed from a misunderstanding of the role of the investigating magistrate in civilian legal systems. Moreover, special prosecutors exist in some common law jurisdictions with investigatory powers and resources more extensive than that of civilian investigating magistrates. However, during the formal extradition hearing in London in September 1999, Pinochet's lawyers argued (amongst other things) that Garzón's conduct was insufficiently independent, and that his extradition request was politically motivated. The judge at the hearing, Magistrate Ronald Bartle, decided that Pinochet could be extradited to Spain and that it was unnecessary to consider Garzón's conduct.

Despite these apparent clashes of legal culture, the legal and political considerations at issue were strikingly similar in all the countries involved in the Pinochet saga. In Britain, as in Spain, the Pinochet case raised questions of judicial independence and judicial propriety.

In both Britain and Spain, the courts were forced to re-examine the interface between domestic and international law and recognise that the traditional conception of international law – which gave primacy to the interests of the state – now connects with a wider range of actors and subjects including the interests of the victims of torture, genocide and kidnapping. In both countries the courts creatively responded to the need to render international

human rights law more effective by constructing a juridical edifice that expanded the jurisdiction of domestic courts but in an evolutionary and relatively circumspect fashion. In Spain and Britain, the courts ultimately derived universal criminal jurisdiction from *domestic law*, and *not* from customary international law. In part, this was because of judicial prudence: grounding jurisdiction in domestic law is likely to secure greater certainty and international legitimacy than deriving jurisdiction from customary international law.

In almost all the countries involved in the Pinochet litigation, the courts had to grapple with the question of whether domestic law establishing extraterritorial jurisdiction could be utilised against alleged crimes committed prior to the creation of extraterritorial jurisdiction and, therefore, in violation of the prohibition on *ex post facto* laws.

Similarly, the issue of the relationship between law and politics – and the respective powers of the judicial, legislative and executive branches of the state – loomed large in all the countries involved in the effort to bring Pinochet to justice. Clearly, the existence of a democratic government, an independent judiciary, the support systems for rights litigation and a lively public sphere are likely to have a material impact on whether the prosecution or extradition of human rights violators proceeds. In particular, the political will of the extraditing (or prosecuting) state is crucial, especially where the law does not permit victims to initiate proceedings without the support of the state or public prosecutor. Take the treatment of the Pinochet case in Britain.

When Pinochet visited Britain in 1994 and 1997, various individuals were unable to persuade the authorities to arrest Pinochet. The then Conservative Government's close links with, and support for Pinochet, reinforced the traditional reluctance of governments to allow their courts to be used to challenge the actions of other governments or their rulers. In these circumstances, Pinochet's prosecution in a Conservative Britain was extremely unlikely. In the autumn of 1998, a new Labour Government was in power. Apparently, the Home Secretary (Jack Straw) was not informed by the police or his officials of Pinochet's arrest until after it had been effected as UK law provides, namely, by the police persuading a magistrate to issue a warrant for Pinochet's arrest, as requested by Garzón. UK extradition law provided for a complex division of responsibilities as between the executive and the judicial branches of government affording the Home Secretary a broad, 'quasi-judicial' role. The ultimate decision to authorise extradition was vested in the Home Secretary, rather than the courts. Thus, Straw was under considerable political pressure, both domestic and international.

Most of the Labour Party and backbench MPs supported the Spanish action, while the bulk of the

Conservative Party, backbench MPs and senior grandees – notably, Margaret Thatcher and Norman Lamont – pressed for Pinochet's release. Opinion in the country was also divided with apparently a majority supportive of Pinochet's detention and extradition. A small but vocal community of southern cone exiles undertook high-profile, peaceful demonstrations in support of Pinochet's detention, sustained by and sustaining linkages with the southern cone, Spain, the media, NGOs (such as Amnesty International, Human Rights Watch and the Medical Foundation for the Victims of Torture), politicians (notably, Jeremy Corbyn MP), and lawyer-activists (such as Geoffrey Bindman and Andy McEntee).

While Straw could have pulled the plug on the case at several stages in the proceedings, including the first week of Pinochet's arrest, he repeatedly stressed that he would determine Pinochet's fate when the judicial proceedings had been completed. He twice made the diplomatically difficult decision to permit Spain's extradition request to proceed. From the summer of 1999 onwards, however, Straw's handling of the case seemed to change, especially from September 1999 onwards. That Straw was considering representations made on behalf of Pinochet that it was unjust to dispatch Pinochet to Spain in view of Pinochet's poor state of health, and that Straw accepted such representations, was perfectly proper given his statutory powers concerning extradition. However, the manner and timing of the exercise of Straw's discretion in the final stages of the case, including Pinochet's release, gave the appearance that justice was not being done. For example, there was criticism that Pinochet's medical examination was flawed, that the report of the medical experts did not warrant Straw's conclusion that Pinochet was unfit to stand trial anywhere in the world, that Straw's haste was a result of a deal involving Chile, Spain and Britain, and a desire to influence the contemporaneous and closely-fought presidential elections in Chile. Whatever the merits of these claims, it is clear that Straw prevented the judicial proceedings taking their course. (The courts were scheduled to hear Pinochet's counsel's application for *habeas corpus* on 20 March 2000, but the Home Secretary finally determined to free Pinochet on 2 March 2000).

In Spain and Britain, the political and legal context in March 2000 was rather different from that pertaining when Pinochet was first arrested and detained in London some 17 months earlier, and this made it easier for the Aznar Government and Straw to act as they did in the final stages of the case. The courts of Spain and Britain had established important precedents that Pinochet's freedom could not eclipse.

ON CATALYSTS, CONTESTATION AND UNFINISHED BUSINESS

Although Pinochet was the first former head of state to be held legally accountable for crimes of state, the

Pinochet case built upon the legal foundations established by a series of domestic courts over the years imposing criminal responsibility on Nazi perpetrators of atrocities. The Pinochet precedent signals a larger potential role for domestic courts and the extension of the obligations of governments to adhere to minimum standards of human rights. After a long period of structured oppression, the previously unimaginable became possible. Since the initiation of the Spanish cases in 1996, and especially since Pinochet's arrest in 1998, the victims have been given an unprecedented opportunity to tell their stories to the world and the investigation and prosecution of human rights violators (within and beyond the southern cone) has accelerated and deepened.

Countries around the world paid attention to what happened in the Pinochet case, and several decided that they were no longer prepared to be safe havens for former dictators and torturers, if only to avoid the glare of international attention focussing upon their own human rights records. The investigation, prosecution and extradition of human rights abusers worldwide have significantly increased. Recent examples include the indictment in Argentina of ex-President Stroessner of Paraguay; the effort to indict 'an African Pinochet', the exiled dictator of Chad, Hissene Habre, on torture charges before the Senegalese courts; the successful prosecution in Belgium of Rwandan's for genocide; the prosecution in the Netherlands of former Suriname dictator Desi Bouterse on charges of torture; and the efforts of French and Chilean judges to interrogate Henry Kissinger about Operation Condor and the 1973 murder of American journalist Charles Horman in Chile. The world is moving towards increasing international co-operation to prosecute crimes against humanity, no matter where they are committed.

The "Garzón effect" and the Pinochet precedent both reflect and sustain what Slaughter and Helfer have called a "global community of law" that is constituted by overlapping networks of legal actors. They have also reinforced the impetus to create a permanent international criminal court and to indict Slobadan Milosevic, former President of Yugoslavia, for massive violations of human rights arising from his role in both the Bosnian and Kosovo conflicts.

The Pinochet case reactivated the US Justice Department's investigation of Pinochet's role in the 1976 assassination of Letelier and Moffitt. Indeed, in September 2001 a civil lawsuit was initiated in New York against Kissinger for his alleged role in a 1970-kidnapping plot that resulted in the death of General Rene Schneider, who was then Commander-in-Chief of the Chilean Army.

The *ad hoc* tribunals in former Yugoslavia (1993) and Rwanda (1994) created by the UN Security Council, and the draft Statute of the International Criminal Court (July 1998), all reject the defences of sovereign immunity and

specifically make provision for individual criminal responsibility. The Pinochet precedent and the Garzón effect are therefore part of a larger movement in international law diminishing impunity which, in turn, reflects and sustains the rapid shift towards new international human rights norms since the 1980's.

The Pinochet litigation also served as an important catalyst with respect to the release by the Clinton Administration of some of the CIA's previously classified files on human rights abuses in Chile which, in turn, disclosed the substantial role of the US in undermining Chile's democracy. The declassified information has proved of great assistance to those investigating and prosecuting the crimes of the military regimes.

While the causes of this metamorphosis are many and varied, the investigations in Spain and the decisions of the courts in Spain and Britain furnished a role model to judges, victims, activists, lawyers and even governments, legitimating local investigations and prosecutions. The fact that Garzón's investigations and the Pinochet precedent were regarded as legitimate, and that Garzón himself was the subject of international acclaim, vindicated them in the eyes of local actors. In Argentina and Chile, they provided a means by which the judiciary, hitherto admonished for its deference in the face of military dictatorships, could re-make its identity, transcend its relative insularity and fabricate a jurisprudence that is at the cutting-edge of international human rights law. That the world seemed to be watching them made this judicial and political revolution all the more urgent.

The judgements of the Spanish and British courts, together with allied international law materials (notably, the decisions of the Inter-American Commission) have yielded a jurisprudential *lingua franca*, seized upon and creatively developed by local actors yet nonetheless drawing upon local ideas, institutions and networks, some of which were long-standing. Thus, the transnational transmission and reception of legal norms and strategies, and the hybridisation that it fostered, was characterised by a 'bottom up' - as well as the 'top down' - process. For example, the *Vicaría* (1976-1992) in Santiago provided an important role model for human rights organisations within and beyond the southern cone, as well as an important focus for transnational networks including the Inter-American Commission on Human Rights, the United Nations Human Rights Commission, the International Commission of Jurists, Amnesty International and the Ford Foundation.

Similarly, the public space wrested by protest movements, such as the Madres de *Plaza de Mayo* in Argentina (and its Chilean counterparts), by investigatory journalists like Patricia Verdugo, and by individual lawyers acting *pro bono*, also proved important and enduring. In 1979, Hernan Montealegre, the Chilean human rights lawyer, published a treatise arguing that domestic and

international law could be used to attenuate impunity. The amnesty laws in Argentina and Chile began to be unlocked by the courts of Argentina and Chile prior to Pinochet's arrest in October 1998, but this was largely through creative interpretations of domestic law, rather than international law. From 1995 onwards-judicial reform and the appointment of new justices in both Argentina and Chile (especially in Chile), also contributed to the evolution of legal and political culture.

The Argentine and Chilean response to the cases in Spain and the Pinochet precedent rebutted the oft-repeated mantra of those seeking Pinochet's release: that the prosecution of human rights violators in countries involved in a transition to democracy would ferment anarchy and a return to authoritarian governance.

Another important consequence of the Spanish cases and the Pinochet precedent is that the amnesties that hitherto have often obstructed the prosecution of human rights violators are now being increasingly circumvented by the courts and even ruled illegal under international law. This attenuation of impunity, allied to other developments in international law and politics diminishing impunity, may hasten the end of 'limited democracies': that is, they may advance the democratisation of those countries whose constitutions and public spheres were dictated by dictators and their military and associated allies and where, even after the return to democracy, the military retained significant political power. One consequence of the Spanish cases and the Pinochet case may be the demise of the idea that you can negotiate a limit to democracy and the prosecution of human rights abusers by way of a deal among the relevant political elite.

The 'Garzón effect' and the Pinochet precedent reflect and sustain a world-wide judicial revolution: namely, the ongoing and incomplete convergence in judicial culture, especially since the end of the Cold War, associated with juridification, the internationalisation of the United States' model of judicial review, the transference of judicial and allied legal norms from one jurisdiction to another as judges become increasingly prepared to resort to the human rights norms of foreign and transnational legal regimes (the globalisation of norms), the significance of transnational associations and networks (formal and informal) of activists, judges and lawyers, aided and abetted by the new information technology and (inevitably) globalisation.

However, just as law and politics operated imperfectly, paradoxically, controversially and (to some extent) unexpectedly during the Pinochet case, so the impact of the Spanish investigations and the Pinochet precedent have also proved uneven, incomplete, indeterminate and subject to fierce contestation. Take the current situation in Chile. On the one hand, Pinochet's arrest and detention in Britain for 17 months, and the decision of the Spanish and

British courts, helped to break the spell that Pinochet cast over Chile. Pinochet arrived home a shadow of his former self in the eyes of the Chilean public. Shortly after Pinochet's return to Santiago, the Chilean Supreme Court lifted his senatorial immunity, opening the way for a trial there. In December 2000 and January 2001, Judge Guzmán indicted Pinochet for murder and 'disappearances'.

Cases filed against Pinochet continue to mount and now total about 250. These cases include the first complaint filed against Pinochet by former members of the army claiming they were tortured and unjustly discharged for opposing human rights abuses under the former dictator's rule. Meanwhile, Pinochet has publicly accepted responsibility 'as former President [...], of all of the acts that they say the [...] Armed Forces have committed'. Beyond Pinochet himself, the investigation and prosecution of human rights abusers in Chile has advanced significantly. Most recently, for example, torture charges have been brought against the current second in command of the Chilean air force.

On the other hand, the Chilean courts subsequently reduced the charges against Pinochet to accessory to the crime and then suspended all legal proceedings, deeming Pinochet mentally unfit to stand trial. The latter decision is currently on appeal to the Chilean Supreme Court and it remains at this point uncertain what further fate will finally befall the old Chilean leader. The 2-1 decision of the Santiago Court of Appeal to suspend all legal proceedings against Pinochet on health grounds and the earlier decisions of the courts to release Pinochet on bail, to reduce his charges, to enable him to evade the fingerprinting and mug shots that Chilean law requires of all persons indicted by Chilean courts, to refuse Argentina's request for Pinochet's extradition – coupled with the intense political pressure on the courts to go easy on Pinochet – tend to indicate that Pinochet enjoys a privileged position relative to other Chilean citizens.

Moreover, the constitutional, legal, and institutional inheritance of the military dictatorship, and the even deeper roots of authoritarianism in Chile, has yet to be challenged. To date, democratisation in Chile has been relatively superficial, rather than thoroughgoing.

Beyond Chile, too, the Garzón effect and the Pinochet precedent have also been subject to equivocation, attenuation and resistance. For example, the British authorities failed to carry out their obligation under the UN Torture Convention to put Pinochet on trial, as they had failed to do on two previous visits. Pinochet would have had no problems in Britain had it not been for the support of the Spanish courts, backed (albeit ambivalently) by the Spanish Government.

Since the establishment of the Pinochet precedent, authorities in several countries, including Belgium, France

and the United States, have refused to investigate, detain, prosecute or extradite allegedly serious human rights violators. As the Argentine judges have become more creative and robust in their efforts to bring human rights violators to justice, so the Argentine Government's hostility towards the decisions of the courts has increased.

For example, two recent decisions of the Argentine courts have ruled that the so-called 'Full Stop' and 'Due Obedience' laws conferring impunity are incompatible with international law and, therefore, unlawful. They have also held that statutes of limitation do not to apply to crimes against humanity. During 2001, however, the Argentine Government rejected extradition requests from France, Germany, Italy and Spain for crimes committed in Argentina against citizens of those countries, contending that Argentina alone has jurisdiction to prosecute those responsible for crimes committed in Argentina.

Judge Guzmán and others have admonished the US Government for what Guzmán called its 'very limited' assistance with the investigation and prosecution of human rights violators. The United States (along with Chile) were criticised in some quarters for exerting considerable pressure to persuade Britain to release Pinochet. There is deep opposition within the US administration to non-US courts having jurisdiction to prosecute current and former military and US officials.

And it is not just the United States that fears that the Pinochet precedent may open a veritable Pandora's box. Belgium probably has the broadest universal jurisdiction over human rights crimes of any country. It has therefore become the most favoured forum by those seeking to bring serious human rights abusers to justice. Current efforts to persuade Belgium to pursue cases against Cuban President Fidel Castro, Iraq's Saddam Hussein, Israel's premier, Ariel Sharon, and the Palestinian leader, Yasser Arafat, have caused some embarrassment in Brussels, and generated a debate as to whether its universal jurisdiction should be more circumscribed. Similar concerns have been expressed in France and Spain. The decision of the Spanish *Audencia Nacional* of December 2000 refusing jurisdiction 'for the time being' in a case involving allegations of torture, terrorism and genocide in Guatemala may also reflect a judicial desire to discourage forum shopping, even where the case concerned involved egregious breaches of human rights.

That the Garzón effect and the Pinochet precedent are a site of contestation of governance was inevitable since they constitute a substantial legal restraint on the exercise of power and operate within a context where the history of human rights has largely been one of impunity for human rights violators. The events of 11 September 2001 have cast a chill over world politics and may result in the downgrading of human rights. The threat of terrorism is now being used to justify torture and extended

imprisonment without trial. Moreover, it is to be expected that the Pinochet precedent, and the revolution of the judiciary that has accompanied it, are controversial since they raise important and difficult issues of law, politics and morality.

In part the problem is one that attends the birth of all new regimes, of the courts struggling with reconciling the old and the new, with the problems of hybridisation, and the relative indeterminacy that this implies. Working through the implications, unfinished business and loose ends arising from seminal cases, like the Pinochet case, tends to be a long and complex affair.

For example, the judicialisation of power has developed a momentum of its own and poses important problems of legitimacy and democratic accountability. Who is the judiciary accountable to? How can the 'politicisation' of the judiciary contribute to transparency, popular participation and the democratisation of the state? When does the application of general, commonly agreed norms concerning egregious breaches of human rights become a pretext for a new form of neo-colonialism, of third world dictators being brought into first world courts, or yet another means by which the law can make a business for itself? And will the judicialisation of power furnish the opportunity to realise the complicity of the first world in the actions that are being brought to trial?

Similar questions of accountability and transparency arise with respect to NGOs and networks – both of which played a crucial role in the effort to bring Pinochet to justice. There is an urgent need to create a more coherent system governing the operation of universal jurisdiction over international crimes – one that applies to all people in equivalent circumstances.


The potential conflicts that may arise between the traditional guarantees of fair trials and due process (the traditional prohibitions against establishing new criminal offences by way of analogy or retrospectively, the heavy burden of proof on the prosecution and the doctrine that there can be no crime without a law) and the belief that, imperfect though it may be, universal jurisdiction may be the best justice currently available, also needs to be addressed. In part, this will require a clarification of how and when norms acquire the status of a *jus cogens* norm, and the relationship between universal jurisdiction and *jus cogens* norms.

The Pinochet case, like the OJ Simpson trial, illustrates the increasing, transnational influence of the media and mediatisation on the key actors in legal proceedings – judges, lawyers, parties, intervenors and NGO's, witnesses, politicians, etc. – and therefore on the construction, conduct and reception of litigation. How should this phenomenon be addressed? What values and ends might be served by mediatisation? And to what extent is mediatisation driving the choices of organisation models, strategies, and funding and legal responses?

The Pinochet saga also raises questions about the extent to which the international rights movement is part of the problem, in that it restricts the possibilities of being a force for good by confining its critique of existing power structures to the language of human rights. Of course, there is a certain irony in the fact that Spain, of all nations, should have sought Pinochet's prosecution, since Chile had been a Spanish colony until the early nineteenth century. Like much of Spanish America, it had imported from Spain constitutional, legal and military regimes, reinforced and legitimated in the post-colonial period, that impeded democratisation, elevated the military's participation in domestic politics, and legitimated regimes of impunity for crimes committed by civilian and military government.

Moreover, Franco's Spain supported Pinochet, who was a confessed disciple of Franco, and the only foreign head of state to attend Franco's funeral. Spain was, therefore, partly responsible for Pinochet's success. And the influence was two-directional. Several of Pinochet's legal and constitutional measures were incorporated into the 1978 post-Franco Spanish constitution. Thus, the Pinochet case was not about Spain interfering in the affairs of another country with which it had little or no connection. Rather, it illustrated the profound inter-connection of the two countries. To suggest that Spain would provide an appropriate forum for trying a former dictator that it had supported, while having done nothing to try its own, merely heightened the irony. It was as if the guilt and anger that Spain felt towards Franco was

projected onto Pinochet; and that Spain was seeking to make amends for what was not done to Franco. Thus, trying Pinochet in Spain might have served as a catalyst to confront Spain's as well as Chile's past, and their deep historical inter-connections.

Perhaps the charge of double standards is intrinsic to the exercise of universal criminal jurisdiction by domestic courts. Is there any nation that has investigated and prosecuted every major human rights abuse that has ever fell within its jurisdiction or for which it was responsible? And are there any nations that do not have a colonial legacy, past or present? Indeed none of this lets Spain (or Britain) off the hook, or detracts from our duty to investigate and prosecute major human rights abusers. 

Professor David Sugarman

Law School, Lancaster University, and Visiting Senior Research Fellow, IALS

In preparing this paper, I have benefited considerably from research support provided by the Institute of Advanced Legal Studies, London, where I currently hold a non-residential visiting fellowship. A more detailed version of this paper is published as 'from unimaginable to possible: Spain, Pinochet and the judicialisation of power', *Journal of Spanish Cultural Studies* (2002) vol. 3, Issue 1 (March) 107-124.

IALS News

British Library and IALS sign formal agreement to work together

A concordat aimed at improving access to legal material for students and researchers has been signed between the Institute of Advanced Legal Studies and the British Library.

The agreement provides a framework for further collaboration and co-operation between the two organisations. It will enable them to develop research resources more effectively, keep each other fully informed of their respective current programmes, and facilitate the development of joint activities. Both institutions will meet regularly to discuss matters of common interest and concern, and progress the primary aims of the concordat which are to:

- Reduce the overlap between British Library and IALS foreign legal journal holdings, and fill gaps in collecting material;
- Identify and fill gaps in the national collection of foreign legal materials;
- Commission research guides to foreign legal literature by country, and publish them on the web;
- Organise training courses to improve professional skills between staff in both organisations;
- Work towards the creation of a national central collection of official gazettes.

The concordat has grown out of the Foreign Law Guide (FLAG) project between the two institutions (see 'FLAG: the new Internet gateway to foreign law holdings in UK national and university libraries', Peter Clinch, *Amicus Curiae*, issue 41, page 20). FLAG is a database of foreign legal literature—including law reports, legislation and treaties—which covers nearly 60 UK libraries.