

From unimaginable to possible: Spain, Pinochet and the judicialization of power

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'Superjudge'

Balthasar Garzón is undoubtedly a phenomenon. In Spain he is popularly known as *superjuez* (Superjudge). 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 polarized 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 problematizing, 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 effort to bring Pinochet to justice – also gave Spain's centre-right government a huge diplomatic headache. In short, Judge Garzón transcends easy labelling.²

The background to the Pinochet case in Spain

On 11 September 1973 the armed forces led by General Pinochet overthrew the left-wing government of president Salvador Allende in a ruthlessly executed coup, in the aftermath of which thousands of Chileans were abducted, tortured and finally murdered by forces commanded by the military *junta*.³ Under Argentina's military rulers of 1976-83, the number of Argentine citizens who disappeared ran into tens of thousands.⁴ One vehicle of this state violence, and an important strand in the Pinochet case, was the alleged role of Chile's secret police (DINA) in organizing and co-ordinating 'Operation Condor', a transnational conspiracy embracing Chile, Argentina, Brazil, Bolivia, Paraguay, Uruguay and Guatemala, involving the exchange of intelligence and co-operation in the finding and execution of those deemed subversives and leftists.⁵

Amnesties created an insurmountable barrier against prosecutions for the crimes of the military dictatorships in Argentina and Chile. What exactly had

become of many of the disappeared remained the subject of secrecy, concealment and evasion. The military steadfastly denied any responsibility for wrongdoing. By the early 1990s, the quest for justice seemed further away than ever, morale among the human rights community had reached a low ebb, and many victims felt that time had passed them by.

From the mid-1990s this vista began, albeit gradually and haltingly, to change. In 1995 two senior members of the Chilean military, General Manuel Contreras (former Director of the secret police [DINA]) and Brigadier Pedro Espinoza, became the first military personnel convicted and sentenced by the Chilean courts for crimes committed during the period of the Chilean amnesty. They were found guilty of assassinating Orlando Letelier (a former Allende minister) and Ronni Moffitt (Letelier's assistant) in Washington DC, and this was possible only because the crimes concerned had been excluded from the Chilean amnesty law at the insistence of the United States (Dinges and Landau 1980). This precedent raised in the minds of some the continuing efficacy of the amnesty law and also the thought that, if Contreras and Espinoza could be prosecuted, why not their commander-in-chief, General Pinochet? That same year, former Argentine Navy Captain Adolfo Scilingo revealed to a journalist his participation in crimes during the Argentine 'Dirty War', including throwing suspected subversives and leftists out of aircraft into the ocean (the 'death flights'). This, in turn, led to more high-level admissions of criminal conduct from the Argentine military (Feitlowitz 1998: 193-256).

Those seeking to initiate prosecutions in Argentina and Chile for the crimes of the military dictatorships faced a dilemma. For the most part their cases were barred by constitutional immunities in Chile and Argentina, and it was seemingly impossible to reverse these immunities. How, therefore, could the human rights abusers be brought to justice? It was in this institutional and political context that groups of activists and lawyers sought justice in Spain.⁶ In March 1996 the *Unión Progresista de Fiscales* (UPF) filed charges of genocide and terrorism against several Argentine military officers, and in July 1996 charges of genocide and terrorism were filed in a Valencia court against Pinochet and other members of the Chilean military *junta* by the president of the UPF and chief prosecutor of the Superior Court of Valencia. The Argentine litigation was co-ordinated by the Human Rights Secretariat of *Izquierda Unida* (IU) – the political party formed from a coalition of the Spanish Communist Party and other left-wing groups – and the Chilean action was co-ordinated by the Allende Foundation, directed by Juan Garcés, a Madrid lawyer and former aide to Allende. In June 1996 Judge Baltasar Garzón accepted the Argentine case; and in the following month Judge Manuel García Castellón, also of the *Audiencia Nacional*, agreed to take the Chilean case. This, in turn, triggered what in terms of its scale and scope has rightly been called 'the most comprehensive investigation to have taken place to date into the human rights abuses of the Southern Cone military regimes' (Davis 2000: 6). In the two years prior to Pinochet's arrest in October 1998, the two Spanish magistrates (Castellón and Garzón) received, sought out and amassed enormous quantities of evidence from many countries – including material from

the 'Terror Archive',⁷ which illuminated the links between Operation Condor, the Chilean intelligence (DINA) and Pinochet – and took hundreds of statements from witnesses (victims, relatives of victims, ex-military, politicians, etc.) who testified before their courts.⁸ A variety of national and transnational networks of victims, activists, NGOs and lawyers helped to co-ordinate and support the investigations. Yet, there was little apparent hope of the Spanish cases leading anywhere – since the accused was 12,000 kilometres away and had immunity from prosecution in Chile. All this began to change after Pinochet arrived in Britain on 21 September 1998.

Once it was known that Pinochet had undergone surgery in London on 9 October, efforts were made in Britain and Spain to prosecute him. On 14 October, Garzón wrote to the British authorities, seeking to question Pinochet about the disappearance of Spanish citizens in Chile during the Pinochet regime. The British police responded that, if Pinochet were to be questioned, Garzón would have to ask the British authorities to arrest Pinochet. On 15 October there were press reports that Spanish judges were seeking to question Pinochet and that the British police had been asked by Interpol to find and detain Pinochet. The following morning Garzón's court received charges from *Izquierda Unida*, and from Juan Garcés and the Association of the Victims of the Disappeared in Chile, to prosecute Pinochet for the disappearance of over 70 people as part of Operation Condor. Garzón accepted the charges, and later that afternoon urgently requested the British authorities to arrest and extradite Pinochet. Pinochet was arrested in London late that evening.⁹

The 'peculiarities of the Spanish'

In most countries, the state could (and probably would) have strangled the Spanish cases 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. Organizations representing the public interest can initiate criminal prosecutions, provided that they can persuade an investigating magistrate to take the case on its merits. Once such proceedings commence, it is difficult for the state to stop them – despite, as in this instance, the subsequent persistent opposition of the Spanish Public Prosecutor.¹⁰ 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 prosecutions in the Argentina and Chile case were further assuaged by the distinctive character of Spain's national superior court, the *Audiencia Nacional*, which has jurisdiction to investigate and prosecute certain serious

crimes committed outside Spain, including genocide and terrorism. Originally, the charges in both complaints only concerned victims of Spanish nationality. Subsequently, however, the charges were enlarged to include many non-Spanish citizens, thus raising the question of whether Spain had universal jurisdiction (that is, jurisdiction without either the place of the crime or the nationality of the offender being Spanish). Garzón argued that Spain had universal jurisdiction over the alleged crimes, that the alleged offences fell within the Spanish legal definitions of genocide, terrorism and torture, and that the domestic amnesties in Argentina and Chile did not preclude an investigation in Spain, as Spain does not recognize general amnesties and also because the amnesty laws violated the international obligations of the countries concerned to investigate and prosecute the alleged crimes.

The Public Prosecutor's office challenged Garzón's decision, so the Argentine and Chile cases went on appeal to the full court of the *Audiencia Nacional*. The eleven judges of the court unanimously upheld the universal jurisdiction of Spain, although on a different basis from that claimed by Garzón. On the issue of genocide, the public prosecutor had contended that the alleged crimes in Argentina and Chile were politically motivated and therefore did not fall within the definition of genocide under Spanish law, which only applied to a national, racial, ethnic or religious group. However, the *Audiencia Nacional*, following Garzón's lead, adopted a broader definition of genocide than that prompted by a literal interpretation of the Spanish law and as stipulated in the Genocide Convention – the benchmark of genocide in international law. Instead, Garzón and the *Audiencia Nacional* adopted a 'customary' definition of genocide whereby 'national group' meant a distinct human group that was part of society as a whole. The targeting of those who did not conform to the new regime's ideas of national identity did, therefore, constitute genocide.¹¹ In short, by endorsing a broad interpretation of genocide, the *Audiencia 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 English-speaking '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. Their aim is to gather evidence that will be used to determine whether the suspect should be accused of crime and put on trial, and the evidence that will subsequently be used to determine whether the accused is guilty or not.

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 organized 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 (Burnett and Mantovani 1998; Allum 1997; Militello and Paoli 2000; Militello and Huber 2001). 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.¹² 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.

Garzón's return to judicial duties following his period in political office was unusual, even in the Civil Law world, and would not normally arise in most common law jurisdictions. But it is Garzón's alleged injudicious conduct that has attracted most attention. His intense relationship with the media; his readiness to attend and participate in public meetings and seminars involving or organized 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 him 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 (Harriger 2000). 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.¹³

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.¹⁴ In Britain, as in Spain, the Pinochet case raised questions of judicial independence and judicial propriety.¹⁵ In both Britain and Spain, the courts were forced to re-examine the interface between domestic and international law and recognize 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 (Sands 2001). 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 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.¹⁶

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 utilized against alleged crimes committed prior to the creation of extraterritorial jurisdiction and, therefore, in violation of the prohibition on *ex post facto* laws. While the problem was a common one, the basis of the British courts' ultimate decision to establish extraterritorial jurisdiction was more limited in scope than that of the Spanish.¹⁷

On the intimate relationship between law and politics: Some examples from the Spanish and British saga

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 litigation¹⁸ 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 case of Spain. At the commencement of the Pinochet proceedings in London, Spain had a minority conservative government. Its Prime Minister, Jose María Aznar, was seeking to capture the 'middle ground' of Spanish politics and,

therefore, marginalize the political left.¹⁹ There was an election on the horizon, and overwhelming public and media support for the arrest and extradition of Pinochet – sustained, in part, by the large community of exiles from the southern cone in Spain. In these circumstances, the extent to which the Government could interfere in the case (at least in public) was limited, especially in the light of the autonomy that the law afforded to the courts. While the Government did not want to damage Spain's economic and political relations with Chile, Prime Minister Aznar refused to discuss the political dimensions of the case and stressed that the matter was for the courts. The decision of the *Audiencia Nacional*, and the rulings of the House of Lords that Pinochet was not entitled to claim immunity from the English courts, further limited the Government's room to manoeuvre.

The key moment was when the request of Garzón, endorsed by the *Audiencia Nacional*, went to the Spanish Government. It is not wholly clear under Spanish law whether the Government could stop the request of the courts. There was some disagreement between the Justice Ministry, who argued that the Government was merely a channel of communication, and the Foreign Ministry, who argued that the Government could stop Garzón's request. The former interpretation had been the one that had been in operation for a while, but it was not unchallengeable. However, the Government adopted the Justice Department view, however spurious it was, probably because it suited the Government – in the sense that at this particular juncture it was politically convenient for the Spanish Government to say to the Chileans: 'Look, this matter is for the judges and we cannot intervene; we had to pass this request on. We are merely a conduit.'

In private, however, influential elements within the Government sought to prevent Pinochet's extradition to Spain. Thus, the autonomy carved out by Garzón vis-à-vis the executive resembled a narrow ledge – one that might be overwhelmed at any time by the weight and the narrowly defined interests of the executive. For example, once the cases got under way in 1996, the *Audiencia Nacional's Fiscal Jefe*, Eduardo Fungairiño, repeatedly challenged the legality of the proceedings, as did other members of the Spanish Public Prosecutor's office. Press conjecture at the time had it that these challenges were a consequence of pressure from the Spanish Government. Similarly, during 1999, the Government, under pressure from Chile, seriously canvassed legal opinions on whether it was lawful for Spain to resolve the dispute with Chile by arbitration, rather than in the courts. But the preponderance of legal and public opinion in Spain regarded arbitration as an unwarranted interference with the autonomy of Spain's courts,²⁰ and the Government ultimately rejected Chile's call for arbitration. Criticism of the Spanish Government's interference in the case also arose when Spanish officials appeared to overrule Garzón. The considerable furore that this engendered in Spain caused the Government to ratify Garzón's instructions immediately (Pérez Royo 1999; Larraya 1999).

However, when on 11 January 2000 the British Home Secretary, Jack Straw, declared that he was minded to free Pinochet on health grounds, the Spanish Government immediately announced that it would not challenge Straw's

decision. Thereafter the Spanish Government refused to undertake further appeals and challenges, despite the wishes of Garzón. When Straw announced his final decision to release Pinochet on 2 March 2000, Garzón wanted to mount a legal challenge; but the Spanish Government reiterated that it would not press for judicial review. In the absence of any further legal challenges, Pinochet left Britain at lunchtime the same day.

That the legal and political issues were inextricably linked in both countries is also evidenced by 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 him. 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. Pinochet's prosecution in a Conservative Britain was highly 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 authorize extradition was vested in the Home Secretary, rather than the courts. Thus, Straw was under considerable political pressure, 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, 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.²¹

In Spain and Britain, the political and legal context in March 2000 was rather different from that pertaining when Pinochet was first arrested 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.

The 'Garzón effect' and the Pinochet precedent: On catalysts, contestations and unfinished business

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.²² 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 world-wide has 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 Rwandans 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.²³ The world is moving towards increasing international co-operation to prosecute crimes against humanity, no matter where they are committed.²⁴

While the causes of this metamorphosis are many and varied,²⁵ 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 hybridization that it fostered, was characterized by a 'bottom up' - as well as the 'top down' - process.²⁶

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.²⁷ 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 democratization 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.²⁸

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 internationalization 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 globalization of norms), the significance of transnational associations and networks (formal and informal) of judges and lawyers, aided and abetted by the new information technology and (inevitably) globalization.²⁹

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. As Roht-Arriaza notes:

The European Cases put the [...] coalition government in Chile in something of a bind. To argue for Pinochet's release, they had to affirm that he could be fairly tried at home. It became fashionable for politicians to call for domestic trials, and even the right wing was forced to go along. Once [Pinochet] returned they were under political pressure to show that he could get a fair trial, which made them more supportive of domestic prosecutions. (2001: 316)

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' (Institute for Policy Studies 2000). Beyond Pinochet himself, the investigation and prosecution of human rights abusers in Chile has advanced significantly. Most recently, 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 Pinochet³⁰ – tend to indicate that Pinochet enjoys a privileged position relative to other Chilean citizens.³¹ Moreover, the constitutional, legal, and institutional inheritance of the military dictatorship, and the even deeper roots of authoritarianism in Chile, have yet to be challenged. To date, democratization in Chile has been relatively superficial.

Beyond Chile, 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 initiative of Spanish lawyers backed by their Government' (Bindman 2001).³²

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.³³ During 2001, Government ministers rejected extradition requests from France, Germany, Italy and Spain (Judge Garzón) 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 (Burbach 2001). The United States (along with Chile) were criticized in some quarters for exerting considerable pressure to persuade Britain to release Pinochet.³⁴

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 *Audiencia 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. 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.³⁵

In part the problem is one that attends the birth of all new regimes, of the courts struggling to reconcile old and new, with the problems of hybridization, change by conjoining, which is the way that 'newness enters the world', and the relative indeterminacy that this implies (Rushdie 1991: 394; Sugarman 2000). 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 judicialization 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 'politicization' of the judiciary contribute to transparency, popular participation and the democratization 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 judicialization of power furnish the opportunity to realize the complicity of the first world in the actions that are being brought to trial?³⁶

Similarly, 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 (cf. Pyle 2001).

The Pinochet case, like the OJ Simpson trial, illustrates the increasing, transnational influence of the media and mediatization on the key actors in legal proceedings – judges, lawyers, parties, intervenors and NGOs, 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 mediatization? And to what extent is mediatization driving the choices of organization models, strategies, 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 (Kennedy 2001).

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 democratization, elevated the military's participation in domestic politics, and legitimated regimes of impunity for crimes committed by civilian and military government (Loveman 1993).

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 fallen within its jurisdiction or for which it was responsible? And are there any nations that do not have a colonial legacy, past or present? None of this lets Spain (or Britain) off the hook, or detracts from our duty to investigate and prosecute major human rights abuses whether they are foreign or in our midst.

Notes

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² See, further, Rei (1999); Urbano (2000).

³ There were 3,197 victims of executions, 'disappearances' and killings from 1973 to 1990, according to the Rettig Commission and its successor. Government agents secretly disposed of more than 1,000 of these victims, presumably after their torture and murder. See, further, Human Rights Watch (1999); Ensalaco (2000).

⁴ In Argentina, the Report of the National Commission on the Disappearance of Persons (CONADEP) concluded that almost 9,000 people disappeared during the period of the military rule, though it is estimated that as many as 30,000 died or disappeared. See, generally, Feitlowitz (1998); Sznajder and Roniger (1999).

⁵ See, generally, Herman (1982); Ensalaco (2000: 244-55); and <http://www.derechos.org/nizkor/doc/condor/> (accessed May 2001).

⁶ On the Spanish litigation, see Wilson (1999). Also Rojas (1998); and Márquez Carrasco and Alcaide Fernández (1999).

⁷ A huge amount of documentation discovered in Asunción (Paraguay) in 1992 that afforded copious evidence of the existence of *Operación Condor*.

⁸ An important turning point was when Scilingo gave evidence before Garzón in Spain in late 1997.

⁹ On 20 October, Judge Castellón dropped his parallel case, in favour of Judge Garzón.

¹⁰ Concerning the Public Prosecutor's initial support, it is rumoured that the previous Prosecutor-General was coming to the end of his mandate and that he therefore let it go ahead. It is unclear whether he sympathized with it or merely thought that it would not go anywhere. But when the new team arrived they started to oppose it.

¹¹ They also concluded that the terrorism charges were legitimate. The *Audiencia Nacional's* decision to support Garzón on the issue of universal jurisdiction and genocide has been criticized by some criminal law and international law specialists in Spain: principally, because its stretching of the definition of genocide is not warranted by Spanish law; and on the grounds that the new interpretation is based on a misunderstanding of the facts concerning the disappearances in Chile.

¹² This resulted in a group of the Italian investigating judges travelling to Argentina in 1993 to obtain the testimony of witnesses. These proceedings were suspended when the Argentine courts began to prosecute those leaders of the armed forces who directed the state violence, but recommenced after Argentina enacted amnesty laws rendering prosecutions impossible in Argentina.

¹³ *The Kingdom of Spain v Augusto Pinochet Ugarte* (Bow Street Magistrates' Court).

¹⁴ In this paper I will largely focus on Spain and Britain. A more comprehensive treatment of these and allied issues will appear in my forthcoming book on the effort to bring Pinochet to justice.

¹⁵ In the context of the finding that one of the Law Lords, Lord Hoffmann, was a director and chairperson of the charitable arm of Amnesty International, an intervener, and that this gave rise to the appearance of bias. On this, and other aspects of the Pinochet case in Britain, see Brody and Ratner (2000); Byers (2000); Davis (2000); and Sugarman (2001) and the references cited there.

¹⁶ See, generally, Sugarman (2001) and the references cited there.

¹⁷ The jurisdiction of Belgium was held to be derived from customary international law. See Tribunal of first instance of Brussels (Investigating Magistrate Vandermeersch), 8 November 1998, reprinted in *Revue de Droit Penal et de Criminologie* (1999), 278.

¹⁸ For example, funding, *locus standi*, the permissible scope for class actions and intervenors etc. See, generally, Epp (1998).

¹⁹ Several commentators characterized Aznar as Spain's equivalent of British premier, Tony Blair.

²⁰ On the issue of arbitration, see Remiro Brotóns (1999).

²¹ 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.

²² It has 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.

²³ The Pinochet case also reactivated the US Justice Department's investigation of Pinochet's role in the 1976 assassination of Letelier and Moffitt. Moreover, 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. See, generally, Weller (1999); Human Rights Watch (2000); Brody (2001a); Brody (2001b); Hitchens (2001); Roht-Arriaza (2001); and Scott (2001).

²⁴ On the increasing resort to universal jurisdiction within Europe, see Redress (2001).

²⁵ Although Pinochet was the first former head of state to be held legally accountable for crimes of state, the Pinochet case was built upon the legal foundations established by a series of domestic courts over the years imposing criminal responsibility on Nazi perpetrators of atrocities. See, generally, Bassiouni (1999: 56-8).

²⁶ For example, the *Vicaría* (1976-1992) in Santiago provided an important role model for human rights organizations 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 la 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, Hernán 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 Argentine and Chilean courts before Pinochet's arrest in October 1998, but this was largely through creative interpretations of domestic law, rather than international law. Judicial reform in Argentina and especially Chile from 1995 onwards and the appointment of new justices also contributed to the evolution of legal and political culture.

²⁷ 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 make specific provision for individual criminal responsibility. The Pinochet precedent is thus part of a larger trend in international law diminishing impunity. On the significant impact of international pressure on Latin America, notably the rapid shift towards new international human rights norms in the 1980s, see Ropp and Sikkink (1999); Lutz and Sikkink (2001).

²⁸ On the 'arrested development' of Chilean democracy see, generally, Human Rights Watch (1999) and Lira and Loveman (1999). On Argentina, see McSherry (1997).

²⁹ The Garzón effect and the Pinochet precedent both reflected and sustained what Slaughter and Helfer (1997) have called a 'global community of law' that is constituted by overlapping networks

of legal actors. See, generally, Ackerman (1997); Klug (2000); Tate and Vallinder (1995); Shapiro (1996); McCrudden (2000); Sugarman (2001); Goldstein *et al.* (2001).

³⁰ Interview with Judge Juan Guzmán Tapia, Santiago de Chile (Sugarman 2000).

³¹ See, generally, Beasley-Murray (2001); and Cooper (2001: 82-139).

³² I am grateful to Geoffrey Bindman for allowing me to quote from his lecture.

³³ 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: see, International Commission of Jurists *et al.* (2001); Krauss (2001). They have also held that statutes of limitation do not apply to crimes against humanity. On these, and other recent developments relating to impunity and human rights, see the excellent Web site of the Center for Social and Legal Studies (CELS) <http://www.cels.org.ar>.

³⁴ 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 USA in undermining Chile's democracy. See, generally, the 'Chile Documentation Project' of the National Security Archive, George Washington University, Washington DC, and the significant work of its Director, Peter Kornbluh, which can be accessed from: http://www.gwu.edu/~nsarchiv/latin_america/chile.htm (accessed May 2001). The declassified information has proved of assistance to those investigating and prosecuting the crimes of the military regimes.

³⁵ Jennings (2001) is an important example of the current juristic and judicial counter-attack against the Pinochet case.

³⁶ Similar questions of accountability and transparency arise with respect to NGOs and networks, which played a crucial role in the effort to bring Pinochet to justice. See, generally, Welch (2001).

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