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BEYOND PINOCHET: LIBERAL DEMOCRACY AND HUMAN RIGHTS IN LATIN AMERICA

It is an honour and a pleasure to come to your great country as a guest speaker of the John Foster Memorial Trust, a Trust created to promote the cause of human rights and law reform, both areas so very close to my heart and work. For this I am most grateful. I want, therefore to express my appreciation to all trustees, to the Honourable Dame Miriam Rothschild and to my good friend, Lord Antony Lester of Herne Hill, who has been kind enough to organise this lecture and whose work and commitment to the Human Rights cause, deserves recognition from all of us.

On October 16, 1988 the world learned in amazement that General Augusto Pinochet had been detained in a London clinic by British police acting on an Interpol warrant from Spain.

The warrant was issued by Judge Baltazar Garzon based on human rights crimes committed during the years of 1976-1983. Justice Garzon's action was based on the principle of "passive personality", which permits a country to prosecute defendants who victimise its citizens in any place outside of the home country. This authority derives from the rule of "Universal Jurisdiction", the principle that every state has an interest in bringing to justice any person accused of "crimes against humanity" like genocide, torture or terrorism, regardless of the nationality of the perpetrators or their victims.

General Pinochet was a key player on the "Dirty War" that took place in the 1970's and 80's, a war which is part of the dark history of dictatorship in Latin America. During this period, military forces sought to eliminate by way of "disappearances", individual and groups who opposed them: kidnapping, torturing, killing, became part of the day to day terror as "operation condor", a secret international network of security forces, expanded its work throughout the Southern Cone: Argentina, Brazil, Chile and Uruguay_

The world still wonders how all this ever happened and why it happened.

In spite of our strong differences, we Latin Americans perceive ourselves as a unity, in as much as the European Union feels and acts as a Continent. More difficult to achieve is the integration of the Americas, due to the love-hate relationship with the United States, and the historical links of Canada with England. After the Summit of the Americas in 1994, however, new efforts are underway to establish a partnership for democracy, free trade and sustainable development in the continent by the year 2005. A follow up summit in Canada in the year 2001 should put into trial the commitment of this important endeavour.

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- Total population: 503,306 million inhabitants
- Annual population growth rate: 16 for every thousand inhabitants on the year 2000 and the estimation are that it will decrease to 9 for every thousand inhabitants on the 2025.
- Life expectation average: 70 years at 2000 and increasing to 75 by 2025.
- Latin American Internal Gross Product up to 1998 growing annual average 3.3%.
- Internal Gross Product for every inhabitant up to 1998: 1.70/0.
- Variation in consumers prices index up to 1998: 10.2%
- Urban unemployment rate up to 1998, not including the Caribbean 7.9%.
- Languages: Spanish, English, Portuguese, French and multiple dialects.

Ethnic and Race Composition: Indigenous population approximately 8% (30-35 millions) divided in at least four hundred groups with different dialects. At least 40% live in Bolivia, Guatemala and Peru.

African Americans and half-breed: 150 million persons. 50% live in Brazil.

With all its natural exuberance and human diversity, Latin America has the largest gap between rich and poor, according to the 1999 human development index, a cause of embarrassment for those of us that believe in social justice and equity.

3. Historical background: democracy and human rights, the history of a permanent contradiction.

At the beginning of the 19th century the Latin American countries fought and won their independence. This libertarian movement was inspired mainly by the Bill of Rights of 1689 in England, the declaration of independence in 1776 of the United States of America and the ideals of the French Revolution.

The "Declaration of the Rights of Men and Citizens" was secretly, but widely distributed and became inspirational for all of our independence leaders: Bolivar, San Martin, Q'Higgins, Morelos, Jose Cecilio del Valle, among others.

Democracy in the spirit of Locke, Montesquieu and Rousseau, was the model to be included in the original constitutions of every new state on the bases of the idealistic hope of a government "of the people, by the people and for the people".

In spite of the fact that these were the ideals of an educated elite, they persisted as a sort of inspirational guidance throughout our history, even for the marginalized majority.

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Unfortunately, the gap between formal principles and reality, worsen on the following years and dictators and caudillos became part of the day to day living in most of our, by now, "Sovereign Republics". Coups d'état substituted fair elections and strong oligarchies, with the support of the armed forces, gave way to a tragic period of discrimination, exclusion and systematic human rights violations. Ironically, Chile's liberal democracy was one of the most distinguished exceptions and certainly one of the less likely to produce a "Pinochet".

4. The "dirty war" in Latin America. Chile and General Pinochet.

The victory of Fidel Castro in Cuba in 1959 encouraged many armed revolutionary movements throughout the hemisphere which took different forms of violence including "guerrilla movements" and "national liberation" wars.

The reaction brought together the military and their supporters to create the "national security doctrine" to justify the accumulation of decision-making authority in non accountable hands. Based on this premise in the 1970s and 80s, strong military dictatorships took over and developed an ideologically motivated systematic policy of human rights abuses. The "national security doctrine" was enforced to justify the secret operations of what was define as a counter-insurgency strategy to save democracy.

Lack of transparency, destruction of institutions of control, and domination of public opinion through the media led to grotesque forms of massive and systematic human rights violations. In those countries where an active "guerrilla" movement existed, there were also outrageous violations of the laws of war committed by all parties to the conflict. (On this issue, see, Juan Mendes and Javier Mariezcurrena, *Human rights in Latin America and the Caribbean: a regional perspective*, Occasional Paper, The Center for Civil and Human Rights, Notre Dame Law School.

In Chile, Salvador Allende, the candidate of the Popular Unity, a coalition of leftist parties, was elected president on September 4, 1970. A declared Marxist, he was committed to turning Chile into the first socialist republic in Latin America with a democratically elected President. His hopes for transforming the country within the constitutional framework through a "peaceful revolution", encountered insurmountable obstacles both within his own party, and the Chilean society in general.

After three years of his government, the country was divided by a profound political crisis and an ailing economy only precipitated the long expected "coup" from the armed forces.

On September 11, 1973, one of the most violent military regimes was to take over the government of Chile. President Allende, completely surrounded by the military forces in the "Moneda Presidential Palace" gave his final statement: "these are my last words", he said, "and I have the certainty that my sacrifice will not be in vain. I have the certainty that, at least, it win be a moral lesson that will castigate felony, cowardice and treason." Only twenty years later, a documentary was shown on the national television system, that showed Salvador Allende's lifeless body, slumped on a sofa, dead of a self-

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inflicted gunshot wound. (For more on this issue see *Chile under Pinochet: recovering the truth*, by Mark Ensalaco, (University of Pennsylvania Press, 2000)).

On that same day, General Augusto Pinochet was in command of the army ready to enforce his well-prepared national security plan. He had all the support of very strong actors within the country as well as in other regimes from the Continent, including the United States. The roll played by the CIA is still under discussion.

On the other side, the leftist movements including radical students, workers and even the Communist Party, were surprisingly unprepared, thus allowing the merciless repression to get under way.

Within a few hours and on the following days many thousands of suspected leftist Chileans were killed, disappeared, or detained and taken to the National Stadium, converted for the purpose, into a large concentration camp and interrogation centre. It was only the beginning of one of the cruellest dictatorships in America.

Amnesty International, citing the military government, the Catholic Church, the International Commission of Jurists and the Red Cross as sources, reported that as many as 50,000 prisoners were taken prisoner throughout Chile in the first weeks after the coup: "teams of intelligence officers were detailed to the arena to extract information and to make life or death judgements about a prisoner's dangerousness." ... "Prisoners were tortured in dressing rooms and lavatories and scores were taken away for execution" ... "Bodies were rarely turned over to families for burial, rather, army and police patrols left the dead by the side of the road or dumped them in the Mapocho River running through the heart of the city" (Ensalaco, op, cit. Page 32-33).

The Inter-American Court of Human Rights was established in 1979. It has contentious jurisdiction to adjudicate cases involving charges that a State Party has violated the Convention. It also has jurisdiction to render advisory opinions interpreting the Convention and certain other human rights treaties.

Many international human right organisations like Amnesty International, America's Watch, The Lawyer's Committee, among others, played a most important role in the years of the military regimes. Especial recognition is to be given to the Chilean NGO community, organised by the church, families of the disappeared, lawyers and so many others that gave their time and life for the cause of human rights.

After years of strong military rule, the denunciations made by the international community and the civil society of the continuous gross human rights violation, made an impact on public opinion. In Argentina the "Mothers of Plaza de Mayor" toured the world with their white handkerchiefs and won everybody's respect. The "Malvinas war" came as a terrible blow to the military's prestige, and a slow but systematic process of transition to democracy started in the Southern Cone and later in all of Latin America. Again Chile was not an exception.

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There is no question that, during his reign, General Pinochet had obtained the unconditional support not only of the extreme right but also of a majority of the Chilean population that was not in agreement with a Marxist government. There is also no doubt that his hard economic liberal policies gave way to a recovery of the country's economy and won the admiration of the most conservative sectors all over America.

However, by the mid 80's, his political prestige had diminished and an economic crisis started to emerge. Pinochet encountered pressures for a transition not only on the domestic opposition but also from his stronger ally, the United States of America.

In 1988 he conveyed a plebiscite seeking a new electoral period, expecting a "yes" to confirm his legitimacy and to remain in power. Fighting insurmountable odds, a large coalition of Opposition parties, gave the "no" a surprising victory that the military had no choice but to recognize.

Elections took place in December 1989 and Patricio Aylwin became the first democratic elected president after the 11 year dictatorship. Unfortunately, in times of transition the political leaders have to make concessions to the former military groups and Pinochet remained in active duty until 1998. His "constitution of liberty" gave him a lifetime senatorial seat. The British legal system was to change the story of his protected impunity.

The transitional regimes were characterized by this tension between their immediate need to consolidate themselves and avoid relapses into dictatorship, and their aspiration to be true alternatives to the recent past. The debate over impunity dominated the agenda of the transition. Self-amnesty, pseudo-amnesty and real amnesty laws, pardons and other forms of clemency for the perpetrators were obstacles in the way of creating a more democratic order. Fortunately, victims and larger sectors of society fought through those obstacles and insisted on accountability.

Truth Commissions were an important tool in this period for accountability for the crimes of the recent past. In 1983, newly elected President Raul Alfonsin of Argentina, appointed a National Commission on Disappearance of Persons, chaired by the writer Ernesto Sabato. After a very active collection of information from all sources, in 1984 it produced an important report called *Nunca Mas* (Never Again) that established an unimpeachable description of the machinery of death created by the military dictatorship. (On this issue, see, Mendez Juan, *supra*, at 04.)

The democratically elected Chilean President Aylwin established the Chilean Commission on Truth and Reconciliation on April 25, 1990. The distinguished eight member non-partisan commission, known as the Rettig Commission, was allowed nine months to complete its investigation and present a report to the President. The Commission's mandate was to clarify "the truth about the most serious human rights violations... in order to bring about the reconciliation of all Chileans".

The Chilean report did not name the perpetrators of the abuses or suggest sanctions.

7. Towards a universal jurisdiction in human rights. The ethics of globalisation.

General Augusto Pinochet travelled to London in October 1998. During his long dictatorship he had enjoyed the trust of many heads of State including Lady Margaret Thatcher. He should have known that the mood in the world had changed as well as ideologies and governments. His detention on the night of the 16th gave the International Human Right community reasons to be joyful: for the first time there was light in the fight against impunity and the eyes of the world were set on every event taking place in England waiting for the Law Lords' historical decision.

Pinochet challenged his arrest on the grounds that he was entitled to immunity as a former Head of State. The House of Lords twice rejected his claim. In its first judgement, later annulled, the Lords ruled that although a former Head of State enjoys immunity for acts committed in his functions, international crimes such as torture and crimes against humanity were not justifiable "functions". In the second, more limited, judgement, the Lords held that once Britain and Chile had ratified the United Nations Convention against Torture, Pinochet could not claim immunity for torture. A British magistrate then determined that Pinochet could be extradited to Spain on charges of torture and conspiracy to commit torture. (On this issue see the *Pinochet Precedent*, Human Rights Watch, March 2000)

Hailing the decision, Amnesty International stated: "The UK Court has confirmed that people accused of crimes such as torture can be prosecuted anywhere in the world. They have also firmly established that former heads of state are not immune from prosecution for such crimes".

Pinochet was returned to Chile on medical grounds in March 2000. During his long detention in London the government of Eduardo Frei held a permanent judiciary and political campaign to bring the General back to Santiago for trial. In a much ideological divided society every day in the General's detention brought about more economic and social instability. New information (*Augusto Pinochet: 503 Days Trapped in London*, by Monica Perez and Felipe Gerdtzen) has revealed that during those 18 months there were constant secret telephone calls between Prime Minister Blair and President Frei. The forthcoming elections and the fear of the General's death outside of Chile aggravated national pride and sovereignty concerns.

After Pinochet's return to his homeland the most important event took place on August 8 when the Supreme Court confirmed a lower Court decision to strip him of his parliamentary immunity in order to stand trial. The potential criminal prosecution is for the kidnapping in October 1973 of nineteen supporters and officials of the government of President Salvador Allende.

The decision of the Supreme Court was received with an "explosion of happiness and tears" by the organisation of "families of the disappeared" in contrast with the anger and frustration of the military leaders. The same day the commanders of the armed forces and carabineros visited Pinochet in his home to pay respect, an act taken as a symbolic signal of defiance to the judiciary and to the government of the newly elected President Ricardo Lagos.

On a recent interview with the press, the President insisted in his reliance on the discipline of the military and their respect for the Constitution. There is no doubt, however, that the tension on the civic-military relations is at its peak and could get worse as the trial procedures are enforced.

According to Amnesty International "The Chilean government must now live up to its commitment to ensure that those accused of crimes against humanity can be tried in Chile in trials meeting international standards of fairness. At this point, the Chilean authorities are under an obligation to remove the legal obstacles that have made justice impossible within Chile and which have secured impunity, denying truth and justice to the victims of human rights violations and to their relatives. Such measures include:

- Annulling the 1978 Amnesty Law
- Excluding from the jurisdiction of military courts cases of human rights violations and guaranteeing the independence of the civilian justice in current and future cases under investigation
- Adopting measures to lift parliamentary immunity protecting alleged perpetrators of human rights violations."

Justice Juan Guzman Tapia is now in charge of the Pinochet's prosecution and witnesses are being asked to present their cases. More and more the victims and their families are demanding to be heard while defence lawyers rely on medical grounds to prevent the ailing General from standing trial. Every day new evidence comes from witnesses, including some of the military that bring the lines of authority in the crimes committed directly to Pinochet.

Various European countries have filed applications for extradition, while the United States announces new disclosure of classified documents regarding the Letelier case, as well as the very much discussed CIA involvement in the events. The question of "universal jurisdiction" is in discussion on every decision as well as the possibility of accepting a world community justice over the policy of the individual States.

It will not be easy for the people of Chile to reconcile, but hiding the truth is not the way to heal the wounds left by the long years of dictatorship. Many other actors are still to be uncovered, but silence and impunity are no longer the rule: the human rights community has reasons to hope.

In a globalized world knowledge and trade have no boundaries. It is then time for the Universal Human Right's system to provide the ethical backbone to bring justice to all peoples of the world. As members of the human race we are entitled to claim justice: the Pinochet tragic legacy might surprisingly lead the way.