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This working paper series is based on an international symposium, "Human Rights Tribunals in Latin America: The Fujimori Trial in Comparative Perspective." Select panelists have prepared incisive analyses of new trends in transitional justice in the region. The conference was organized by the Center for Global Studies at George Mason University, the Washington Office on Latin America, and the Instituto de Defensa Legal on October 2, 2008 in Washington, D.C., and funded with the generous support of the Open Society Institute.

The Center for Global Studies at George Mason University was founded to promote multidisciplinary research on globalization. The Center comprises more than 100 associated faculty members whose collective expertise spans the full range of disciplines. The Center sponsors CGS Working Groups, publishes the Global Studies Review, and conducts research on a broad range of themes.

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## FOREWORD

*Over the course of the past year, former Peruvian president Alberto Fujimori has sat, three days a week, in front of a panel of three Supreme Court justices tasked with determining his responsibility in a series of grave human rights violations committed during his ten-year administration (1990-2000).*

*Few Peruvians imagined such a trial was ever possible. Fujimori fled Peru in November 2000, amidst explosive corruption scandals. Upon his arrival in Japan, the birthplace of his parents, he was provided protection by top political authorities and was quickly granted Japanese citizenship, effectively shielding him from the risk of extradition to Peru.*

*But events took a new turn in November 2005, when Fujimori left his safe haven in Japan for Chile. In what international law scholar Naomi Roht-Arriaza has referred to as "the age of human rights," this was a critical miscalculation. Instead of launching a bid for the presidency in Peru's 2006 elections, Fujimori instead found himself under arrest in Chile. The Peruvian state prepared an extradition request, and in September 2007, after a long and complex process, the Chilean Supreme Court approved Fujimori's extradition. Within days the former president was returned to Peru, and on December 10, 2007, his trial for human rights violations began.*

*Domestic prosecutions of heads of state for human rights crimes are extremely rare in any country. And Peru may seem an especially unlikely place for such a high-profile trial to unfold. Fujimori remains quite popular among certain segments of the Peruvian public. The judiciary historically has been held in low esteem by Peruvian citizens. Key figures in the present-day political establishment, including the current president, vice-president, and key opposition figures, have their own reasons for being wary of possible prosecutions for human rights violations in the future. Yet, in a striking display of impartiality and professionalism, the tribunal overseeing the prosecution of the former president has been a model of fairness, fully protecting the due process rights of the accused. Regardless of the outcome, the trial of Fujimori demonstrates that with sufficient political will, domestic tribunals can prosecute high-level public officials who commit or order the commission of grave human rights violations.*

*Impunity has long characterized Latin American societies emerging from years of authoritarian rule and/or internal conflict, but today numerous Latin American countries are making great strides in bringing to justice those who committed or ordered the commission of grave violations of human rights. To highlight and analyze this welcome development, the Center for Global Studies at George Mason University, the Washington Office on Latin America (WOLA) and the Instituto de Defensa Legal (IDL) joined forces to draw attention to the Fujimori trial, as well as the other human rights tribunals underway in parts of Latin America today.*

*Mason, WOLA and IDL organized a conference series to examine human rights trials in Latin America. The first conference, entitled *Los culpables por violación de derechos**

*humanos, took place in Lima, Peru, June 25-26, 2008. It convened key experts in international human rights law, as well as judges, lawyers, scholars and human rights activists from across the region, to analyze the Fujimori trial in comparative perspective. (A rapporteur's report for this conference is available online at: <[www.justiciaviva.org.pe/nuevos/2008/agosto/07/seminario\\_culpables.pdf](http://www.justiciaviva.org.pe/nuevos/2008/agosto/07/seminario_culpables.pdf)>.)*

*A second conference took place in Washington, D.C., on October 2, 2008, at the Carnegie Endowment for International Peace. Several participants from the Lima conference were joined by human rights activists, lawyers, judges and scholars from across the region to examine the Fujimori trial as well as other human rights tribunals underway in Argentina, Chile, Uruguay, and Guatemala. The result is a rich multidisciplinary look at a new moment in Latin America's history, in which impunity and forgetting is giving way to processes of accounting for crimes of the past through domestic tribunals, one piece of a broader process of coping with the difficult legacies of the authoritarian and violent past. (A rapporteur's report for this conference is available online at: <<http://cgs.gmu.edu/publications/hjd/OSI2009RappReport.pdf>>.)*

*This working paper series is based on the Washington conference on human rights tribunals in Latin America. Select panelists have prepared incisive analyses of this new trend in transitional justice in the region. Several of the papers analyze the Fujimori trial, offering legal, activist, and scholarly perspectives on the trial of Peru's former head of state. Others examine trends in other countries, including Argentina, Chile, and Guatemala, that have also sought to promote prosecutions for human rights violations. Collectively the papers reveal the strides Latin America has made in its efforts to combat impunity and promote the rule of law and democratic governance. Though obstacles remain, as several conference participants indicated, these efforts represent a key departure from the past, and merit careful scrutiny by policymakers, scholars, and the human rights community.*

*We would like to especially thank the Latin American Program at Open Society Institute, in particular Victoria Wigodsky, which made this conference series as well as the publication of this paper series possible. We also thank Arnaud Kurze at CGS/Mason for his capable assistance during all stages of this project and in particular of the preparation of this working paper series.*

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March 2009*

## **Prosecuting Pinochet: Late Accountability in Chile and the Role of the 'Pinochet Case'**

By  
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The notable post-1998 revival of prosecutions for past human rights crimes in Chile is often attributed to the so-called 'Pinochet effect', the impact of the UK arrest of the former dictator in that year (Roht-Arriaza, 2005).<sup>1</sup> In this sense, the arrest can be viewed as an example of international action shifting domestic blockages. In fact, though, the Chilean justice scenario had already begun to change, with the minimal conditions for revisiting transitional era impunity already apparently in place and beginning to show limited results. In this way, the dramatic events in London were able to accelerate national processes, galvanising both activists and judges in Chile to deal in a more comprehensive way with the outstanding human rights legacy of the recent past. Additional internal factors contributing to this domestic change included previous institutional and judicial reform, persistence on the part of domestic relatives' groups and lawyers, and the simple passage of time. Change has not been limited to the judicial sphere: accompanying social and political shifts since the late 1990s add up to a substantially new Chilean 'memory landscape'. Previously taboo themes have been revisited and readdressed, but the process has not been consensual nor conflict-free. This paper attempts to map the major jurisprudential, political and social milestones of 'post Pinochet case' Chile. Underlying reasons for change are identified, the limits of existing shifts are considered and future prospects discussed. Finally, elements of particular interest for comparative purposes are highlighted.

### **ACCOUNTABILITY IN CHILE SINCE 1998**

In early 1998, judicial accountability in Chile for human rights violations committed during the 1973-1990 dictatorship was at a virtual standstill. The twin effects of a 1978 self-amnesty law and judicial apathy meant that even after the 1990 return to democracy, formal criminal justice had always been the 'poor relation' of Chilean transitional justice policy. At most, there had been a handful of successful prosecutions in the mid 1990s of cases not covered by the time-limited amnesty. These had included the 1995 jailing of former secret police chief Manuel Contreras for the notorious 1976

Washington car bomb assassination of former Chilean chancellor Orlando Letelier and his US assistant. After this high water mark, however, the justice issue resumed its former status as an uncomfortable topic which new political authorities preferred to keep at arms' length.

Relevant legal cases did exist in the justice system, amounting in fact to many hundreds of case files at least in theory on the books of military and civilian courts. Each corresponded to a victim of disappearance (or, less commonly, extrajudicial execution). However, during and immediately after the dictatorship, amnesty had routinely been applied to suspend the related investigations.<sup>1</sup> Only about a hundred cases in the main (civilian) court system showed even a minimal level of ongoing activity. The origins of most of these files stretched back to the dictatorship itself, when victims' relatives had submitted complaints directly to investigating magistrates under the sponsorship of main human rights defence organisation the Catholic Church-backed 'Vicaría de la Solidaridad'. Those which had survived had done so due only to the diligence and persistence of a small number of case lawyers and relatives in keeping them out of the hands of the military justice system through the 1990s.<sup>2</sup> With little or no real prospect of achieving the conviction and incarceration of those responsible, the maximum aspiration for this pre-1998 case universe was often mere survival.

This somewhat unpromising scenario was the backdrop against which two groups of relatives, one directly connected with the Chilean Communist Party, began in 1997 to consider prospects for a direct legal assault against the former dictator in person. The actions were planned to coincide with Pinochet's last year as Commander in Chief of the Army and pending entry into the Senate, and both groups' immediate motives were much more political than legal. Neither group seriously expected that these first ever post-transitional direct legal complaints against Pinochet himself would even be accepted, much less that they would prosper. There had been some glimmers of change in judicial treatment of minor cases in lower courts during the preceding months, leading the groups' lawyers, at least, to be marginally more hopeful. In the main, though, the complaints were viewed as a symbolic gesture, undertaken to express repudiation at the prospect of the former dictator being received into the highest echelons of the democratic legislature by former opponents.

In January 1998, the Chilean Communist Party submitted a complaint for party leaders who had been killed in a clandestine extermination operation

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<sup>1</sup> Fortunately for future accountability prospects, military courts preferred to apply (reversible) temporary suspension, rather than definitive closure, a strategy designed to ensure they kept jurisdiction over any subsequent legal submissions for the same crime.

<sup>2</sup> In the months leading up to the 1990 transition, the military courts made a concerted effort to request transfer of cases from the civilian justice system, routinely going on to apply amnesty without further investigation.

known as 'Calle Conferencia'. Just a few days later, relatives of a group of victims killed by the so-called 'Caravan of Death' operation, a 1973 military-supervised wave of illegal executions, submitted a similar complaint. Both named 'Augusto Pinochet Ugarte and all others who may prove to be responsible'. The two complaints were assigned by rote to Santiago Appeals Court judge Juan Guzmán, a long-serving career judge and conservative figure.<sup>3</sup> This was considered a bad omen by the groups concerned, but to their surprise, Guzmán admitted the complaints and began to investigate. Pinochet's retirement from the army and entry into parliament nonetheless proceeded on schedule in March 1998. All the while, criminal investigations in Spain into the fate of Spanish citizens in Southern Cone dictatorships went ahead in the background, virtually unnoticed.<sup>4</sup>

In September 1998, a Supreme Court confirmation of a lower court ruling in the unrelated, and longstanding, Poblete Córdoba case confirmed the slight national trend towards improved judicial receptivity in human rights cases. The verdict became the first significant jurisprudential milestone of the new period, making inroads for the first time into the reach of the 1978 amnesty law. The Poblete Córdoba decision finally accepted a thesis long-argued by human rights lawyers: that disappearance amounted to kidnap, a so-called 'ongoing crime' until remains were found or the victim's present whereabouts otherwise proven. This extended the crime beyond the reach of the amnesty law, which only applied to crimes committed before March 1978. The verdict also stated that the 'state of internal war' decreed by the dictatorship in 1973 was sufficient to trigger the relevant Geneva Convention protections for prisoners. This would rule out amnesty altogether for certain crimes, irrespective of their date of commission.<sup>5</sup> The verdict had no immediate positive impact on the case itself, eventually returned to military jurisdiction where it continued to languish. The 'ongoing crime' thesis, which was to become key in allowing the reopening and/or resubmission of all disappearance cases in which amnesty had previously been invoked, was however reaffirmed in January 1999 in the so-called 'Parral' case.<sup>6</sup>

Meanwhile, of course, the October 1998 detention of Pinochet in the UK, at the request of Spanish judge Baltazar Garzón, had sent shock waves reverberating through diplomatic, political, media and judicial circles in Chile and far beyond. The immediate 'supply side' effects, as measured by domestic judicial responses, were complex and difficult to gauge. The role of spokesman before world opinion was of course taken on by the executive

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<sup>3</sup> Previously best known for having ordered the censorship of the Scorsese film 'The Last Temptation of Christ'.

<sup>4</sup> The Spanish cases were known to the Chilean complainants, some of whom had even travelled to testify. Neither they nor the Chilean political or military authorities however thought there was any real prospect of their having any practical implications, in particular as Spanish justice does not allow for trials in absentia.

<sup>5</sup> Supreme Court verdict of 9 September 1998, case Rol. 469-98.

<sup>6</sup> Supreme Court verdict, 7 January 1999, case Rol. 248-98

branch, who made vigorous representations against Spanish jurisdiction. The apparent jurisprudential advances of the Poblete Córdoba and Parral cases, and the Guzmán investigations opened in January 1998, were employed by the Chilean government to argue before their Spanish and British counterparts that Pinochet not only in theory but in practice could be, and was in fact being, judged by national courts for crimes supposedly committed in Chile. This argument, amounting in the end to veiled assurances that Pinochet would be properly tried if he were returned home, was of course strictly speaking beyond the remit of the executive to make. Nonetheless, the assurances placed domestic judicial behaviour firmly in the spotlight, and threw down the gauntlet to Chilean judges. Would they allow world opinion to conclude that they were an unchanged, conservative, collusive judicial branch wedded to impunity and out of step with international law? Would they allow themselves to be judged by implication inferior to Spanish or British judges; ill-equipped or unwilling to deliver impartial justice? Ever-sensitive to apparent slights on their integrity or sense of collective self-worth, the Chilean courts did seem unwilling in the following months to give external critics any further grounds for complaint. Although hardly transformed into enthusiastic accountability agents, they did begin to establish the moderately progressive new treatments of disappearance and 'war crimes' as the norm rather than the exception. A wave of new complaints generated during Pinochet's detention - see below - was received and duly accumulated to Guzmán's Rol. 2182-98 investigation. Although some senior judges were clearly unhappy with the new developments, the overall sense was of an unwieldy and somewhat rickety vehicle, kickstarted into motion and now almost inevitably trundling forward under the acquired momentum.

The 'demand side' of this invigorated domestic accountability field took the form of over 300 separate new criminal complaints submitted against Pinochet and others between October and December 1998. This trend for new submissions continued throughout the whole period of Pinochet's overseas detention. Initially in part a strategic ploy by human rights groups, to force the government into keeping its widely-mistrusted promise to ensure, or at least guarantee the independence of, domestic proceedings, it also came to represent what Roht-Arriaza (2005) has aptly described as a seismic shift in perceptions of what was possible. Victims' relatives, human rights organisations, lawyers, extra-parliamentary left-wing groupings, trades unions and a host of other pro-accountability actors felt the need to jump on the now-moving bandwagon. Since it seemed that those cases which made it into Rol. 2182-98 were finally going to be thoroughly investigated by a reasonably sympathetic judge, some of these apparently 'new' submissions were actually attempts to have old cases transferred into Guzmán's purview. The simplest ploy was to add the name of Augusto Pinochet to the complaint's roster of named suspects. All kinds of other legal loopholes were also exploited to argue that previous assignments of cases, to military judges, or to relatives' home jurisdictions, were inaccurate. The newly opened Rol

2182-98 became for a time the repository of all hope for private pro-justice actors in Chile. The very day Pinochet stepped down from the Air Force jet that brought him home from London to a hero's reception, lawyers were ready with a request for charges to be brought in one of the episodes into which the now-unwieldy Rol 2182-98 had been divided.

The subsequent fate of this new case universe was perhaps predictably uneven. The concentration of complaints and optimism, in Rol. 2182-98 submissions eventually became counterproductive, as the case became a monster investigation which Guzmán struggled to process. By January 1999, the file was divided into (initially) 20 separate episodes, of which 'Caravana', the one which seemed to offer the best investigative prospects, was initially prioritised. As time went by, two specific knock on effects began to spread the momentum acquired by Rol 2182-98 more evenly throughout the judicial system. Firstly, a portion of the new submissions relating to old cases were rerouted to the existing files instead of being admitted into Rol 2182-98. Where the old cases had been prematurely or unsatisfactorily closed by amnesty, relatives and lawyers therefore began to argue for re-opening, under the new interpretations relating to disappearance. Where the old cases still existed but were inactive, the arrival of new submissions and information was employed by case lawyers to reinvigorate the previous investigation. The jurisdiction of military courts was challenged, and lawyers began to rehearse new lines of argument for cases of illegal execution. (The latter could still, in theory, be amnestied, where it could be proved that the death had taken place before March 1978. More conservative judges therefore investigated anew only in order to justify the re-application of amnesty, by proving that death had occurred before the cutoff date of the 1978 law. Lawyers however began to revert to previous lines of argument, bolstered by the Poblete Córdoba verdict, about Geneva Convention and other international law exceptions to the types of crime that could be amnestied for the 1973-1978 period.)

From 2000 onwards, the new case universe began to work its way slowly through the unwieldy Chilean court system alongside existing human rights cases. Investigating magistrates opened or reopened weighty written files containing hundreds of pages of reports, witness statements, certificates and documentation of every conceivable variety. A pattern of overall progress, towards the gradual resolution of at least a portion of open cases, and towards the apparent installation of first temporal and then international law exceptions to amnesty, was punctuated by occasional reversals and periodic accusations of political interference. Juan Guzmán, unhappy at having a portion of his initial caseload reassigned to other judges, complained of explicit political and higher court pressure to 'ease off' and not to finally charge Pinochet. He was subjected to repeated disciplinary measures for minor infractions, and accused his own judicial secretary of destroying investigative material, for which she was eventually sacked. One member of the judicial panel charged with voting on removal of Pinochet's immunity in

one specific episode later alleged that she had received 'a phone call' from a highly-placed political source, advising her of the government's considered view that investigations had proceeded far enough and it would not be necessary, or even welcome, to go so far as to have Pinochet charged. Chile's judiciary, long famed for its readiness to bend to executive will, seemed on this particular issue to be acting with an unwonted and finally unwelcome zeal.

Judicial progress with outstanding cases received a substantial boost in 2001, when special judges were appointed to oversee and expedite all human rights related cases in the civilian justice system. Again, the Supreme Court seemed to be willing to act with more alacrity than political authorities: after a government-sponsored fact gathering exercise known as the 'Mesa de Diálogo' (see below), information on the fate of some of the remaining disappeared was handed to the courts. Later proving to be of dubious quality, this information nonetheless prompted the courts to assign full and part time judges to follow up. Rather than acting only over the few dozen names contained in the data, the court however ordered a full national survey of all old and new case files, handing the bulk of them over to the new judges. Having acquired some of the necessary resources, and the finally enthusiastic co-operation of a specialised investigative unit,<sup>7</sup> the judges proceeded apace to clear up cases which had previously languished for years. Other parts of the justice system began to play an active role too: the Consejo de Defensa del Estado, a state body charged with representing the state's legal interests, began to associate itself to some of the cases in their final stages. Acting alongside private complainants, the Consejo requested charges and sentences against some of the more emblematic former agents being investigated. The Consejo's role was however occasionally ambiguous: in one particularly emblematic case, its intervention was reversed at the appeals stage to argue for the reapplication of amnesty to that and all other outstanding cases.<sup>8</sup>

A more reliably pro-prosecution line was taken by the Human Rights Programme of the Ministry of the Interior. A formerly small and fairly obscure entity, not even part of the Justice department, the Programme had in previous incarnations carried out mainly administrative tasks connected with truth commission followup. After the Mesa de Dialogo, however, it was charged with offering legal advice to relatives affected by the new information about victims of disappearance. The Programme seized the opportunity to expand the range and scope of its legal assistance work. After a 2003 human rights policy announcement (see below) gave it even more prominence, the Programme transformed itself quietly into the only reliably pro-accountability actor within the Chilean state apparatus. Careful to maintain a low profile, because of mandate restrictions as well as concerns

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<sup>7</sup> A dedicated detective brigade of Chile's civilian Investigative Police, usually known as 'Departamento Quinto', Department Five, the official title of one of its previous incarnations.

<sup>8</sup> The Sandoval case, 2004.

about opposition from within the present administration as well as from the political right, the Programme nevertheless provides associate lawyers for most of the privately-sponsored criminal complaints currently before the courts.<sup>9</sup>

As of 2008, the Programme is widely regarded by private human rights case lawyers as the most reliable guide to the status and extent of the prosecutions 'map' across the country. Programme figures register 698 agents charged or processed as of October 2008, in 341 separate legal cases for disappearance or illegal execution. Ongoing or concluded cases now exist for almost 40% (1,241) of Chile's officially acknowledged total of 3,195 victims of disappearance.<sup>10</sup> Around 30 additional criminal human rights violation cases exist, including two dozen cases for torture.<sup>11</sup> Perhaps a similar number of civil complaints, for exile and other violations, also exist.<sup>12</sup> This present case universe represents the evolution of the complaints submitted before and after 1998. Major trends in case law and activity over these years have included a gradual expansion of the numbers and levels (rank) of state agents investigated and accused. After 1998, the perception that it was possible to pursue not only lowly 'triggermen' but also high ranking officers and 'intellectual authors' of repression emboldened lawyers to submit complaints at these levels. Although Pinochet's personal legal situation never culminated in full charges being brought, complainants registered successes in having his immunity<sup>13</sup> removed on several occasions. The sticking point was always, as in London, his health rather than his supposed innocence, and at the time of his death in December 2006 he had been processed in a total of four cases, with more pending.<sup>14</sup> These and other post-98 cases did however

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<sup>9</sup> The Programme was initially set up to locate victims of disappearance, and of execution where bodies were not subsequently released to families and have not been found. It cannot act in the emerging field of cases for torture or political imprisonment. It has also been specifically prevented from participating in civil claims, to avoid the open contradiction of having to argue against counterparts from the Consejo de Defensa del Estado, which maintains that the Chilean state has no civil liability for the violations carried out during the 1973-1990 period.

<sup>10</sup> Both of these specific figures need to be adjusted downward, to 1,240 and 3,194 respectively, in the wake of the dramatic November 2008 'reappearance' of German Cofré, included since the mid-1990s in the register of official victims. Cofré, whose case had been included in a group of executions currently under investigation by judge Carlos Gallardo, had in fact fled to Argentina in 1974, where he had begun a new life.

<sup>11</sup> Programme statistics do not map these cases in any detail, as the Programme acts in an official capacity only in cases of disappearance or execution without discovery of remains. Some Programme lawyers nonetheless act in a private capacity as the lead prosecution lawyers in these cases.

<sup>12</sup> There is no official register of the numbers of these cases, mostly brought by survivors' associations from the year 2000 onward.

<sup>13</sup> As a former (self declared) president. Chilean law requires this level of immunity to be challenged separately in each potential case before allowing a person under its protection to be charged with any criminal offence.

<sup>14</sup> Processing is a pre-charging status which nonetheless carries a presumption of some level of participation. Processing was active against Pinochet in one human rights case and one

produce almost equally emblematic high-level convictions: Contreras, Pinochet's former confidante, is named in almost all complaints for the 1973-1978 period and is now in (military run) prison serving accumulated total sentences running into hundreds of years. His successor at the head of the dictatorship's intelligence apparatus has suffered a similar fate,<sup>15</sup> while in 2005, the first complaint against a serving, rather than retired, general was registered.<sup>16</sup> In mid 2008 Santiago Sinclair, last pre-transition vice-commander in chief of the army, and later a senator, was processed for five assassinations, while in October 2008 retired general Arellano Stark, another former right hand man of the dictator, was handed a six year sentence<sup>17</sup> for the emblematic Caravana case which had opened the floodgates back in 1998.

Another significant characteristic of human rights case progress in the decade since 1998 has been the impact of cumulative revelations, and the pooling of previously scattered information, in revealing more clearly the lineaments of Chilean repression. Although Chile is one of the few instances worldwide where repression was carefully studied and even documented while it was actually happening, recent cases have served to reveal the existence of previously unknown secret police brigades and detention centres. Viviana Díaz, longtime leader of Chile's main relatives' association, learned in 2007 via judicial hearings how her father, a Communist Party leader, had been kept alive for months in an 'extermination centre' which Pinochet himself allegedly visited, and from which no-one is known to have emerged alive. Human rights lawyers' deliberate strategy of 'rewarding' lower level confessions with more lenient treatment of requests for bail and so on have begun to make additional inroads into the culture of silence amongst former agents. Simple life cycle issues also seem to have played a part, with judges reporting that some elderly ex-servicemen have expressed a desire to 'clear their consciences' before they die. What Payne (2008) calls 'triumphant confessions' from the unrepentant have also played a part,<sup>18</sup> as has inter-service rivalry and score settling.

The human toll this 'late justice' has taken on relatives, witnesses and survivors has been substantial. Relatives, witnesses and former fellow detainees were summoned to tell and in many cases retell versions of how victims had been detained, where they had been held, what glimpses or

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financial fraud case, and had been suspended for health reasons in two more human rights cases.

<sup>15</sup> Salas Wenzel headed the National Intelligence Center, CNI, which inherited in 1978 the mantle and much of the personnel of Contreras's notorious DINA secret police, dissolved in that year.

<sup>16</sup> General Miguel Trincado, named as an additional suspect in the longrunning Caravana case  
<sup>17</sup> Almost immediately, however, suspended because of Stark's ill health

<sup>18</sup> Chile's emblematic case is former torturer Osvaldo Romo. Interviewed for television during the 1990s from his prison cell, Romo took apparent delight in recounting details of his torture technique and justifying his aberrant acts. The 2008 film 'The Judge and the General', which tells the story of the Guzmán investigation, reproduces extracts of the interview.

rumours had emerged of their subsequent passage through clandestine torture and detention centres and what, if anything, was known of their eventual fate. Former agents were also cited to testify. Where versions conflicted or contradicted, judges often ordered 'careos' or direct confrontations between witnesses and suspects. Where the suspects were well connected former (or, in a few cases, serving) military officers, they would often attend in force, with an array of defence lawyers to contradict and challenge witnesses at every turn. These meetings were held not in open court but in the inescapably more intimate settings of judges' private chambers. Some witnesses who are themselves survivors report being subjected to harrowing episodes of forced proximity with former torturers. Even the largely respectful behaviour of judges and other judicial personnel could not fully blunt the force of the re-encounter.

These dramatic personal situations have their counterpart in the reactions of often elderly former agents suddenly being called to account for crimes they believed had lapsed into obscurity. The suicide of one former agent in January 2005 was widely publicised by opponents of the whole process, and military authorities in general missed no opportunity to express their displeasure at the 'parade' of military officers through the courts. Commander in chief Cheyre called attention repeatedly to the suffering caused to those indicted and then confronted with long delays: some, he observed, had died before their cases could be concluded and their names cleared. Relatives would often reply that they, too, had waited an inordinate time for justice; and Cheyre stopped short of calling for processes to be abandoned or closed, requesting instead that they should be 'expedited'. This issue has largely been treated with some caution by complainants, keen of course to see rapid progress with the new cases but alert for any sign of official desire to abort the accountability process with 'punto final', full stop, measures.

Despite these far-reaching effects in the lives of the individuals concerned, the institutional reach and implications of this apparently invigorated justice scenario are still limited in important ways. Those mainly internal to the judicial sphere itself are discussed below. The most substantial caveat however has origins in the political (executive and legislative) sphere. Chile's 1978 amnesty law remains entirely textually intact and valid. It has never been repealed, nor have attempts to challenge its constitutionality ever prospered. This fact renders current Chilean progress entirely contingent, and reversible, as it is based exclusively on prevailing 'fashion' in judicial interpretation. The absence of action from other branches of the state to affirm or cement judicial change over accountability is one of the major elements distinguishing the Chilean accountability scenario from that of neighbouring Argentina, and drives us to examine the political and social backdrop to the formal justice shifts described above.

## POLITICAL AND SOCIAL CHANGE ACCOMPANYING SHIFTS IN FORMAL JUSTICE

In 2006, an Interamerican Court ruling found, not for the first time, that the 1978 Chilean self-amnesty law was illegal and recommended its repeal. President Michelle Bachelet announced immediate study of 'measures' to comply, eventually promising not repeal but an 'interpretive bill'. This, it was claimed, would bring the statute into line with international law without repealing it or overturning its effects. The promised bill, despite being submitted to parliament as a pre-project with 'extreme urgency', has yet to materialise.<sup>19</sup> The current right wing opposition has repeatedly signalled its intention to cease the signing or ratification of international human rights commitments if elected, and meanwhile votes consistently against the extension of current protections or institutionality in human rights. Chile is accordingly one of only two countries in the region not to have a human rights ombudsman, while a recent government proposal for a national Human Rights Institute was finally withdrawn in the face of opposition from both left and right. This unpromising state of affairs coexists uneasily with a centre-left government whose Socialist Party president, herself a former political prisoner and exile, has made clear and welcome efforts to forge closer links with relatives' and survivors' groups than did any of her predecessors. One of Bachelet's first official engagements was the inauguration of a monument to three murdered Communist Party militants, and in the first six months of her presidency she also made a visit to Villa Grimaldi, the reclaimed former torture centre where she had briefly been detained, along with her mother, back in the 1970s.

Bachelet is, however, not so much the exception as the rule in a pattern of externally constrained, ever-cautious, and only apparently paradoxical executive management of the historic human rights issue. This pattern was established in the run-up to Chile's 1990 democratic transition, one of the most heavily 'pacted', and restricted, transitions on the continent. Chile's return to democracy was scripted and orchestrated by the outgoing dictatorship. The Constitution drawn up by regime ideologues in 1980 was preserved virtually intact, complete with authoritarian 'enclaves' such as the presence of unelected Senators, continuity of functionaries including Pinochet-era Supreme Court appointees, and the continued presence of the former dictator himself as Commander in Chief of the Army. Exceptionally high barriers were set for constitutional reform, and the combination of a binominal electoral system and a coterie of 'designated Senators' overrepresented conservative forces, affording the right an effective veto in the upper house. The right also of course had a genuine claim to popular

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<sup>19</sup> Early in 2008, the then president of the Senate in fact moved for it to be withdrawn completely. Full legislative history, including debates, available via [www.senado.cl](http://www.senado.cl), section 'Tramite de Proyectos', entering reference code 3959-07.

support, having held on to a total of around 45% of the vote in the 1989 presidential elections.

Human rights crimes and their legacy, having contributed in large part to international repudiation of the regime in its last years, were a particularly sensitive subject which outgoing but still powerful actors were accordingly careful to leave as 'tied up' as possible. First democratic president Patricio Aylwin was clearly given to understand the limits of his incipient control over the country and its institutions, illustrated by with Pinochet's notorious threat 'the day they touch one of my men, the rule of law is over'. Having witnessed the abortive efforts in neighbouring Argentina to hold former military men to account, Aylwin learned his lesson well. A truth commission, rigorous and well documented, was perhaps as much as he was ever going to be able to achieve, and in any case as much as he was prepared to risk. The 'Rettig Commission' (1990-1991) accordingly published its findings on just over 3,000 cases of fatal violence or disappearance, but justice measures were virtually absent and a campaign promise to repeal the 1978 self-amnesty law quickly disappeared.

The pattern of real and quickly internalised *de facto* restriction of accountability prospects in post-transitional Chile has been ably documented by Alex Wilde (1999). Wilde describes how effective stasis or even neglect of the human rights legacy question through the 1990s was punctuated by 'irruptions', unforeseen and usually unwelcome events which put the issue temporarily centre stage. Quickly managed back into obscurity by the ruling Concertación, however, human rights crimes were never the only or even the principal item on the national agenda in the years from 1990 to 1998.<sup>20</sup> Despite some controversy surrounding Pinochet's accession to the Senate in early 1998, plus some literary and cultural manifestations around the 25<sup>th</sup> coup anniversary in September of the same year, it took the UK arrest of Pinochet to definitively thrust the dictatorship's human rights record into the national spotlight. Here the pattern of apparently inexplicable executive caution or vacillation re-emerged with a vengeance. Many in the ruling Concertación coalition, including then-president Frei himself, had suffered the effects of repressive violence at close quarters. It is accordingly difficult to imagine that the thought of justice finally catching up with the ageing dictator was not appealing at least to some. The official line, however, was quickly and vehemently defined as against extradition, on the 'principled' grounds of national sovereignty concerns. Frei, like his replacement Ricardo Lagos after him (2000-2006), argued vigorously that international law was not to be interpreted as taking precedence or even direct effect in the national territory,<sup>21</sup> and the main concern of both presidents became to repatriate

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<sup>20</sup> See also Collins (2006 and 2008) for this period.

<sup>21</sup> This despite a pre-transition modification to Article 5 of the 1980 Constitution, which established the opposite. See Huneus (2005)

Pinochet as quickly as possible, by whatever means necessary (Perez and Gerdtzen, 2000, Ekaizer, 2003, or Davis (ed.), 2003).

The debacle did perhaps serve to convince both the political authorities and the military that fresh efforts were required, in order to convince constituencies both national and international that Chile could and would deal more comprehensively than before with its own recent past. A military-government rapprochement, carefully cultivated since Pinochet's retirement, suffered an initial setback before settling into a new pattern with renewed concessions, and perhaps a renewed sense of urgency, on both sides. Based perhaps on the misapprehension that 'Donde Estan?', the most emblematic demand of the human rights community, was also its only or its most pressing concern, both partners seemed to believe that a renewed truth venture could blunt or divert the pent up national demands for justice that Pinochet's arrest had unleashed. Accordingly, the so-called 'Mesa de Diálogo' initiative was announced in 1999. Bringing together military officers, government officials and some human rights lawyers under the supervision of the Catholic Church, the roundtable drew up a scheme for gathering information to locate the remaining disappeared. A subsequent law guaranteed anonymity to informants, and a six-month period of fact gathering was decreed during which military and church channels would be opened to receive information.<sup>22</sup> The whole procedure was controversial, with relatives' groups and some human rights lawyers denouncing it as a veiled 'full stop' exercise or as window dressing, designed mainly for overseas consumption.

In the end the list of names and locations of victims produced was both desultory and inaccurate, and the main long-term effect of the exercise, aside from the flurry of judicial activity mentioned above, was the creation of deep division in the human rights community. This community, consisting in the main of a few historic organisations and lawyers, never proved as adept as its counterparts in Argentina or even Peru at presenting a united front, creating majority popular support for its claims or even learning to make best use of a minority position. Although their demands were clear and largely consistent through the 1990s, persistence was not matched by innovation. A sharp drop in resources and profile after transition was allowed to push the movement into a relatively marginal position, with the iconic Agrupación de Familiares de los Detenidos Desaparecidos (AFDD), in particular, acquiring a reputation for intransigence and ideological maximalism.<sup>23</sup> The newer, occasionally younger and generally more combative groups which emerged onto the scene

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<sup>22</sup> For the purposes of securing agreement, the longstanding and widely disbelieved military contention that they have no institutional records of repressive crimes was respected.

<sup>23</sup> Many of the AFDD's post-transitional leadership figures were also closely linked to the Communist Party, Chile's main extra-parliamentary left wing grouping and the only party to have consistently denounced the 'timidity' of the Concertación's transitional justice policy.

after and because of Pinochet's 1998 arrest and detention did little to reverse this trend. The organising logic, central priorities and defined goals of the new actors tended to be as diverse as their multiple and overlapping identities: trades union groups, relatives or survivors associated with a particular legal case, collectives organised around a particular mobilising issue or personal identity,<sup>24</sup> womens' groups, etc. This new diversity made concerted action more difficult. One relatives' group which emerged in the north of the country forged close links with the right wing UDI party, which in early 2003 began to make public suggestions about new reparations. This move was widely interpreted as an effort to invade territory the centre-left Concertación regarded as naturally its own. Partly in response, and partly in anticipation of September's 30<sup>th</sup> coup anniversary, President Ricardo Lagos made a major human rights policy announcement in August 2003 under the title 'No Hay Manana Sin Ayer', No Tomorrow Without Yesterday. The proposal increased existing reparatory pensions and announced a major new truth commission initiative to document political imprisonment and torture, issues not dealt with in any depth by the initial Rettig report. Disliked on the left for its suggestion that 'due obedience' be recognised via reduced penalties for low ranking informants, the proposal also contained suggestions unacceptable to the right, such as the designation of additional special judges and the transfer of more human rights cases out of military jurisdiction. By April 2004, little remained of the original proposal save the new truth commission.

This, however, proved to be a substantial step forward. Created by Decree Law no. 1040 of September 2003, the so-called 'Valech Commission' collected over 35,000 survivor testimonies, detailing repressive practices previously acknowledged only in general terms, and known in depth only to those who had taken an interest in the subject. The report's launch in November 2004 provoked genuine public attention and debate. In the face of the overwhelming nature of the 28,000 victims initially recognised by the commission<sup>25</sup> the military and right could do little more than issue sombre reaffirmations of their commitment to 'reconciliation'.<sup>26</sup> Although not followed up in anything like sufficient depth, the report did mark a before and after in widespread acknowledgement of crimes which many had previously preferred to ignore. The revelations reinforced those being

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<sup>24</sup>Such as the 'FUNA', a version of Argentina's 'escrache' movement, which dedicates itself to public denunciation and harassment of known repressors; or 'HIJOS Chile', an association of children (and now grandchildren) of victims of fatal violence.

<sup>25</sup>Later rising by an additional 1,020 names, of whom 87 were children under 12 years old at the time they were tortured.

<sup>26</sup>Although the navy and police force explicitly distanced themselves from the *mea culpa* issued by the head of the army, while the Supreme Court was clearly piqued by the 17-page section of the report which drew attention to the judiciary's dereliction of duty during the dictatorship.

produced by the parallel judicial processes over death and disappearance, and came hard on the heels of journalistic exposés of the Riggs corruption scandal engulfing Pinochet. The political and even the physical memory landscape of Chile was undergoing gradual, but irrevocable change.

The Riggs bank case emerged in 2004 as the definitive harbinger of Pinochet's disgrace. An unrelated US Senate enquiry, designed to identify possible sources of terrorist funding, threw up anomalies in various accounts held at Riggs bank. It transpired that these accounts, containing million dollar deposits, could all be traced back to Pinochet himself, using aliases, or to direct family members. The source of the funds was murky and the opening and administration of the accounts irregular. The fallout was front page news in Chile, leading eventually to charges for tax evasion, fraud and suspected arms trafficking. Direct association with the figure of Pinochet became a potential liability rather than a badge of honour for right wing presidential hopefuls.<sup>27</sup> During the 30<sup>th</sup> anniversary coup commemorations of the previous year (2003), it had already been possible to perceive a subtle devaluation of the image of the former military strongman, in favour of the rehabilitated figure of the president he deposed in 1973. Contemporary audio recordings of Pinochet, plotting in graphic and decidedly unstatesmanlike language to have Salvador Allende killed even if he offered to resign and go into exile, were given ample airtime on national TV. On the day of the anniversary itself, Lagos ceremonially laid a wreath at the statue of Allende which since 2000 has graced one corner of the square in front of the presidential palace. Soon afterwards, the public square opposite the palace was remodelled to remove the so-called 'Altar de la Patria', and flame of the unknown soldier, which had been the rationale for a permanent armed military guard. The overall effect was to subtly reduce the visibility of military insignia and personnel around the city's downtown political centre. With Bachelet's accession, the symbolism was taken a step further with the opening up of the ground floor of the palace to casual visitors, the renaming of the square immediately behind the palace as the 'Plaza de la Ciudadanía' and, in 2008, the inauguration of a set of rooms within the palace restored to represent Allende's private office.

Political commemoration and revindication is not, of course, synonymous with action over human rights, and official signals have continued to be mixed on both fronts. The 'Plaza de la Ciudadanía' opened up on Bachelet's orders was almost immediately closed off again, by decrepit metal railings, after a protester threw a Molotov cocktail at the façade of the presidential palace during an 11 September commemorative march. Permission is now

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<sup>27</sup> Presidential hopeful Sebastian Piñera made much of the fact that he had not voted for Pinochet or his candidate in the 1988 plebiscite or 1989 presidential election. Piñera's counterpart from the other main right wing party rushed to affirm that of course, knowing then what he now knew, he would not have done so either...

routinely denied for the 11 September march to pass by the Allende statue, a ban which in 2007 and again in 2008 produced ritualised impasses and violence between protesters and heavy-handed special forces. Over the same period, Chile's specifically human rights-related memory landscape has been transformed by a series of initiatives which similarly appear to provoke sincere, but conditional or even erratic, state involvement. Starting with the 'Villa Grimaldi Peace Park', opened back in 1997 but substantially redeveloped in more recent years, former clandestine detention centres have been reclaimed and turned into commemorative and/or educational sites marking the human rights crimes which took place there. A small (two person) section of the state Human Rights Programme discussed above was given over to this memorialisation activity in the early 2000s, and other entities including the Council for National Monuments and the Ministry of Public Works have now become significantly involved. The Programme's stated intent is to support the installation of sites or commemorative plaques across the entire country, and their website contains links to a 2007 commissioned survey and photographic record of existing memorials.

This welcome initiative has however represented belated official 'adoption' of a private (civil society) impulse, a welcome balance for some who prefer the freedom to decide on their own form of commemoration, but questioned by those who would prefer to see an unequivocal independent symbol of state repudiation of violations. The latter view questions whether the restriction of state involvement to funding of civil society projects amounts to a logic of 'privatisation', the equivalent in the commemorative field of the state's willingness to provide legal 'assistance' once legal cases against repressors are under way, but not to initiate them in its own right. Visual commemoration, like justice in the form of trials, is here treated as an essentially private, voluntaristic issue to be resolved by the mobilised few. The state's role, is by implication, to permit but not necessarily to promote. The issue goes beyond simply feeling that the state is not prepared to do all it could. In the context of Chile's pacted transition, and even after so much terrain has had to be ceded by those who previously defended all aspects of the dictatorship's record, there is still a recidivist current on the right which promotes the so-called 'empathic moral' view of the 1973-1990 period. In this interpretation, the 'excesses' of repression are offset against instances of political violence by the left during the dictatorship,<sup>28</sup> or even against the political chaos and economic shortages of the latter months of the Allende government. Views such as 'there were victims on both sides' are less often expressed in public in 2008 than they were in 1998, nonetheless, this rationalisation is clearly still current. In this context, Bachelet's recent

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<sup>28</sup> The Rettig commission nonetheless attributed the overwhelming majority (95.7%) of incidents of fatal violence between 1973 and 1990 to 'government agents or persons working at their service'. Rettig report, 1991, Appendix Two, author's translation.

vacillation over an invitation to attend the inauguration of a monument to a murdered right-wing politician took on a particular significance.

Jaime Guzmán, regime ideologue and one of Pinochet's closest civilian collaborators, was assassinated in 1991 by an armed left wing group just days after the publication of Chile's first truth commission report. His death was responsible for the virtual cancellation of plans for diffusion and public promotion of Rettig's conclusions, amidst fears of a resurgence of political violence. Guzmán founded the right wing UDI party in the 1980s, and was the author of the 1980 Constitution which did so much to restrict post-transitional democracy. As Pinochet's star had waned so had the figure of Guzmán become more important to the right. Insofar as he can be portrayed as the architect of economic and institutional changes which are still defended, Guzmán represents the acceptable face of a regime increasingly discredited in other aspects. Guzmán's devout Catholicism accordingly began to be widely mentioned, as did anecdotes suggesting that he had found repression distasteful and had personally intervened to 'save' or protect a fortunate few, including former students of his from the Catholic University. Eventually, longstanding plans to build a monument which would also house a foundation to promote his ideas were put into motion.<sup>29</sup> Re-sited to a more exclusive part of the city after local residents refused to have it built at Santiago's main uptown-downtown interchange, the sculpture and building were completed in 2007. The inauguration was nevertheless repeatedly delayed, and it became apparent in early 2008 that issues surrounding Bachelet's putative attendance were at least partly the reason. An early verbal commitment to attend caused a minor storm when made public in October 2008 as a putative official engagement of the President and full cabinet. Finally, Bachelet withdrew on the grounds that the character of the event had changed, from the initial honouring of an elected Senator<sup>30</sup> who had been assassinated to a much more comprehensive championing of Guzmán's life and work. The damage was however done, on both sides: the right announced themselves disappointed at her failure to show an 'even handed approach', while the left and some relatives' groups were outraged at the apparent readiness to consider the activity as equivalent to her attendance at human rights commemorations.

The 1990 pattern of caution and apparent vacillation on human rights policy thus has its equivalent in 2008, in what may well be the last consecutive Concertación presidency since transition.<sup>31</sup> The terrain on which the debates

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<sup>29</sup>Permission for the monument had been the explicit price exacted by the right for voting through plans for the Allende statue discussed above.

<sup>30</sup>Guzmán was elected as a right wing representative in the first post-transitional legislature.

<sup>31</sup>Signs of division and exhaustion in the ruling coalition have become notorious in the period since 2006, with infighting between the coalition parties, poor poll ratings and minor but pervasive corruption scandals suggesting a certain sclerosis after almost two decades in power.

are played out is not at all the same, having become decidedly more difficult for diehard regime apologists since 1998. Nonetheless, the habit of understatement, caution and concession in everything relating to Chile's human rights legacy seems a difficult one to break, even for a presidency with an apparently strong personal commitment to the subject. As discussed above, lasting institutional and legislative changes have either not been mooted at all or have not prospered, and it seems at least possible that many of the modest gains of the recent period therefore risk reversal under a future right wing government.

### **REASONS FOR POST-1998 CHANGE**

What have been the major causes of the clearly defined, albeit clearly limited, post-1998 judicial and political changes described above? The underlying reasons for improved judicial receptivity to the issue of historical violations are addressed in more detail in Collins (2008 and forthcoming), and some are rehearsed in summary form above. The list includes the secondary effects of judicial reform and replacement, as well as some measure of insider recognition that judicial credibility is low in Chile, and that at least part of that low public esteem has to do with a perception that the courts failed to protect ordinary people when there was both a chance and a pressing need for them to do so.<sup>32</sup> Judicial reform is however identified by most relevant actors as having been more significant, in fact perhaps the most significant single factor in permitting the change in outcomes. Described in more detail in Hilbink (1999, 2007) or Correa Sutil (1999), the reform package referred to was actually set in motion by the same Frei presidency which was so reticent on the specific historic human rights issue as to, famously, repeatedly refuse to receive delegations from the AFDD. The judicial reform plan however had no direct relation whatsoever to the historic human rights issue, being drawn up around a modernisation agenda. This alone did much to secure consensus across the political spectrum for measures which, crucially, included the replacement of a whole generation of Supreme Court judges, mostly Pinochet appointees. The subsequent Chilean judicial conversion to rights protection is neither wholesale nor complete, having been restricted almost exclusively to the issue of amnesty for past crimes (Hilbink, 2007 and Couso, 2004). It is however notable that this opening has been sufficient to allow private actor pressure and juridical argument dating back almost three decades to finally begin to prevail.

This pressure, and the existence of legal theses over amnesty, disappearance and the applicability of international human rights law, in themselves amount to another causal factor underlying Chilean accountability change since 1998. Clearly not sufficient in and of itself to produce new outcomes,

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<sup>32</sup>Interview data

since it had been applied almost constantly (though not consistently) since 1973 or 74, legally-framed actor pressure using formal judicial channels is perhaps the most distinctive feature of Chilean human rights activism throughout this whole period. Early use of legal channels could not of course produce accountability, but did create the 'paper trails' which are now being used to achieve it. This legal continuity between pre- and post- transition is almost unique in the region. As well as contributing greatly to the availability of evidence even at a considerable temporal distance from actual commission of some crimes, it has helped present-day Chilean human rights lawyers avoid or overcome technical barriers such as prescription (expiry of statutes of limitations) or 'cosa juzgada' (double jeopardy).<sup>33</sup> Thus the persistence of committed human rights lawyers, in creating cases 'just because', as in keeping them alive 'just in case', paid off in entirely unforeseeable ways once the structural barriers to accountability began to be lowered.

Other, apparently even more fortuitous dynamics such as the spontaneous generation of a critical mass of artistic, literary and individual testimony around significant dates such as the 25<sup>th</sup> and 30<sup>th</sup> anniversaries of the coup, seem to be common to other settings.<sup>34</sup> This suggests that the passage of time can have counterintuitive, perhaps just contradictory, effects on the prospects for accountability or other forms of (re)addressing truth and justice questions at a distance from political violence. Although witnesses and perpetrators alike age and in some cases die, the lifecycle issues which remove some from the scene altogether prompt others to want to talk, even to confess. New generations, meanwhile, may feel more removed from the events in question: and yet this distance does not always translate to indifference. Some in fact feel freer than did their parents or grandparents to question received wisdom about what is or is not possible, wise or dangerous. Indeed, depending on the shape political life has taken after transition it is quite possible that former repressors have for the first time become a spent force, no longer to be feared. This dynamic may be one of the major structural differences between the

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<sup>33</sup> The former has been an issue in Central America, where it was virtually impossible to access the courts or otherwise generate lasting official or unofficial records at the height of political violence in already more chaotic civil war settings. The latter has been an issue in Argentina, where the cutoff line provided by the mid 1980s full stop and due obedience laws meant fresh cases could only be established by the dubious artifice of retrospectively dissolving the effects of those laws.

<sup>34</sup> Some observers in Argentina date the resurgence of accountability pressure in that country to a larger than expected turnout for a 1996 march to commemorate the 20th anniversary of the military coup. TV coverage of the march in Spain was moreover seen by Spanish prosecutor Carlos Castresana, responsible for the initial complaint for Argentinian repression which was the origin of the Pinochet case in Spain.

Southern Cone, where trials have (re)commenced in generous numbers, and Central America, where they largely have not.<sup>35</sup>

Finally, in the case of Chile, the previous personification of the regime in the figure of Pinochet meant that the decline, fall and final demise of the former dictator did much to break the 'spell' binding perceptions of what was possible to calculations of what he or his personal circle would accept. The fact that Pinochet died without being finally subjected to a verdict by a national court is perhaps testament to his residual influence and staying power; on the other hand, the addition of criminal fraud and personal enrichment charges to the traditional litany of human rights-related accusations perhaps had particular force. In a context of continued national polarisation, there will often be a constituency ready and demonstrably willing to ignore charges which can be dismissed as politically motivated (or, indeed, 'crimes' which can be politically justified). Since Pinochet had however portrayed himself as the reluctant hero of the hour, a simple soldier rescuing national honour from the clutches of venal and corrupt civilian politicians, the virtual certainty that he had salted away money was genuinely a more substantial blow to his image. Lessons for the human rights community perhaps include a need to think more creatively about what is or is not considered acceptable by a former regime's present-day supporters, although there is clearly an ethical tightrope to be walked when deciding to adapt a message to fit better with a perspective which can countenance torture and murder but not tax evasion.

#### **LIMITATIONS AND FUTURE PROSPECTS**

Over the course of the decade, and in particular since 2000, Chilean jurisprudence surrounding historic human rights cases and the scope of amnesty has obviously undergone significant transformation. The twin principles that disappearance is a post-1978 crime and that some 'war crimes' cannot be amnestied irrespective of when they occurred have been reasonably well established, becoming the norm at Supreme Court level. Nonetheless, jurisprudence is not an obligatory referent in the Chilean justice system. As new interpretive trends have not been 'locked in' by legislative changes, progress is dependent on entirely reversible trends in judicial behaviour. In this regard future prospects are extremely uncertain, particularly given the likelihood of alternation in government combined with the traditional Chilean judicial penchant for obeying the political signals of

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<sup>35</sup> The difference is one of degree: although in Chile witnesses and judges have been threatened, and in Argentina a recent witness disappeared, the structural and institutional power of individual repressors is greatly reduced. They no longer head their institutions, and their institutions – usually the military – no longer have effective veto power over state decision making.

the day. Principles such as the direct justiciability of international human rights treaty law per se have not yet been securely established: many judges still, for example, refuse to sentence or even bring charges for torture, on the grounds that it is not typified in the present Chilean criminal code. The invocation of amnesty where this is, technically, still applicable is erratic and seems to depend exclusively on which judge investigates the case. At Appeals or Supreme Court level, the particular composition of the bench which hears the case has become the best possible predictor of the outcome. Directly contradictory verdicts can and do issue from the same court, and even from the same bench, within the space of a few weeks.

Lingering manifestations of judicial reluctance over accountability have taken various forms. A remaining fondness on the part of some for the invocation of amnesty has created perverse incentives for confession to more, rather than less, serious crimes. Once disappearance became a post-1978, and therefore unamnestiable, crime, former agents played the new odds. Confessing to pre-1978 murder became less risky than allowing oneself to be charged with theoretically less grave, but chronologically subsequent, crimes such as kidnapping or false imprisonment. Another avenue regularly used by pro-impunity judges is light sentencing. Particularly visible between 2003 and 2005, this was a resort used when evidence and higher court custom suggested that outright absolution was not an option and amnesty would simply be overruled at the next level of appeal. Judges began to use suspended sentences and assertions of 'previous good character' to ensure that as far as possible no officer actually served time in jail even when found guilty.<sup>36</sup> By 2008, a development of the same principle was the invocation of 'media prescripción', literally, 'half statute of limitations'. This longstanding provision in the general criminal code allows a judge to heavily discount any eventual sentence for crimes in which more than half the time period allotted by the statute of limitations has elapsed.

To date, then, the decidedly tortuous progress towards full accountability in Chile suggests that although judicial change has been a necessary precondition, the judiciary have on the whole been reluctant heroes rather than enthusiastic authors of recent change.

State or government<sup>37</sup> commitment has also been mixed, with a clear pro-accountability message absent even in recent times when external constraints on Concertación action have clearly been loosened. Different segments of the Chilean state have acted to facilitate the new memory and accountability landscape, but each actor involved reports experiencing internal resistance,

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<sup>36</sup> This is the main reason why a total of 253 sentences confirmed as of October 2008 only translates to approximately 40 individuals actually serving sentences involving privation of liberty. The disparity in Argentina is even more pronounced, with some sources estimating that only two convicted repressors are actually subject to a prison regime.

<sup>37</sup> An analytical as well as descriptive distinction which needs further exploration.

counsels of caution and suggestions that on this particular subject it is wise to tread softly and not to broadcast successes too loudly.<sup>38</sup> Government policy as represented by the executive has meanwhile shown evolution towards more proactive human rights policy in 'soft' areas such as memorialisation. In the 'hard' areas of prosecution and institutionalised rights protection, Bachelet has however suffered repeated defeats in the legislature. Unforced errors such as the Guzmán memorial debacle moreover suggest that at least some of the remaining grey areas in human rights policy are a result of genuine reluctance or unwillingness to take a stronger line.

The prospects for reversal of symbolic and even judicial change with a future change in government are certainly real, and were exemplified at Pinochet's December 2006 funeral when even members of the most 'renovated' wing of the Chilean right expressed their view that Pinochet's image, dignity and legacy had been unfairly maligned but would eventually have their day. It is quite unrealistic to suggest or even fear that reversals would take either the judicial or the sociopolitical scenario back to its 1998 balance. Nonetheless, it seems likely that the pendulum would be swung back a little with, for example, a final tabling of repeated right wing proposals for a legislated endpoint to current judicial processes. Questions over state benefits (reparations measures) raised in the wake of the November 2008 reappearance of German Cofré also suggest that, at a minimum, no further improvements to or expansion of financial reparations packages can be expected. The promised 'interpretive bill' on amnesty is also unlikely to be revived, and it seems likely that an incoming right wing presidency will bet on finally closing the issue by attrition, gradually starving it of oxygen. This supposing that no further 'irruptions' burst onto the scene in the way the Pinochet case did in October 1998; and also that current moves to expand the universe of targets beyond former repressive agents to still-powerful civilian regime collaborators and those who benefited financially from the dictatorship do not prosper. The moral consensus in Chile, fragile enough when it comes to the relatively clear cut issue of the disappeared and executed, would however be unlikely to permit any such campaign to gain mainstream purchase.

## CONCLUSIONS

Chile's somewhat unexpected renaissance of 'post-transitional', or late, accountability for past human rights crimes suggests that even where political leadership is absent or ambivalent, pro accountability pressure from civil society can in some circumstances gain sufficient purchase to change domestic accountability outcomes, in particular forcing re-examination of

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<sup>38</sup> Interview data.

transition-era compromises over justice. The existence of ‘paper trails’ and an experienced, legally literate human rights movement seem to help, as perhaps can outside interest or stimuli as long as minimal domestic conditions are in place. These in turn seem necessarily to require a minimal level of democratisation in the justice sector, where the institutionalisation of basic principles of international law doctrine could be at least as useful as specific rights-related efforts. Where this institutionalisation is not backed by legislative or wholesale judicial-cultural change, in turn secured by genuine judicial branch autonomy, there is however a risk that symbolic and practical accountability change remains vulnerable to political reversibility. Here the importance of securing transversal commitment to a minimum set of human rights principles, rather than to a particular view of recent history, can perhaps be argued.

In Chile, domestic activism was a necessary but not sufficient condition for accountability change, it had to be joined or at least complemented by judicial reform and replacement before tangible change could be seen. The simple passage of time, itself a factor in replacement, may also have been crucial in shifting both objective conditions and subjective attitudes within the judiciary in a direction which finally made movement possible. Lessons for external actors interested in promoting or facilitating post-transitional accountability change include the salience of broader assessments of institutional ‘readiness’ to absorb or process external accelerants. Assistance with building internal conditions, through support for archive building, documentation and the acquisition of experience in litigation may prove to be less glamorous but in the long term more effective than third-country legal cases or the threat of these. The spotlight which third-country case dynamics throw on national justice standards can however be helpful in persuading reluctant or simply inert national judiciaries to finally activate the new ‘opportunity structures’ which reform and other domestic shifts have helped to create. The prospects for a ‘virtuous circle’, where progress on the historical accountability issue can in turn serve as a vector of broader progressive (pro-rights) judicial cultural change are as yet uncertain. Any signs of such a pattern in Chile would represent a vindication of the so-called ‘Garzón effect’ thesis (Roht-Arriaza, 2005), which holds that exposure to its own international reputation and to the ‘good example’ of other judiciaries had a salutary effect in challenging previous Chilean judicial intransigence.

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