
JUDICIAL INDEPENDENCE AND HUMAN RIGHTS IN LATIN AMERICA
VIOLATIONS, POLITICS, AND PROSECUTION
ELIN SKAAR

# Judicial Independence and Human Rights in Latin America

*Previous publications by Elin Skaar*

*Reconciliation or Justice? Protecting Human Rights through Truth Commissions and Trials* (in Norwegian)
(coedited with Bård-Anders Andreassen)

*Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*
(coedited with Siri Gloppen and Roberto Gargarella)

*Roads to Reconciliation*
(coedited with Siri Gloppen and Astri Suhrke)

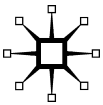
*Courts and Power in Latin America and Africa*
(cowritten with Siri Gloppen, Bruce Wilson, Roberto Gargarella, and Morten Kinander)

# Judicial Independence and Human Rights in Latin America

## Violations, Politics, and Prosecution

Elin Skaar

palgrave
macmillan



JUDICIAL INDEPENDENCE AND HUMAN RIGHTS
IN LATIN AMERICA


First published in 2011 by PALGRAVE MACMILLAN® in the United States - a division of St. Martin's Press LLC, 175 Fifth Avenue, New York, NY 10010.

Where this book is distributed in the UK, Europe and the rest of the World, this is by Palgrave Macmillan, a division of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

Palgrave® and Macmillan® are registered trademarks in the United States, the United Kingdom, Europe and other countries.

ISBN: 978–0–230–61749–0

Library of Congress Cataloging-in-Publication Data

Skaar, Elin.
Judicial independence and human rights in Latin America : violations, politics, and prosecution / Elin Skaar.
p. cm.
ISBN 978–0–230–61749–0 (hardback)
1. Human rights—Latin America—Case studies. 2. Judicial independence—Latin America—Case studies. I. Title.
JC599.L3S57 2011
347.8′012—dc22 2010045376

Design by Integra Software Services

First edition: February 2011

10 9 8 7 6 5 4 3 2 1

Printed in the United States of America.

For Terje and Torstein

# Contents

# List of Figures and Tables

## Figures



## Tables

# Preface and Acknowledgments

When I arrived in Buenos Aires in 2000 to do fieldwork for my doctoral dissertation, I was stunned by the uproar that retired military officers managed to create just by showing their faces in public. As I was sipping *café con leche* in a café across from Congress in the city center, a mob of people suddenly descended upon an infamous torturer, Julio Simón, also known as "El Turco Julián," as he made his way into a neighboring café. Two hours later, El Turco Julián was escorted from the café, where he had been forced to seek refuge in the bathroom, by heavily armed police, covered by army trucks with water cannons, all protecting him from the furious crowd loudly chanting "*¡asesino, asesino!*"

My stay in Buenos Aires came almost two decades after the transition to democratic rule and years after a handful of military junta members had been prosecuted and sentenced. Clearly, the human rights question was not yet settled in Argentina. In 2000, I was witnessing the onset of a new wave of prosecutions against former military repressors both in Argentina and in neighboring Chile, where Pinochet had just returned to stand trial in the national court. Pinochet died in custody in 2006, leaving the numerous court cases against him unconcluded. Simón, by contrast, was later convicted and sentenced to 25 years in prison for his involvement in the kidnapping of a baby whose activist parents were killed by military security forces in Buenos Aires in 1978. The cases against Pinochet, Simón, and numerous other former military officers in the region prompted the question: why trials now, so many years after the transition to democracy?

This book attempts to answer this question by focusing on the role of the courts in the legal processes aimed at holding the military to account for past human rights violations. My interest in human rights dates back to research I undertook in Latin America while in a master's program in the early 1990s, when the brutality of the military dictatorships was still fresh in people's minds. The book is based in part on my subsequent doctoral work, but it incorporates new insights gained through other research projects that I have been involved in on judicial reform and the role of courts in new democracies.

The initial doctoral fieldwork was made possible by generous assistance from the University of California, Los Angeles (UCLA); the Research

Council of Norway; the U.S.-based Social Science Research Council; the UCLA International Studies and Overseas Programs (ISOP); and the Chr. Michelsen Institute (CMI) in Bergen, Norway. I am thankful to the Norwegian Non-fiction Writers and Translators Association for providing me with the resources to complete the arduous task of tracking the legal developments in the human rights field in Argentina, Chile, and Uruguay over the last decade. The CMI generously granted me time off from staff obligations so I could immerse myself in the final writing process. The Research Council of Norway provided a grant to cover copyediting costs.

Numerous people and institutions offered valuable input at different stages of this project. The Universidad Diego Portales in Santiago and the Centro de Estudios Legales y Sociales (CELS) in Buenos Aires kindly extended practical help during my fieldwork. I am grateful to the many individuals in Argentina, Chile, and Uruguay who willingly gave their time and assistance and made my fieldwork an enjoyable experience. Those who granted interviews and who are directly quoted in this book are listed by name in appendix 1. In addition, the following people also granted interviews that I draw valuable insights from throughout this book:

For Argentina: Martín Abregú, Taty Almeida, Pastor Arturo, Adolfo Luis Bagnasco, Alberto Bovino, María Cristina Caiati, Horacio Cattani, Nora de Cortiñas, Sergio Dario Di Gioia, Alicia Herbón, Claudio Marcelo Kiper, Pastor José de Luca, Alba R. Lanzillotto, Julio B. J. Maier, Jaime Malamud-Goti, Carlos March, Mercedes Miroño, Francisco Pullen, Horacio Ravenna, Daniel Alberto Sabsay, Catalina Smulovitz, Sofía Tiscornia, Patricia Valdez, Carlos Alberto Vayafin, Adrian Ventura, Alberto R. Dalla Vía, Juan de Wandelaer, and Carlos Zamorano.

For Chile: Rodrigo de la Barra, Andrés Baytelman, Rafael Blanco, Cristián Bustos, Felipe Caballero, Nelson Caucoto, Carlos Cerda, Alberto Chaigneau, Nelson Cortéz, Mauricio Duce, Nicolás Espejo, Lionel N. Acuña Faúndez, Hugo Frühling, Yuri Gahona, Mireya García, Roberto Garretón, Gastón Gómez, Felipe González, Hugo Gutiérrez, Mario Torres Labraña, Raúl Lopez, Jorge Mera, Mario Garrido Montt, Carlos Peña, Cristián Riego, Jorge Mario Saavedra, Héctor Salazar, Patricia Silva, Jorge Correa Sutil, Ximena Torcanal, Julián Muñoz Torres, Carlos Valdivieso, and Juán Enrique Vargas.

For Uruguay: Lilia E. Ferro Clérico, Carlos Demasi, Eduardo G. Esteva, Federico Fasano, Estela Jubette, several representatives from Madres y Familiares de Uruguayos Detenidos Desaparecidos, Guillermo Payssé, Romeo Pérez, Alberto Pérez Pérez, Carlos Ramela, Alvaro Rico, José Pedro Rilla, Maria del Carmen Rueco, Jorge P. Pereira Schurmann, and Fernando Urioste.

Many not only shared their professional knowledge but also graciously opened their homes to me. Julián Muñoz Torres in Santiago, Carlos Alberto Vallefín and Jaime Malamud-Goti in Buenos Aires, and Gabriela Fried in Montevideo deserve special mention.

The Department of Political Science at UCLA provided me with a stimulating intellectual environment throughout my graduate studies. Special thanks go to the members of the Latin American Workshop and to the all-women writing group at UCLA. I am especially grateful to Barbara Geddes, my dissertation committee chair, for spurring my thoughts in new directions and always challenging me. Thanks also to my committee members Daniel N. Posner, George Tsebelis, and José C. Moya. The following people provided helpful comments on dissertation chapter drafts: Cristián Bustos, Pablo Chargoñia, Lilia Ferro Clérico, Christian Courtis, Roberto Gargarella, Siri Gloppen, Máximo Langer, Felipe Michelini, and Lise Rakner.

For insightful comments on drafts of one or more book chapters, I thank Daniel Brinks, Cath Collins, Javier Couso, Terje Einarsen, Julio Faundez, Gabriela Fried, Roberto Gargarella, Siri Gloppen, Mariana Llanos, Louise Mallinder, Jessica Schultz, Jeff Staton, Astri Suhrke, and Bruce Wilson, as well as members of the CMI Rights, Democracy, and Development Research Group. Ola Roth Johnsen kindly offered technical assistance on the figures and tables. CMI librarians Kirsti Hagen Andersen and Reidunn Ljones promptly and patiently tracked down any material that I requested. Nobody will probably read this book as thoroughly as Cathy Sunshine, who provided excellent professional editorial assistance and made the finalization of the book a fun experience. Any errors are, of course, my own responsibility.

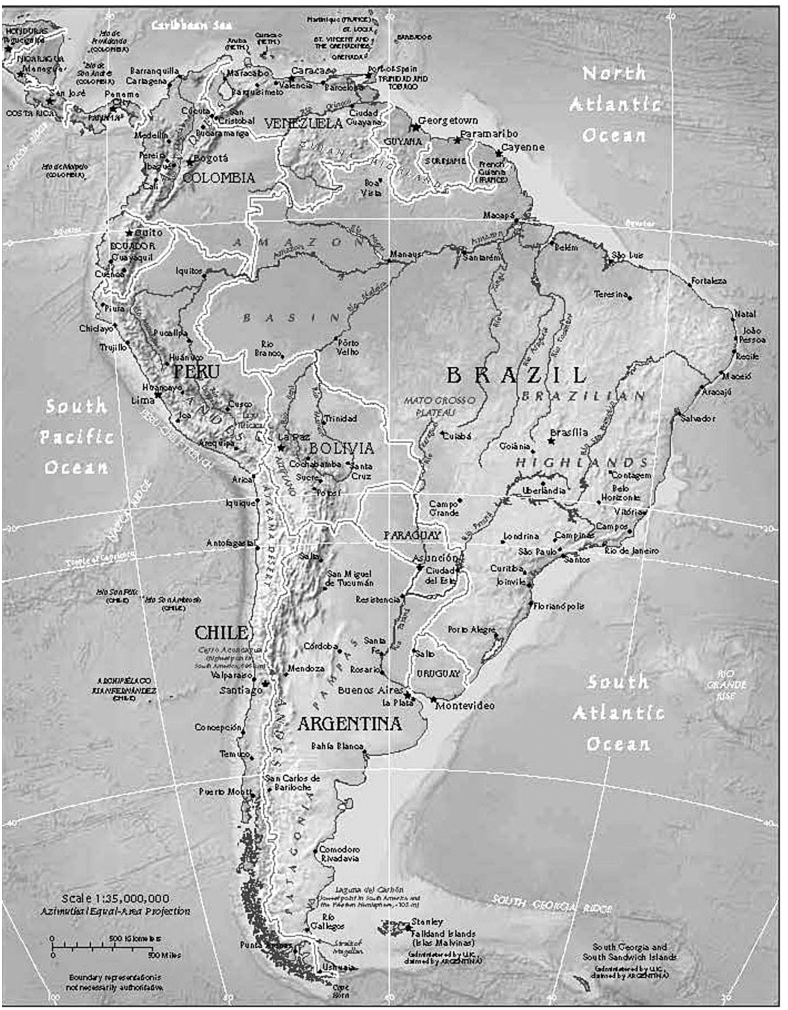
Heartfelt thanks are due to Terje, my best and most critical judge and friend, who painstakingly read all parts of the manuscript and offered moral and practical support throughout the long process. Thanks also to Torstein for being a sunbeam in spite of suffering a writing mum. Finally, I am grateful to my parents, Kari and Magne Skaar, for being always supportive, and super babysitters, too.

Bergen, April 2010

# Abbreviations

| | |
|---|---|
| APDH | Asamblea Permanente por los Derechos Humanos |
| CDE | Consejo de Defensa del Estado |
| CELS | Centro de Estudios Legales y Sociales |
| CNI | Centro Nacional de Informaciones |
| CNRR | Corporación Nacional de Reparación y Reconciliación (Chile) |
| CNVR | Comisión Nacional de Verdad y Reconciliación (Chile) |
| CODEPU | Corporación de Promoción y Defensa de los Derechos del Pueblo |
| CONADEP | Comisión Nacional Sobre la Desaparición de Personas |
| CONADI | National Commission for the Right to an Identity |
| CONSUFA | Consejo Superior de las Fuerzas Armadas |
| DINA | Dirección de Inteligencia Nacional (Chile) |
| ESMA | Detention center at the Escuela Superior de Mecánica de la Armada, Buenos Aires |
| FASIC | Fundación de Ayuda Social de las Iglesias Cristianas |
| IACHR | Inter-American Commission on Human Rights |
| ICC | International Criminal Court |
| NGO | nongovernmental organization |
| PIT-CNT | Plenario Intersindical de Trabajadores-Convención Nacional de Trabajadores |
| SERPAJ | Servicio Paz y Justicia |

# Map of South America




*The World Factbook 2010*. Washington, DC: Central Intelligence Agency, 2010.

# Chapter 1

# Retributive Justice: The Politics of Prosecution

When preliminary research for this book started in 1998, General Augusto Pinochet was still head of the armed forces in Chile and enjoyed senatorial immunity as senator-for-life. Peru's president Alberto Fujimori was undermining the authority of the judiciary to secure reelection while using secret death squads to finish his battle against the left-wing guerrilla movement Sendero Luminoso (Shining Path). Although the Inter-American Court of Human Rights had handed down its landmark *Velásquez Rodríguez* decision in 1988, defining forced disappearance as a crime that violates nonderogable rights, judges in domestic courts across the continent had largely ignored this ruling. A general international criminal court to handle the most serious human rights violations—torture, extrajudicial killings, genocide, and other international crimes—had yet not been established.

A decade later, the Latin American political and legal scene had been radically transformed, and there was a new international climate for dealing with gross human violations committed by heads of state and subordinate state officials. Though it would have been scarcely imaginable in early 1998, Pinochet was arrested in London later that year. He was eventually sent back to Chile to stand trial for human rights violations and economic fraud. Although Pinochet died in 2006 at the age of 91 before his trial was concluded, his prosecution paved the way for a new interpretation and application of international human rights law. The year after Pinochet's death, then Chilean president Michelle Bachelet followed up on the Chilean Supreme Court's decision to extradite former president Fujimori to Peru to stand trial for crimes similar to those of Pinochet. A lower court in Lima sentenced Fujimori to 25 years in prison in April 2009. The Peruvian Supreme Court upheld this decision in January 2010, making Fujimori the first former head of state since World War II to be tried in a free and fair trial in his own country.[1]

By 2010, legal proceedings against other former Latin American heads of state for human rights violations were under way or had been completed in domestic courts in at least six more countries.[2] Heads of state from countries with weak domestic courts were conscious that they might face the International Criminal Court (ICC), which was established in The Hague in 2002 after more than a half century of debate. The ICC had initiated examinations of "situations" in Afghanistan and Colombia and had taken on cases involving state or rebel leaders in four African countries.

This level of involvement of the courts in prosecuting human rights violations marked a new stage in the quest for justice. I call this stage "post-transitional justice" to distinguish it from the first wave of "transitional justice" measures that immediately followed the period of gross human rights violations under the military regimes.[3]

This book focuses on the stage of post-transitional justice. In particular, it is about how judicial independence—or the lack thereof—affects the prosecution of state officials for gross human rights violations committed under a prior regime. It traces the role of Latin American courts in ensuring accountability for the violations of some of the most basic human rights since the transitions to democratic rule in the 1980s and 1990s. I will start with a brief account of the prosecution "climate change."

## FROM TRANSITIONAL JUSTICE TO POST-TRANSITIONAL JUSTICE

Few countries in Latin America escaped military rule or civil war in the 1960s, 1970s, and 1980s. In the Southern Cone, Paraguay's dictatorship, established in 1954, was joined by military juntas in Chile (1973), Uruguay (1973), and Argentina (1976). To the north, Ecuador's coup in 1963 was followed by coups in Brazil and Bolivia in 1964 and in Peru in 1968. In Central America, long-standing military regimes in Nicaragua (from 1937) and Guatemala (1954) were followed by military takeovers in El Salvador (1961) and Honduras (1963). Only Colombia, Costa Rica (which remained a democracy), Mexico (which had a gradual transition from one-party dominance to multiparty state), and Venezuela did not fit the mold.

During the transitions to democratic rule, from 1979 into the early 1990s, demands for justice were commonly tempered by the political imperative to minimize conflict, giving rise to nonjudicial mechanisms such as truth commissions. With very limited exceptions, the new democratic governments did not attempt to address past violations through the courts.

In 1985, Argentina became the first country in Latin America to succeed in bringing its military to court for gross human rights violations

committed during military rule, which had ended only two years earlier. Indeed, it was only the second country in the world since World War II to take such a step, following Greece in 1975. The trials of nine Argentine junta leaders made headlines all over the world and have been called "the springboard for the global transitional justice movement" (Lutz and Reiger 2009, 1). Yet, they initially seemed to have few repercussions in other countries of the region, where amnesty for the military remained the most common policy. And in 1990, then president Carlos Menem of Argentina pardoned the five junta members who had been convicted along with a score of other military officials who had been brought to court. By the end of the 1980s, only one successful trial for serious human rights violations had been held in the region: the trial of two Chilean generals for the Letelier-Moffitt murders.[4]

Beginning in the mid-1990s, a trickle of human rights cases reached the courts, principally in Argentina and Chile. Fifteen years later, hundreds of military personnel were facing charges of gross human rights violations in domestic courts in Latin America, including several former heads of state (Roht-Arriaza 2009b). There were prosecutions in Bolivia, Guatemala, Haiti, Mexico, Paraguay, Peru, Suriname, and Uruguay. Indeed, Latin America is now spearheading the global quest for retributive justice after authoritarian rule.

What happened? Why did the military initially get off the hook after the transitions to democracy? And why, decades later, are military men in ever increasing numbers facing charges of torture, extrajudicial killings, forced disappearances, and genocide? This wave of prosecutions reflects a fundamental change in the justice climate, but its causes and effects are not well understood.

To address this issue, I examine the onset of post-transitional justice between 1995 and 2000. Specifically, I am investigating how and why gross human rights violations committed during authoritarian rule became the subject of either criminal cases or civil lawsuits in the courts, at least one electoral cycle after the transition to democratic rule. Two questions are central: To what extent have the courts driven or secured the processes of accountability for past abuses? And to what extent does judicial reform account for these changes in judicial response?

Based on an overview of the trials in all relevant Latin American countries in the period 1995–2000, together with an in-depth analysis of developments in Argentina, Chile, and Uruguay from the time of transition till the present, this book argues that the more active role of courts and judges is central to explaining the upsurge in trials. This increase in judicial initiative is mainly, though not exclusively, due to formal increases in judicial independence resulting from judicial reforms in the 1990s. These reforms have provided judges with more space and with new "legal tool boxes" for judicial action in human rights cases. They have also made

judges more receptive to regional and international human rights developments that have, in a sense, provided them with new political and legal opportunity structures.[5] Judges in Chile and Argentina, where significant legal reforms were enacted, are shown to be significantly more activist than their counterparts in Uruguay, where such reforms are lacking.

This book thus deals with both law and politics. It engages with the democratic transition and transitional justice debates, with the literature on reforms to increase judicial independence, and with comparative politics research on the role of courts in democracies and the behavior of judges in promoting human rights and the rule of law.

## Unfinished Business: The Problem of Dealing with Human Rights Violations

The rising concern with human rights in Latin America should be understood in light of both regional developments and broader international trends. The growing international preoccupation with human rights in the 1980s coincided with the start of widespread transitions to democratic rule around the world.

Across the continent, generals held the reins of power, with support from right-wing sectors of society and the explicit or implicit backing of the United States. Under the military dictatorships, gross human rights violations were rampant, although the types and levels of repression varied from country to country. Gross human rights violations, sometimes called serious human rights violations, include torture, extrajudicial killings, forced disappearances, genocide, and crimes against humanity.[6] All entail severe breaches of citizens' rights to life and to freedom from torture; basic guarantees of any liberal democratic state. Many of these violations were carried out in an organized, systematic way as means to root out opposition to the military. The generals typically invoked the threat of communism, echoing Cold War rhetoric emanating from Washington. They ruled according to the principles of the so-called National Security Doctrine, a strategy of political violence launched by the right to combat the perceived spread of leftist ideas after the Cuban revolution of 1959.[7] Several countries formed regional networks of repression. One was Operación Cóndor, in which the military juntas of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay collaborated in hunting down and executing or "disappearing" purported subversives.[8]

Some brief examples will shed light on the extensiveness of gross abuses across the continent. In Guatemala, approximately 500,000 people are believed to have died or disappeared during the 36-year civil war that ended in 1996 (CEH 1999). Neighboring El Salvador estimated 22,000 acts of serious violence, including deaths and disappearances, during its

12-year civil war (CVES 1993).[9] In Peru, around 70,000 people died during the military confrontation against Sendero Luminoso between 1980 and 2000 (CVR 2003). For Argentina, the estimates run between 10,000 and 30,000 victims during the reign of five military juntas from 1976 to 1983.[10] Chile claimed around 3,500 dead and disappeared when Augusto Pinochet stepped down in 1990 (Chilean Human Rights Commission 1992). At the other end of the numerical scale, Uruguay documented only 164 disappeared in its truth commission report of 1985, but 10 percent of its population was thrown into prison and many were tortured at the beginning of its military dictatorship in the 1970s (SERPAJ 1989). Other countries in the region fall somewhere in between these extremes.

When countries finally exited from military rule, a pressing political-legal question faced the new civilian power holders: what to do about the human rights violations committed by the military. The initial responses to repression, which came to be called "transitional justice," embraced a number of mechanisms.[11] Only a couple of countries, notably Argentina, pursued legal remedies in the form of trials. Many more opted for formal but nonlegal mechanisms. A large number of countries established truth commissions—frequently, though not always, in connection with the passage of amnesty laws. Truth commissions are, to use Priscilla Hayner's (1994, 558) seminal definition, "bodies set up to investigate a past history of violations of human rights in a particular country—which can include violations by the military or other government forces or armed opposition forces."[12] Brazil was the first Latin American country to establish a truth commission to investigate the atrocities, and it did so while the military was still in power. By the time the Brazilian commission managed to publish its report, in 1985, truth-telling exercises were under way in a number of countries. The truth commission in Bolivia (1982), which never published a report, was followed by one in Argentina (1984), whose report is regarded as highly influential. Truth commissions followed in Uruguay (1985–88 and 1986–89), Paraguay (1989), Chile (1990), Honduras (1993), El Salvador (1993), and Guatemala (1995).[13]

A forerunner in establishing truth commissions, Latin America also became a model region with respect to setting up reparations programs for victims. Those of Argentina, Chile, and Peru are considered among the best and most comprehensive in the region (García-Godos 2008; Roht-Arriaza 2004). Other responses to repression included institutional reform of the security forces, the police, the military, and the judiciary, reforms that were often recommended by truth commissions in their final reports. Less common, but perhaps no less important from a victim's perspective, was the erection of various types of memorials, such as streets named for disappeared people, statues, museums, and so forth, Finally, a few governments offered official apologies to victims and their

families. All these transitional justice mechanisms were put in place to achieve multiple aims: to mark a clear break with the past, to restore confidence in state institutions in general and the courts in particular, to ensure the (re)establishment of the rule of law, to enhance democratization and democratic consolidation, and, in the long term, to foster reconciliation.

## WHY FOCUS ON PROSECUTION?

There were, then, many responses to human rights violations, but this book is mainly concerned with the legal response. In any well-functioning society, the courts normally deal with those who commit crimes. Gross human rights violations stemming from dictatorship periods are particularly serious crimes because they are committed by the very officials or institutions whose responsibility it is to enforce the law. In Latin America, the state apparatus committed, supported, or tolerated these violations, and the state, specifically the judiciary, failed to investigate the crimes at the time they occurred. Given that the governments installed after the transitions to democracy were supposed to guarantee the human rights of all their citizens, their responses to past human rights violations were of utmost importance for democratic consolidation and for (re)establishment of the rule of law.[14]

Furthermore, punishment of gross human rights violations is considered necessary or desirable for a long list of moral, legal, and institutional reasons. Ideally, punishment creates accountability, restores justice and dignity to the victims of abuse, establishes a clear break with past regimes, demonstrates respect for democratic institutions (particularly the judiciary), reestablishes the rule of law, contributes to reconciliation, and helps ensure that similar atrocities will never happen again. If hideous crimes go unpunished, people in newly democratic countries will be unable to trust the state in general and the legal system in particular. At worst, state violence may resume.

While it is the responsibility of legal systems to try and sentence human rights violators, Latin American judiciaries have largely been marginalized in these processes. An examination of how the courts have dealt with human rights cases will generate broader insights into the emerging role of courts in new democracies. Obviously, courts are not the only actors involved. Civil cases need to be brought to court, and the prosecutor (or investigating magistrate) must instigate investigation in criminal cases. Thus, claims for truth and justice must be forwarded before the courts can act. Furthermore, courts rely on the prosecutor's office and the police for information and evidence regarding human rights violations.

Nonetheless, focusing on courts' responses to past human rights violations makes sense. First, the judicial apparatus is where criminal proceedings for past human rights violations should take place. Examining

the behavior of judicial actors will shed light on the factors that encourage or hinder judges in acting in these matters. Second, since transitional justice issues lie at the crossroads of law and politics, exploring the role of courts in these matters should add valuable insights into interstate branch politics. Third, courts ideally should uphold the rule of law. The extent to which they do so says much about the quality of democracy and democratic consolidation. Fourth, if courts are to protect human rights in liberal democracies, we can reasonably expect them to deal with the human rights violations of past regimes as well. If they fail to secure accountability for past abuses, we need to know how this may influence the courts' inclination and ability to protect rights and guarantees under democratic regimes.

Clearly, then, accountability for past human rights violations is desirable for a complex set of normative, legal, and institutional reasons. When is punishment *possible,* though? This is a political rather than a normative question that will be addressed in several steps. First, looking back to the early days of the political transitions in the 1980s, when were trials actually held?

## The Historical Role Played by Latin American Courts in Prosecuting the Military

To understand the changing propensity of judges to prosecute those allegedly responsible for gross human rights violations, it is useful to distinguish empirically between three main phases. In the first phase, corresponding to the 1970s and 1980s, military dictatorships held sway in Latin America. Human rights violations were widespread and were not dealt with by anybody—neither by the executive nor by the judiciary. The executive, that is, the military, was responsible for ordering and carrying out the violations. The judiciary was subservient to the military, either because judges were military appointees or because they were holdovers from the previous civilian regime who were friendly to the military and hence lacked independence.

In the second phase, right after the transitions to democratic rule in the 1980s and early 1990s, the issue of how to deal with human rights abuses by the former military regime was considered a political issue to be dealt with—or not—by the executive branch. Much of the debate in that period centered on the pressing question of "truth versus justice."[15] This often boiled down to a choice between establishing a truth commission (frequently perceived as a second-best option) and, preferably, putting alleged human rights perpetrators on trial. The executive could establish a truth commission, order reparations programs (frequently recommended by the truth commission reports), issue amnesty laws, or in very rare cases, order prosecution of alleged human rights violators.

Over the last decade or so, a third phase has unfolded, in which the scholarly debate has shifted in the direction of "truth *and* justice"—or solutions beyond truth versus justice.[16] Whereas judges previously acted on executive orders in the few cases in which they tried to prosecute the military, judges are now increasingly acting autonomously in these matters. By the mid-1990s, some Latin American courts that had earlier refused to accept writs of *habeas corpus* or *recursos de amparo*,[17] and that on occasion had even expressed explicit support of the military regimes, seemed to be going out of their way to corner ex-military personnel responsible for serious human rights abuses. What factors increased the willingness and ability of some Latin American judges to take on cases of human rights violations stemming from the dictatorship period, years after the transition to democratic rule, while other judges seemed to remain indifferent? In other words, what factors determine when it is both desirable and possible to charge former military of a previous regime with violations of human rights?

## THEORETICAL AND EMPIRICAL CONTRIBUTIONS

This project draws on several streams of literature, combining institutional and contextual approaches to prosecution for past violations in a way that has seldom been attempted. At present, there is no comprehensive theory that explains variation in trials across time and countries. With one notable exception (Collins 2010b), scholars have so far made little effort to specifically explain the onset of post-transitional justice. This is true even though the subfield of *transitional justice* has grown to cover a large number of disciplinary approaches to justice in a post-conflict setting (Bell 2009; Blank 2007; Corey and Joireman 2004; García-Godos 2008; Huyse and Salter 2008; McAdams 2001; Mendeloff 2009; Minnow 1998; Roht-Arriaza and Mariezcurrena 2006; Skaar, Gloppen, and Suhrke 2005; Thoms, Ron, and Paris 2008; Waldorf 2006).

Much attention has been paid to the development of *international human rights law* and the institutions that implement it and guarantee its implementation (Akhavan 2001; Levit 1998; Nino 1992; Roht-Arriaza 1995; Sadat 2004; Teitel 2005; Webber 1999). But this literature does not to any significant extent link changing norms to changes in behavior, with the notable exceptions of works by Couso, Huneeus, and Sieder (2010) and Huneeus (2009). Some analysis has been done on the connections between a changing international legal framework and the activity of human rights organizations, focusing on the growth of *transnational human rights networks* (Sikkink 1993, 2005) and on domestic political change (Risse, Ropp, and Sikkink 1999), but there are few links to the role of courts here.

Many writers have been concerned with the *new role of courts* in the region (Hilbink 2007) and with *judicial behavior* (Helmke 2002, 2005), though not necessarily with respect to past human rights violations. In recent years, the *judicial activism* unfolding in a number of Latin American countries and elsewhere in the world has captured the attention of institutional and legal scholars (Couso 2005; Sieder, Schjolden, and Angell 2005; Wilson 2009), but the connections between judicial activism and courts' activity with respect to past human rights violations has been addressed sparingly (Sikkink 2005). Much has been written on *judicial reform* (Biebesheimer 2001; Buscaglia, Dakolias, and Ratliff 1995; Carothers 2001; Dakolias 1995; Hammergren 2002; Jarquín and Carillo 1998; Langer 2001; Ungar 2002) and *judicial independence* (Domingo 1999; Helmke 2002; Kahn 1993; Keith 2002; Larkins 1996; Ramseyer 1994; Ríos-Figueroa 2006). But surprisingly little work has been done on the potential impact of judicial reform on transitional justice; exceptions include recent books by Calleros (2009) and Collins (2010b), as well as a work in progress by Domingo (2010). Though each of these literatures offers only partial explanations for the onset of post-transitional justice or the behavior of courts in human rights matters, each brings valuable insights that I build on in developing my arguments.

By focusing on the role of the judiciary in shaping the outcome of human rights cases, the book introduces into the democratic transition and transitional justice literatures an elite actor that has largely been neglected. The theoretical analysis builds and expands on the early works of Hunter (1997, 1998) and Pion-Berlin and Arceneaux (1998) with respect to their criticism of the modes-of-transition literature as static and thus unsuccessful in explaining changes in human rights polices over time. Going beyond existing comparative studies of human rights issues in Argentina, Chile, and Uruguay,[18] this book provides a systematic comparative empirical study of the judiciary's role in dealing with past human rights violations in these three Southern Cone countries after their return to democratic rule in the 1980s and brings de Brito's 1997 analysis of transitional justice up to date. In particular, this study sheds new light on the understudied legal processes in Uruguay. In spite of its obvious legal and political importance, the behavior of Latin American judges in human rights questions has been addressed by only a handful of scholars, notably Collins (2010b) and Hilbink (2007).[19] An examination of the role of judges in human rights matters also contributes to the growing literature on the *judicialization of politics* (Espinoza 2005; Sieder, Schjolden, and Angell 2005; Wilson 2009; Wilson and Rodríguez Cordero 2006).

This book's empirical exploration of the plausible links between court reform, formal increases in judicial independence, and the inclination of judges to act in human rights cases contributes to the scarce literature on the impact of judicial reform.[20] It is especially concerned with the

impact of reform on judicial behavior in human rights trials.[21] In contrast to existing studies that measure the impact of reform on rights protection, this study empirically examines the effect of constitutional provisions for judicial independence on the courts' disposition to prosecute *past* human rights violations—which, it is hoped, will have a deterrent effect on future violations. Hence, it does not measure the varying extent of violations under present democratic regimes, but rather the varying degree of response to violations committed years or decades ago. As such, the book complements Collins's (2010b) recent analysis of retributive efforts in Chile and El Salvador and Domingo's (2010) ongoing work on the factors affecting transitional justice in Latin America in the new millennium.

Finally, if empirical evidence supports my claim that constitutional reform constitutes an enabling framework for more active judicial action in the field of human rights, a natural policy implication would be to help new democracies make their judicial apparatus stronger and more effective.[22]

## METHODS AND DATA

This book concentrates on the period that saw the onset of large-scale trials in Latin America, 1995–2000. More general comments are offered on human rights developments since the turn of the millennium. In offering a systematic comparative analysis of the role of courts and judges, this book stresses *legal* solutions to the problem of past human rights violations in the form of retributive justice. Other human rights policies, such as truth commissions, reparations, policies on exile, and efforts to build collective memory, will be given more cursory attention.

Since the book addresses issues that range from legal developments to institutional reform to the behavior of individual actors, it will draw on several bodies of literature in its search for answers that lie at the crossroads of institutional and behavioral analysis. The main literatures with which the book engages are those dealing with transitional justice, court behavior in democratic consolidation, judicial reform, and judicialization of politics. The analysis draws on a large body of primary sources, including interviews, newspaper reports, and publications from the three case study countries collected during fieldwork in the region in 2000 and 2001. I conducted interviews with more than 70 people from the judicial sector (judges, lawyers, court clerks), nongovernmental organizations (NGOs), academic institutions, and so on, in all three countries (see appendix 1). The interviews covered a set of basic questions but were conducted in an open-ended manner so as not to exclude important information that might fall outside the scope of the prepared questions. Each interview lasted from one to three hours, after which I transcribed it and

translated it from the Spanish. In addition, a small selection of early court cases is used to illustrate some important points, though the analysis does not purport to give a full overview of all existing trials. This material provides the basis for the historical analysis of the onset of (large-scale) post-transitional trials in the period 1995–2000.

Data for the analysis covering the ensuing ten years come mainly from secondary sources, such as reports by Amnesty International and Human Rights Watch, cases handed down by the Inter-American Court of Human Rights, and scholarly books and articles. The analysis of this recent period has also benefited greatly from the increased propensity of national and regional courts and national and international NGOs to publish court cases, reports, and other findings on the Web.

## Linking Violence, Politics, and Prosecution: The Argument in Brief

Why did so few Latin American countries initially fail to pursue retributive justice after the fall of the dictatorships in the 1980s and 1990s? And why did some Latin American courts become forerunners in retributive justice by the turn of the millennium?

Dealing with human rights at the time of the democratic transition was widely perceived as a political issue, to be dealt with by the executive branch. Pressures from NGOs and civilian activists, as well as international pressures, often prompted executive action. The solutions a particular government chose were closely connected to the type of democratic transition in the country (Skaar 1999). Negotiated or "pacted" transitions were frequently accompanied by amnesty laws precluding prosecution, as well as by, in some cases, truth commissions and other nonlegal measures. Only where there was an explicit military defeat—in Argentina—was it considered politically possible to even suggest holding the military to account. In no other case, irrespective of the type of transition, was dealing with human rights violations considered the business of judges and courts. To the extent that human rights cases were brought to court, judges had routinely turned them down. The initial failure to hold trials, therefore, has often been attributed to executives failing to adequately address human rights violations, whether because they feared military retaliation or because they lacked personal interest in the matter.[23] However, one could equally well attribute the lack of justice at the time of transition to weak and often partisan courts that favored whoever was in power, including the military. This meant that the efforts of private civilians to seek justice in the region rarely succeeded.

A quarter century later, international rather than domestic factors are widely hailed as driving judicial processes in Latin America. To the extent that national actors are the focus, scholars still insist that the upsurge

in accountability since the mid-1990s in the region is chiefly due to changes in the political climate and changing attitudes of the *executive branch,* frequently in response to external pressures. Typical arguments are that governments have become more aware of human rights norms, more sensitive to international pressure to respect human rights, more open to extradition requests from foreign courts, and more concerned about the publicity surrounding judicial processes against Latin American former military in foreign courts.[24] Some observers have also argued that transnational human rights movements have played a role in driving accountability processes (Sikkink 2005).

An alternative hypothesis, to be explored in this book, is that judges rather than politicians have taken the lead in the quest to obtain justice for past wrongs. This does not mean that politics has ceased to matter. But by exploring the role of courts and judges in these processes, one may shed light on the shifting balance of power between the executive branch and the judicial branch in dealing with retributive justice over time. This in turn can expand our knowledge of what have become, essentially, judicial and not political processes.

If it is true that judges in several Latin American countries have taken on a new, more activist role in cases of gross human rights violations from the dictatorship period, the second question is why judges are now taking these cases instead of refusing to hear them or sticking them in a drawer as they had previously done. A useful starting point is to examine the extensive judicial reforms that were carried out in the region in the 1980s and 1990s and their impact on judicial independence.

Just as transitional justice gradually developed into a common response to human rights violations, judicial reform came as a response to the ill-functioning, dependent, inefficient, and conservative courts that dominated the Latin American region at the onset of democratic rule in the 1980s and 1990s. Typically, the courts had been out of order during the military dictatorship period or the civil wars (as in Guatemala and El Salvador) or they were co-opted by military rulers (as in Argentina) or they supported military rule (as in Chile). In no country did the courts deal effectively with human rights violations during the periods of military rule or civil violence. On the contrary, courts as a general rule failed to respond to writs of *habeas corpus* or to hear human rights cases.[25]

Partly in response to the human rights situation, partly in order to enhance economic investment, and partly in response to the rise of multiparty politics, practically all Latin American countries reformed their judicial systems during the 1980s and 1990s. They were frequently encouraged and supported by international agencies such as the International Monetary Fund, the World Bank, and the U.S. Agency for International Development. These regional reforms, which form part of a global trend of judicial reform, include a wide range of measures aimed at

increasing the independence, accessibility, and efficiency of the courts.[26] For instance, a large number of countries in the region have made efforts to change their criminal procedures from inquisitorial or quasi inquisitorial to accusatorial, or more accusatorial, and some have tried to overhaul their public prosecutor's office.[27] Nearly all countries have also attempted to improve the education of judges, including through the creation of national judicial schools that offer programs for preparing judges or for continuing their education (Correa Sutil 1999, 256). Several countries have established a *defensor del pueblo* (public defender's office). Most importantly, for this analysis, there have been substantial efforts to strengthen the Supreme Courts through constitutional reform. At least 14 of 18 Latin American countries enacted constitutional reforms affecting the judiciary's independence between 1988 and 1999.[28] The measures to increase judicial independence included depoliticizing appointment systems, securing guaranteed budgets for judiciaries, increasing the budgets of public ministries and other sector organizations, and creating judicial councils and constitutional courts or chambers (Hammergren 1998, 267).

The main idea was to reestablish courts as viable players in the democratic game on a continent dominated by hyper-presidential systems to ensure a higher degree of both horizontal and vertical accountability and thus strengthen the rule of law (O'Donnell 1999a). What effects have these reforms had on rights protection? Although there is a burgeoning literature on judicial reform, we know very little of its impact, particularly in the field of human rights.[29] Some authors have landed on the rather negative conclusion that these reforms have received more credit than they deserve. For instance, Prillaman, writing in 2000, claimed that many Latin American countries had gone through a process of democratic decay since the reforms were implemented; he expressed great concern about the state of democratic consolidation and the prospect for well-functioning societies based on the rule of law in the region.[30] A decade after this rather pessimistic conclusion, I am ready to argue that this negative judgment of the reform process may have been premature. Part of the point of this book is to explore the causal links between different institutional, constitutional, and legal reforms and evaluate their joint impact on judicial behavior with respect to holding the military to account for gross human rights violations. A number of questions guide subsequent theoretical and empirical analysis: What impact did these judicial reforms, broadly speaking, have on the actions of judges in the human rights field? More specifically, did the constitutional guarantees for judicial independence actually make the judges more independent and autonomous? How? And with what consequences for the human rights issue? Tracing judicial behavior over time may be a useful way to start searching for plausible answers to these questions.

As noted, judicial reforms varied widely in scope and substance from country to country. The point I wish to make in this book is that formal increases in judicial independence have potentially been crucial to the self-redefinition of the role of courts and judges with respect to human rights and the larger goals of court legitimacy and the rule of law. A note of caution, though: constitutional guarantees of judicial independence constitute merely a *minimal requirement* for the actual exercise of judicial independence. They do not ensure that it will happen. The exercise of judicial independence is influenced by a number of factors. Due to the hierarchical structure of Latin American judiciaries, lower court judges often rely on the goodwill of their superiors for appointments and promotions. Actual judicial independence therefore requires freedom from undue executive interference (structural independence) as well as freedom from undue interference by other judges higher up in the court hierarchy (internal independence). It must be independence in real life, not only institutional independence on paper.

Even when formal independence exists, judges do not operate in a vacuum. Their actions depend on the laws that form the basis for their decisions and on the procedures that they are legally bound to follow. To legally pursue gross human rights violations, judges must have a sufficient legal basis on which to prosecute. The presence of domestic amnesty laws may make prosecution difficult. Moreover, judges may be subject to military threats as well as to political pressures. As a result, they do not always operate freely or independently in applying the law. Human rights cases from the dictatorship period have been a particularly sensitive issue in many countries because the military has a direct interest in not having these cases resolved through the courts and has often openly opposed trials. The threat or hint of a military coup is but one expression of military dissatisfaction. Death threats against judges who take on human rights cases, and against their families, are another. One enabling condition for judges to operate independently is therefore a weakened military. In addition, before judges can take on human rights cases, somebody must bring these cases to court. Human rights cases are typically forwarded by victims, their families, and their legal supporters, sometimes in alliance with transnational networks. Therefore, there must be a sustained or persistent demand for "justice" in criminal cases and for "truth" in civil cases. The role of human rights defenders in these cases and their interactions with the judiciary are an important aspect of my analysis.

The main argument proposed here is that judges have become more active protectors of human rights and that changes in judicial behavior in human rights cases are due primarily, though far from exclusively, to institutional changes.[31] In other words, judges, partly because of judicial reforms, have gone from being unable and/or unwilling to take these

kinds of criminal cases to gradually becoming either more willing or more able to do so, or both.

As a starting point, I would expect a judge to take on human rights cases brought before her and examine every aspect of relevant national and international laws when she is not dependent on the outgoing regime (and hence does not want to protect the interest of the military who committed the abuses), not dependent on the executive (who may not favor trials), and not dependent on superior judges (who may be reluctant to deal with these cases or may hold a conservative attitude to the application of international human rights law). How the judge handles the case would depend in turn on the laws in force, which affect important aspects such as statutes of limitation, which crimes are punishable, and the sentences that can be meted out—or, alternatively, the crimes that are shielded from prosecution under national law. If my argument is correct, I would expect more independent judges to be more likely to reinterpret existing amnesty laws designed to protect the military and accept cases of serious human rights violations that they would have rejected earlier, other factors remaining constant. Given that judges always operate in a social and political context, external factors are, however, also likely to influence their decision making. These influences complicate the analysis and need to be addressed as well.

## Three Case Studies

After making the basic argument that there is a connection between the degree of judicial independence and the number of trials in the Latin American context, I next examine this argument as it applies to three Southern Cone countries. There are many reasons why Argentina, Chile, and Uruguay constitute an excellent testing ground for exploring the connections between constitutional reform, actual judicial independence, and the tendency for judges to prosecute the military for gross human rights violations.

In terms of similarities, they are neighboring countries that share the same colonial heritage, the same language, the same dominant religion, and the same legal systems. All three countries are relatively developed by Latin American standards, meaning that they have reasonably robust and diverse economies and high literacy rates. They also have small indigenous populations relative to the rest of Latin America. All three countries suffered brutal military dictatorships in the 1970s and 1980s, when repression was rampant and the judiciaries did little or nothing to combat the abuses or speak up for human rights. The military in each ruled according to the principles of the National Security Doctrine and formed part of the regional network of repression called Operación Cóndor. Though each country showed different patterns of repression (as will be

discussed later), the practice of kidnapping people and making them disappear was a common thread.[32] The executives in all three countries issued amnesty laws that initially precluded prosecution of the military for gross human rights violations.

Paradoxically, almost 30 years after the worst repression took place, some of the countries that had earlier collaborated in repression started to collaborate in hunting down the offenders and trying to put them on trial. The process was spearheaded by Argentina and Chile. No scholar predicted that this was going to happen. With the onset of democracy, human rights constituted one of the most politically contentious issues in the countries in question. However, Argentina, Chile, and Uruguay opted for different solutions to this problem at the time of transition, partly in response to the way the democratic transitions came about (by military collapse in Argentina and by ballot in Chile and Uruguay), which in turn influenced the distribution of power among the key participants in the transition process.

Although they started off with very different institutional arrangements at the time of transition, Argentina and Chile moved in remarkably similar directions, leading to the increased tendency of judges to prosecute the military. Uruguay lagged behind, with no prosecutions before 2002. The three countries also differ on another important dimension: Argentina and Chile have successfully reformed their judicial systems (including constitutional reforms augmenting formal judicial independence), whereas Uruguay has made a series of unsuccessful attempts at judicial reform.[33] This allows me to explore how judicial reform and judicial activism—or their absence—in the field of human rights may be related. We may reasonably expect that military threat and demand for justice will both vary across time. Given that the three countries are geographically located in the same region, we may further anticipate that regional and international developments in the human rights field constitute a set of relatively stable contextual factors to which the judges in all three countries respond. Since Uruguayan judges have been exposed to the same international and regional human rights developments as have judges in Argentina and Chile, reasons for the delayed onset of post-transitional justice in Uruguay must be sought principally in domestic factors. Uruguay therefore forms an interesting counter-case that allows us to explore judicial inactivity.

## STRUCTURE OF THE BOOK

Chapter 2 defines judicial independence and relates this concept to the main explanations of transitional justice and post-transitional justice. It further develops a tentative framework for understanding why Latin American judges, since the mid-1990s, seem increasingly inclined to put

military men on trial for past human rights violations stemming from the dictatorship period. Judicial reform, particularly constitutional reforms that increase judicial independence, is suggested as the single most important, though not the only, factor that explains changes in judicial behavior. In addition, three preconditions must be present: a reduction in military threat, a persistent public demand for justice, and a sufficient legal basis for prosecution.

After testing a simplified version of this argument on all Latin American countries for the time period 1995–2000, using a formal definition of judicial independence, the rest of the book offers an in-depth analysis of post-authoritarian developments in three Southern Cone countries. In this comparative analysis, other contextual factors such as changes in national, regional, and international human rights norms and jurisprudence create the backdrop against which national progress in justice unfolded. Several key questions are addressed: How have judicial reforms affected the division of labor between the executive and the judiciary? More specifically, how have these changes enhanced judicial independence? How have the internal workings and traditional hierarchical structures of the judiciary been moderated? What factors, other than institutional change, may have encouraged judges to take on cases involving past human rights violations? Specifically, how may structural changes to the judiciary have opened up the space for judicial action in human rights matters?

Chapter 3 shows that judges in Argentina have since the mid-1990s displayed a surprising degree of willingness to prosecute the military. Part of the explanation is to be found in the constitutional reforms of 1994, which incorporated international law into the Constitution and thus expanded the basis for judicial review. Contrary to expectations, though, the 1994 Supreme Court reforms augmenting formal judicial independence seem to have been of less relevance in the initial phase of post-transitional justice, as informal court-packing practices persisted. Shifting the focus to Chile, Chapter 4 demonstrates that although the arrest of Pinochet in London in 1998 and subsequent legal developments acted as a catalyst to large-scale trials toward the end of the 1990s, other crucial national factors contributed to speedy developments in the legal field. Chapter 5 shows how judicial inaction in the human rights field in Uruguay is partly explained by the passage of an amnesty law. This law allowed the executive to turn human rights violations into a political issue by effectively transferring the power to investigate human rights abuses to the executive branch. As a result, the judiciary remained marginalized for many years. Since the delayed onset of post-transitional justice in Uruguay coincided with the inauguration of a human rights–friendly government in 2005, a central task of this chapter is to unmask the relative importance of executive policy making and judicial activism to account

for recent prosecutions of top- and mid-level Uruguayan former military officials.

Based on empirical developments in the three Southern Cone countries, the last chapter considers how structural changes to the judiciaries have broadened the space for judicial action in human rights matters, which in turn made some judges more receptive to regional and international developments in human rights law and practice. In a sense, these changes in human rights norms and jurisprudence constituted new "legal toolboxes" or new opportunity structures, which reformed judiciaries were in a better position to take advantage of than those that remained unreformed. Although developed in light of the Latin American experience, the theoretical framework proposed in this book should also be applicable to post-transitional contexts in other parts of the world, since putting human rights violators on trial has become a global trend. Finally, the findings of this study are contrasted with the universal human rights requirements of independent courts and the often-assumed inherent criterion of "judicial independence." Independent courts at the national, regional, and international levels—of which the national courts are part—form a complex legal network that in recent years has increased global respect for human rights. This network is providing important support for efforts to address past violations, which, we may hope, will have a deterrent effect on future violations as well.

# Chapter 2

# Explaining Post-transitional Justice

In scholarship on human rights policies during democratic transitions, the focus has been on the executive for too long. It is time to shift attention to another important actor: the courts. Although many scholars have written on the courts in recent years, the links between constitutional reform and justice for past human rights violations remain largely unexplored. The main argument presented in this chapter is that constitutional reforms have made Latin American judges more prone to prosecute the military for past human right violations because judges now enjoy more independence from powerful executives and the hierarchy of the judicial system has loosened, making lower court judges less dependent on their superiors. As a result, judges, especially those sympathetic to a human rights agenda, can push prosecutions more forcefully than they could before.

The argument made here is primarily structural. Nonetheless, it should be acknowledged at the outset that a plethora of individual, structural, and contextual factors at the national, regional, and international levels may influence the behavior of judges. Starting from the individual perspective, judges are human beings with diverse personal characteristics: each judge has a certain education, belongs to a certain social class, and holds certain religious, moral, and ethical values, all of which are likely to bear on how he or she forms opinions. Some judges are described as conservative and others as liberal. Some judges are considered activists, while others practice judicial restraint. These characteristics imply that knowledge of a judge's personal ideology and convictions helps us predict how that judge will rule in a particular case.[1]

Judges may also be perceived as rational actors who act to maximize their own interests and preferences, just as politicians do (Epstein and Knight 1998).[2] According to this perspective, judges may be concerned with preserving their power, position, and privilege, in which case a desire

to please their superiors—the executive or other judges—may influence their rulings. Indeed, some observers have seen judges' propensity to satisfy the government rather than require accountability as detrimental to the proper functioning of the judiciary. In some contexts, the judiciary may display loyalty to the former government, which raises the important question of independence from whom. Yet another interesting twist occurs when judges in certain political contexts, rather than respond to the sitting government, try to curry favor with the incoming government to maximize their chances of retaining their jobs (Helmke 2002, 2005).

Judges are not the only actors on the scene. In any court case, the judge interacts with prosecutors, police, witnesses, other judges—including foreign judges. Like politicians, judges react to various forms of pressure external to the judiciary. This can include public pressure, often expressed through the media. It can also include incentives in the form of bribes or other corrupt inducements.

Although judges function as individuals, they do so in an institutional context. They carry out their work within courts that operate according to procedural rules that differ from country to country (civil law, common law) and are constrained by constitutional mandate, law, and resources. Moreover, every court is situated in a particular political-legal context and shaped by a specific legal culture. All of these factors may delimit or expand the scope for court action and ultimately shape judges' incentives. These are the "opportunity structures" that judges operate within (see Chapter 1).[3]

In the international arena, national courts are at the lowest level in a three-tier hierarchy of judicial bodies. There are also regional courts, such as the Inter-American Court of Human Rights, and, as of 2002, the International Criminal Court; both of these higher-level courts develop norms and may hand down judgments that judges in national courts must respond to. An interesting question with respect to Latin America is to what extent judges have been receptive to changing regional and international human rights norms, and how this, in turn, may have affected their judgments in particular human rights cases.

To sum up, judicial behavior, like any other human behavior, is shaped and constrained by an infinitely large set of factors. Each of the explanations for judicial behavior briefly sketched above, though incomplete in itself, may lend valuable insights that help explain why judges act the way they do in any given setting. Examining all the potentially relevant factors that might influence judicial behavior is a monstrous, even impossible, task. It is useful, though, to keep in mind that the different sets of factors briefly noted above together constitute a multilayered framework for judicial action.

This book examines a small but significant part of this large web of potential explanatory factors. The analysis will focus first on how judicial

reform, by increasing formal judicial independence, may have altered the structural conditions for judicial behavior. It then looks at how these changes may have affected the human rights field by influencing judges' ability and willingness to hold the military to account for past human rights violations. Since the book is about the independence of courts as well as independent judicial action, I will refer to both courts and judges. I will not attempt to deal with how judiciaries respond to human rights violations under democratic rule, as a number of other scholars have already done so.[4]

This chapter first provides a discussion and working definition of the central concept in this book: judicial independence. It then traces the debates on judicial independence as they play out in the literature on transitional justice and post-transitional justice. To explain the onset of post-transitional justice in recent years, it outlines the minimum preconditions that allow trials for past human rights violations to be held, which are explored empirically for Latin America. Finally, summary comments are offered.

## Defining Judicial Independence

A lack of judicial independence has plagued Latin American courts for decades, if not centuries, as courts have historically been subservient to the executive in many countries characterized by excessive presidentialism. This is now undergoing change. To understand these shifts, this section first offers a minimalist definition of judicial independence, focusing exclusively on constitutional guarantees, before providing a more comprehensive working concept.

Many scholars in recent years have taken up the subject of judicial independence, a concept that is "fraught with ambiguities and unexamined premises" (Rosenn 1987, 2). This has given rise to an impressive variety of definitions and analytical approaches.[5] In the narrowest sense, judicial independence means judges' freedom from political influence (Domingo 1999, 153).[6] In a broader sense, we may distinguish between (a) independence from the conflicting parties in order to achieve neutrality in the judge's decision, (b) independence from undue influence on the part of other judges, and (c) independence from influence of the executive or the other branches of government.[7] It is also useful to distinguish between the independence of courts as an institution (external independence) and the independence of individual judges (internal independence) (Ríos-Figueroa 2006).

Power and autonomy, then, are central concepts in the debates on judicial independence (Ríos-Figueroa 2006). There are questions about the ideal balance of power between the three state branches and about what kind of checks-and-balance function the courts ought to

play in a well-functioning democracy to achieve this balance (Gloppen, Gargarella, and Skaar 2004; Gloppen et al. 2010a). The "right degree" of independence is thus a matter of controversy (Fiss 1993). Important tensions exist between the values of independence, accountability, efficiency, and access, at both the theoretical and empirical levels. Some argue that to evaluate the success of reforms meant to enhance independence, one needs to consider independence as intrinsically linked to access and efficiency (Hammergren 2007; Prillaman 2000; Ungar 2002). The following analysis does not pretend to address all these complexities. Instead, I develop a fairly simple argument that examines the relationships between on-paper and real-life independence and its potential impact on human rights trials. An underlying assumption is that institutions matter for the exercise of judicial independence.

A useful starting point for this analysis is to distinguish between formal (de jure) and actual (de facto) independence. Making such a distinction is not always easy (Ríos-Figueroa 2006), and some even consider it undesirable (Brinks 2005). Though there is certainly no guarantee that de jure independence will translate into actual independence, there are many reasons why de jure independence is valuable in itself. Most importantly, without a constitutional guarantee of judicial independence, the exercise of judicial independence is contingent upon the willingness of government and other institutions to respect the independence of courts and judges.

In the narrowest sense, de jure judicial independence entails legal or constitutional guarantees of judges' freedom from undue political influence—so-called structural independence. A series of different structural/constitutional measures are believed to contribute to a measure of de jure independence. Though there are a plethora of ways to approach the concept of judicial independence, I consider it useful for the purpose of this initial analysis to narrow the focus to five observable institutional variables that have formally increased the powers and autonomy of the Supreme Court vis-à-vis the executive.[8] They are (a) *length of tenure* of Supreme Court justices, (b) *appointment procedures*, (c) the establishment of *judicial councils*, (d) measures to increase the *judicial review powers* of the Supreme Court through the creation of constitutional courts or by other means, and (e) constitutional guarantees of *financial independence* for the courts.[9]

Short comments on these five factors are warranted. First, two centuries after Alexander Hamilton (1788) noted that one way of guaranteeing independence from the executive was life tenure, life tenure for Supreme Court justices is still considered superior to shorter terms on the bench, since it ensures a carryover of judges from administration to administration.[10]

Second, with respect to appointment procedures, it is considered detrimental to judicial independence to have the executive appoint Supreme Court judges without any control organs being involved. Good appointment processes include elements of transparency and checks and balances between different state organs (or other entities) involved in the appointment procedures. Yet no appointment system is perfect—or perfectly free from political influence. Regardless of whether judges are popularly elected; appointed by some combination of the executive, legislative, or judicial branches; or selected by competitive examination, they are likely to have a belief system that mirrors the dominant culture. Thus they cannot rule totally objectively (Rosenn 1987, 3).

Third, since judges at all levels have been involved in the human rights cases to be examined in the empirical chapters, it makes sense to focus on constitutional guarantees that at least in theory enhance the de jure independence of judges at all levels. Newly established *judicial councils* (Consejo de la Magistratura or Consejo de la Judicatura) have played an important role in the Latin American context as they have been "empowered to choose, monitor, and discipline judges" and have thus acquired "major responsibility over nearly every area of judicial independence and functioning" (Ungar 2002, 169). Since these councils in some countries take over the power of Supreme Court judges to appoint, dismiss, and reprimand lower court judges—in essence, to control their career path—they may enhance internal independence.

Fourth, expanded powers of judicial review are considered a useful check on executive power as they enable the Supreme Court or Constitutional Court to "override unconstitutional laws passed by the legislature and unconstitutional actions committed by the executive." Importantly, "different to the '*amparo*' lawsuit, which only protects the individual who files the suit, these judicial figures can produce sentences (judgments) with general effects" (Calleros 2009, 96). This is a tricky area in that judicial review may not be, strictly speaking, part of judicial independence as defined by the United Nations, among others. However, independent courts without sufficient power to overrule unconstitutional legislation and illegal or void administrative acts undermine the very point of judicial independence. This would be the case where courts cannot try the constitutionality of amnesty laws or decisions regarding the granting of amnesty or presidential pardons.

Finally, it is hard for courts to have an independent function if they have no guaranteed budget and always depend on the executive for funding. This is particularly important in poorer countries where resources are scarce and where the executive may favor dependent courts. Control through the budget is one way of securing loyalty. Recent comparative research on Latin American courts concludes that financial independence

is "one of the best comparative indicators of judicial independence" (Calleros 2009, 80).

Since I consider constitutional guarantees a *minimum requirement* or precondition for the exercise of (actual) judicial independence, examining an increase in formal or de jure judicial independence along the five dimensions outlined above provides an important starting point from which to assess changes in actual judicial independence. Yet, we know that these structural mechanisms defined in Latin American constitutions have not guaranteed the courts' decision-making autonomy or so-called substantive independence; they merely create a framework for independent judicial action.[11]

The interesting empirical question, of course, is at what point these constitutional provisions translate into actual independent judicial action. How do we know judicial independence when we see it? It is sometimes easier to determine the *absence* of judicial independence than its presence. Evidence that judicial independence is lacking would include (a) failure to comply with, enact, or respect constitutional guarantees of judicial independence as defined above; *or* (b) undue political pressure on the judiciary; *or* (c) undue pressure on judges from fellow judges; *or* (d) undue pressure from actors external to the judiciary, such as the military. Let us look at each in turn.

First, lack of judicial independence may occur when constitutional guarantees of independence are violated. For instance, constitutional guarantees of life tenure do not count for much if newly elected presidents throw out the court to staff the Supreme Court with their preferred justices. Judicial councils may exist on paper but never be set up—or if they are set up, they may not fulfill their functions in a satisfactory manner. Constitutional guarantees of financial independence are of little practical value if money is not allocated for courts in the state budget.

Second, an important question is who is likely to exercise *undue* pressure on judges that may compromise their good judgment and hence judicial independence, or in the words of Brinks (2005, 599), their "decisional" independence. We know that a judge is not independent if he or she is instructed by the executive in a particular case. Although this is primarily a concern for Supreme Court justices, it potentially applies to judges at all levels. This kind of pressure may be subtle (as in the failure to promote or reappoint a judge at the end of term) or direct (as in removal of a judge from office).

Third, beyond court autonomy in relation to the executive, the "individual autonomy" of a judge concerns collegial relationships or the power of one judge over another. In both common and civil law countries, collegial control may also be exercised over lower court judges through the regular appellate procedures, although judicial independence may exist even where lower court judges have to take the decision of higher court

judges into account (Fiss 1993, 55). Lack of independence comes in when higher court judges *abuse*—rather than use—their power over lower court judges.[12] It is therefore reasonable to assume that a lower court judge does not operate independently if she always seeks to please her superior and avoids making controversial statements for fear of hindering her own job security or promotion. Because of the hierarchical structure of the Latin American justice systems, higher court judges may exert undue influence over their subordinates by controlling nomination, promotion, and removal procedures. Hence, it is possible that changes in court composition or nomination procedures affecting the relationship between the various levels in the court systems will increase the individual independence of lower court judges. One way of formally measuring this would be to examine legal or constitutional changes that remove or reduce the power of higher court judges over lower court judges. Another way is to look at sanctions against judges for not complying with dominant views. Such sanctions may include, the refusal to promote judges to higher positions when they have made unpopular decisions, or even worse, the removal of judges who take on controversial cases.

Fourth, judges can be subject to pressures from the conflicting parties in a given case, which may affect the neutrality of their decisions. Bribery is perhaps the most outright form of influence on judges, but more subtle forms of persuasion such as, making use of cultural or social bonds, for example, can also impair the detachment of a judge from the parties (Domingo 1999, 154). Where the military is a party to the case (a focus of this analysis), judicial neutrality is of utmost importance. As a number of scholars have pointed out, corruption and external threats can also compromise judicial action and impede the exercise of judicial independence.

At a minimum, then, an independent judge should rule according to the law and should not be swayed in his or her conviction by undue pressure from actors internal or external to the justice system. Yet it is not always easy to say what "undue pressure" means in a particular setting. Apart from the obviously undesirable pressures outlined above, there is general agreement that judges do not operate in a vacuum, that is, they are exposed to public debates and social developments like all other government actors. There is even good reason to argue that judges ought to be sensitive to changes in society so as to be in tune with the people they serve. Finding the right balance between judicial autonomy and sensitivity to changing social norms is therefore a challenge. Indeed, part of the argument I want to make in this book is that judges should be sensitive to changing norms in order to successfully comply with changing international law standards in the human rights field.

To conclude, the working definition of de jure judicial independence proposed here includes constitutional guarantees of judicial independence defined according to the five key characteristics of structural

independence outlined above. Moving to a more comprehensive definition of de facto independence, I propose one that includes (a) respect for constitutional guarantees of independence along the five dimensions; (b) for Supreme Court judges in particular, freedom from executive interference in judicial decision making; (c) for lower court judges, freedom from undue interference from superior court judges in judicial decision making; and (d) for judges at all levels, freedom from threats or bribes or other forms of undue pressure from third-party actors.

We know that the level of (de jure as well as de facto) independence has varied in Latin America since the transitions to democratic rule. But how does this variation correlate with the propensity of judges to prosecute the military?

## FROM TRANSITIONAL JUSTICE TO POST-TRANSITIONAL JUSTICE: THE DEBATES IN LATIN AMERICA

The role of judicial independence in contributing to retributive justice has received surprisingly little attention in scholarly works. This is spite of the fact that coming to grips with past human rights violations has been considered crucial to building the rule of law, contributing to democratization, and strengthening democratic institutions, particularly the courts. Most interestingly, the booming transitional justice literature largely ignores judicial independence as a prerequisite for trials.[13] If judicial independence was not relevant, then what did cause the trials to take place?

Early explanations of transitional justice focused on national actors and balance-of-power arguments. Scholars inspired by the Latin American transitions in the early 1980s attributed the failure to hold trials immediately after the transitions to an unfavorable balance of power, that is, the institutional legacies of the transition were believed to determine the scope for executive action in the field of human rights.[14] Trials of alleged human rights violators would not take place unless there had been a total regime collapse or the military had been defeated in a war, as happened in Argentina (Correa Sutil 1997; Huntington 1991; Zalaquett 1992). Where the military remained a threat to the new regime, the democratic government would be cautious in prosecuting the military.[15] However, since it was assumed at the time that the balance of power between prominent political actors (specifically the military and the incoming government) was static, these scholars failed to account for the onset of trials that could be observed from the mid-1990s onward.

In response to this obvious weakness of democratic transition theory, scholars started to shift the focus to how new institutional arrangements may alter the behavior of key political players who influence policy outcomes in the human rights field. David Pion-Berlin and Craig

Arceneaux (1998) made the important point that policy outcomes are products of changes in executive or political autonomy and authority. Foreshadowing later discussions on the importance of international legal developments, Wendy Hunter (1998) convincingly argued that changes in the domestic and international environments had affected the political calculations and behavior of both military and civilian actors in most Latin American countries that returned to civilian rule in the 1980s and 1990s. These insights greatly improved our understanding of when prosecution may be possible. Yet, principally because these scholars overestimated the executive's powers to determine policy outcomes, they failed to predict the delayed onset of trials in the mid-1990s.[16]

Scholars concerned with human rights policies at the time of transition or immediately thereafter generally restricted their focus to the executive and the legislature. Prior to the mid-1990s, few scholars had paid much attention to the judiciary's potential role in determining the outcome of particular human rights cases. Judicial independence was simply not an issue. Part of the reason is probably that the judiciaries of many developing countries (particularly in Latin America) were subservient to executive will and therefore did not function independently at the time of transition. With the emergence of judicial reform at the beginning of the 1990s, however, it was no longer evident that the courts would remain a neglected third branch of government. Nor was it evident that courts would continue to play a marginalized role in a matter that should be strictly their concern: prosecution of those who violate the law.

## The Role of Courts and the Impact of Judicial Reform

With the beginning of judicial reform in Latin America in the 1990s, courts suddenly became the center of scholarly attention. Judicial reform, it was hoped, would make courts more independent, more effective, more transparent, more accessible, more efficient, and more accountable.[17] As noted by Kapiszewski and Taylor (2008, 741), "the past decade has brought an unprecedented boom in the study of courts as political actors in Latin America," characterized by an "extraordinary diversity of academic research on judicial politics." Based on a combination of normative and practical expectations on the desired or expected impacts of judicial reform, scholars took up a series of partially interrelated themes: the rule of law, the role of courts in democratic consolidation, courts and accountability, judicial reform and good governance, judicial activism, and the judicialization of politics.

Judicial independence was a common thread through all of these discussions. To play an important role in democratic consolidation, some scholars suggested, properly functioning courts need a degree of horizontal accountability, enabling them to exercise a checks-and-balance

function in relation to other branches of government.[18] And in order to perform that accountability function, contribute to good governance, and ensure the protection of rights, courts must enjoy a certain degree of judicial independence.[19] There is general consensus that a well-functioning democracy should be founded on the rule of law, in which independent courts play a crucial part.[20] Another central pillar of the rule of law has been protection of the legal and human rights of citizens. In sum, independent and well-functioning courts are considered necessary for rights protection and the protection of democratic values and beliefs (Gargarella, Domingo, and Roux 2006).

But what is known of the impact of judicial reform on the field of rights protection? Unfortunately, not much. Indeed, as Daniel Brinks has pointed out, "most analyses of Latin American court systems are plagued by measurement issues" (2008, 12). Most studies that have attempted to evaluate the general impact of reforms in the region have reached conclusions that are pessimistic or downright negative.[21]

Despite the growing concern with how best to achieve judicial independence and protection of constitutional rights, surprisingly little empirical research has examined the extent to which constitutional provisions of judicial independence actually have an impact on a nation's human rights behavior.[22] With some notable exceptions (Correa Sutil 1997; McAdams 2001; Teitel 2000; United Nations 2004), scholars have been concerned mainly with rights protection under democratic regimes and to a much smaller extent with retributive justice for rights violations in the past. Research to date has focused on the impact of judicial independence on levels of human rights violations broadly understood (Keith 2002) or on one particular right—such as unreasonable search and seizure (Cross 1999)—or on ratification of human rights protection instruments (Powell and Staton 2009). There is also a large and growing literature on the visible tendency across Latin American countries to transfer certain rights issues from the political sphere to the courts—a "judicialization of politics" (Sieder, Schjolden, and Angell 2005, 7).[23]

## Potential Causes of the Onset of Post-transitional Justice

To sum up, the strengthening of the courts through judicial reform coincides both with post-transitional justice and with the increased activism of judges in protecting human rights within the democratic states, but there is a huge knowledge gap with respect to the links between judicial reform and altered judicial behavior. Moreover, not many scholars have tried to explain post-transitional justice as a later phenomenon distinct from the efforts to address human rights violations immediately after the transition. Notable exceptions—and directly relevant for the present study—are Pilar Domingo, whose work in progress (2010) examines in general terms the impact of judicial reform on transitional justice processes

in Latin America; Paloma Aguilar (2008), who contrasts the absence of transitional justice after the end of the Franco regime in Spain with more recent efforts to address the violations committed in the 1970s through compensation to victims; Kathryn Sikkink, who examines the importance of international human rights networks and the influence of foreign trials on the mobilization of national NGO networks in Latin America (Sikkink 2005, 2008; Sikkink and Walling 2007); and Cath Collins's (2010b) study of post-transitional justice in Chile and El Salvador, examining the impact of levels of domestic activism, accountability actors' strategies, changes in the stance of the judiciary, and the presence of internationalized (transnationalized) initiatives.

## Identifying the Minimum Conditions for Post-transitional Justice

In considering the responsiveness of the legal system to claims for truth or justice stemming from the dictatorship periods, a useful starting point may be to identify the actors that are involved in bringing about trials and explain their behavior. The main question (and the dependent variable for this study) is *when and why* we see prosecution of the military for gross human rights violations at least one electoral cycle after the transition—a phenomenon referred to here as *post-transitional justice* (see Chapter 1).

These post-transition trials occur in two distinct contexts. In a few countries, notably Argentina, earlier trials had already been held in connection with the political transition to democratic rule. In other countries, such as Chile, the new democratic governments initially failed to mount a legal response to gross human rights violations stemming from the authoritarian regimes, and trials occurred only several years, or even decades, after the reintroduction of democratic rule. In both of these scenarios, the post-transitional trials are taking place in a political-legal-social context that is arguably quite distinct from the one that prevailed at the time of transition, and the legal strategy for dealing with past human rights violations has also changed. Is there any reason to believe that these late trials are motivated by the same factors that produced earlier trials, or do they require separate explanations? It is relatively easy to determine the number of court cases and the number of convictions in cases raised against the military in a given country. *Why* they occur is a different question, and the primary focus of this chapter.

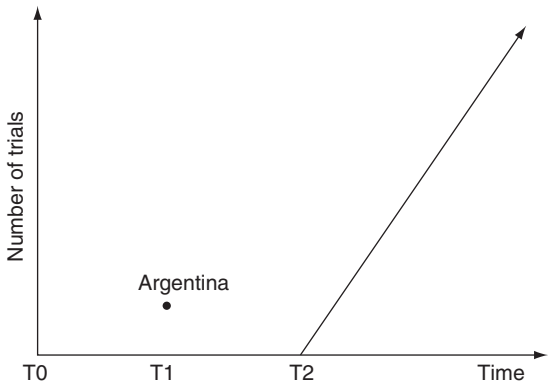
### The Connections Between Judicial Independence and Trials

To distinguish trials at the time of transition from trials that take place years into the consolidation phase, we need a theoretical framework that

explains variations in the propensity to prosecute the military for gross human rights violations (i.e., the number of trials) across time and across countries. The first step is to identify some of the main preconditions that are required for trials to take place.

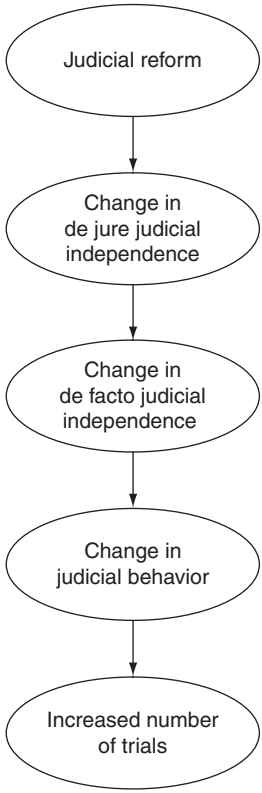
The *absence* of trials soon after the Latin American transitions to democracy in the 1980s can be attributed to an unfavorable balance of power and a lack of executive commitment to prosecutions—or simply to the absence of judicial independence, as I am prepared to argue. But accounting for the trickle of trials that started in the mid-1990s and developed into a justice cascade after the turn of the millennium requires a set of more nuanced explanations. The core argument to be explored here is that this deluge of trials is primarily driven by the courts, in part because they have become more independent. The first condition for trials, then, is an independent judiciary. To illustrate the argument in its simplest form, the degree of judicial independence across time is plotted against the number of trials in a given country (figure 2.1).

**Figure 2.1 Trials over time**



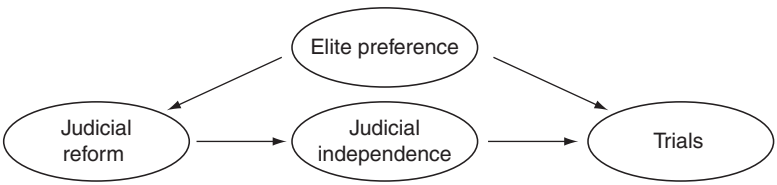

In brief, there were no trials at T0 (during the dictatorship period) because of the absence of an independent judiciary. At T1, immediately after the transition, unreformed courts were still not independent and there were no trials—except in Argentina. At T2, trials started to happen. Between T1 and T2, an important development took place: judicial reform efforts were launched in order to, among other things, increase the (formal) independence of the courts. I propose that we are more likely to observe trials of human rights violators where there is a more formally independent judiciary, other conditions remaining the same. Figure 2.2 shows this connection in simplified form.

**Figure 2.2 Judicial reform and trials**




One caveat is in order: as Prillaman (2000, 7) correctly points out, a judicial reform process is, "for better or worse, an inherently political undertaking." An executive who favors trials may also favor constitutional reforms that enhance de jure and de facto judicial independence. If so, we would get the relationship shown in figure 2.3.

**Figure 2.3 Elite preferences, judicial reform, and trials**



Such a model, of course, is plausible. Where it applies, it will be hard to unmask the causal relationships, as elite preference will be an intervening variable between reform and trials.[24] However, research has shown that Latin American executives have carried out judicial reforms, including those specifically aimed at increasing the independence of judges, for all sorts of reasons other than concerns about human rights; in particular, considerations related to economic policies and foreign investment have driven many reform programs (Finkel 2004; Prillaman 2000). Whether or not there would be such a connection between elite preferences, reform, and trials in any given country thus requires empirical analysis. Similarly, when and under what circumstances de jure independence translates into actual independence is also subject to empirical analysis (see chapters 3–6).

## Executive-Court Dynamics

In considering whether or not trials will take place, let us first focus on two potential protagonists: the executive and the courts. Both the executive and the judiciary may influence whether or not military figures are put on trial. Only when the judiciary is actually independent in the de facto sense given at the beginning of this chapter can we expect there to be a predictable increase in fair trials against the military (and political leaders), provided that other minimal conditions, such as a sufficient legal basis for prosecution, are in place.

Consider T1 and T2 in the timeline shown in figure 2.1. Developments in Latin American countries over the past three decades suggest that the human rights policies/transitional justice mechanisms implemented at the time of transition may later be altered or supplemented in terms of both scope and substance. Whereas very few trials took place at T1, the picture is radically different at T2. In Pion-Berlin and Arceneaux's well-placed criticism of the static view of institutions in the early transition literature, "policy outcomes are inextricably tied to levels of institutional concentration and autonomy in the *executive branch.* Human rights gains occur when policy-making authority is centered in a few hands and where the president can use institutional channels suitably closed to military influence. Low levels of concentration and autonomy result in policy setbacks; mixed levels lead to moderate success." Institutions, they further argue, "intervene between the expression of preferences at one end and the creation of actual programs at the other end" (1998, 633–35, italics mine). Policy making, particularly in the human rights sphere, could be seen as an elite bargaining situation in which the outcome depends on (a) the authority of the decision makers (their power over the outcome) and (b) the autonomy of the decision makers (absence of influence from other actors). The core of Pion-Berlin and Arceneaux's argument is that the fewer the number of veto players (i.e., the fewer actors who have to be consulted), the easier it is to get policy outcomes in congruence with

the stated policy preference of the executive.[25] They specifically state that where the judiciary has an independent function, and thus constitutes a veto player additional to the executive-legislature-military structure, the possibility of reaching consensus on human rights issues *is reduced*.

I want to challenge this argument. It is evident that if we are to understand specific policy outcomes, we must look at the institutional framework that shapes decision making. It is less evident that, as Pion-Berlin and Arceneaux contend, "policy outcomes are inextricably tied to levels of institutional concentration and autonomy in the *executive branch*." Rather than view an independent judiciary as a possible obstacle to executive efforts to push through policy preferences, because the number of veto players is increased, I argue instead that an independent judiciary may *replace* the executive as the veto player in human rights policy making. I propose that trials one electoral cycle or more after transitions to democracy are more likely to take place *in countries and during periods in which the judiciary is more independent*. In other words, when a judge thinks that a particular human rights case merits hearing on the basis of presented facts, the judge will pursue the case if she is able to act independently—that is, without interference from the executive (who may be opposed to trials), from superior judges (who may be partial to the executive), or from the military (who may threaten to use force and hence upset democratic procedures).

The main rival hypothesis coming out of the transition literature as well as its critiques is that the executive branch (together with the legislature) is responsible for policy making in human rights matters. The "executive," here meaning the executive branch together with the legislature, arrives at a policy position after responding to or bargaining with various pressure groups. Political leaders in democratic systems are expected to respond to pressures and challenges to their survival from various societal forces. The pressures and challenges relevant to human rights are (a) *military* pressure for immunity and against prosecution; (b) *domestic* pressure for "justice" (from the human rights sector, other specific interest organizations, and possibly also part of the public); and (c) *international* pressure to respect human rights and comply with good governance procedures. "The executive" is not a monolithic structure, as there may be many internal conflicts and opposing views within a government (between different political parties, or between the president and the parliament) or within the bureaucracy with respect to how to deal with past human rights violations. Yet, it is convenient to use the term "executive" here to denote the formal position of the government in these matters.

To sum up, democratic transition literature has attributed the absence of trials to the failure of executives to prosecute military officers immediately after the transition because the executives perceived military demand for impunity to be more powerful and threatening than public demand for justice. Strong militaries could put force behind their words by staging

a coup if they felt sufficiently threatened. Critiques of transition theory, assuming that policy outcomes still depend on the executive, have argued that shifts in civil-military relations have made policy changes in the human rights field possible. I want to make a different point, namely, that policy outcomes on human rights issues are likely to be decided by executive preference only where the judiciary is dependent. *Where the judiciary is free to act more independently, executive preference with respect to trials should have less impact on the outcome in human rights cases.*

Consider two main protagonists who have the power to decide whether or not trials will be held: the executive branch (responding to or bargaining with pressure groups) and the judiciary. Each of these two actors may hold one of two positions, either favoring trials or opposing them. The executive policy position is labeled "favors trials" if the executive officially pushes for or directly orders trials against the military. A classic example is the stance of President Alfonsín of Argentina, who promised in his electoral campaign that justice would be done and trials would be held, and who "ordered" the prosecution of the military juntas after the transition to democracy in 1983. By contrast, the executive policy position is labeled "opposes trials" if the executive openly does not favor prosecution of the military and even takes steps to actively prevent trials from happening. For example, President Sanguinetti of Uruguay passed a virtual amnesty law protecting the military after the transition to democracy.

Like politicians, judges do not make value-free judgments. Their decision making is influenced by their personal ideology and policy preferences.[26] With respect to political ideology, judges are often placed along a liberal-conservative axis. Judges may also be characterized according to how they view and interpret the law and whether they believe that courts should play a conservative role or be drivers of social change. Those who opt for strict application of the law are said to exercise judicial restraint, whereas those who hold an activist position with respect to judicial review may change the law through more dynamic or innovative interpretations of the legal text and hence become drivers of social change (figure 2.4).[27]

We may expect both liberal and activist judges to favor prosecution of perpetrators of human rights violations, but departing from different ideological points of view. Although there is often an overlap between judges who are supportive of human rights and judges who believe in courts as agents of social change, this is not always the case. A judge may be conservative, but activist. A judge may be liberal, but restrictive in application of the law. According to figure 2.4, we would expect judges who are both liberal and activist to be the ones most likely to favor prosecution of the military.

**Figure 2.4 Liberal-activist versus conservative-restrictive judges**

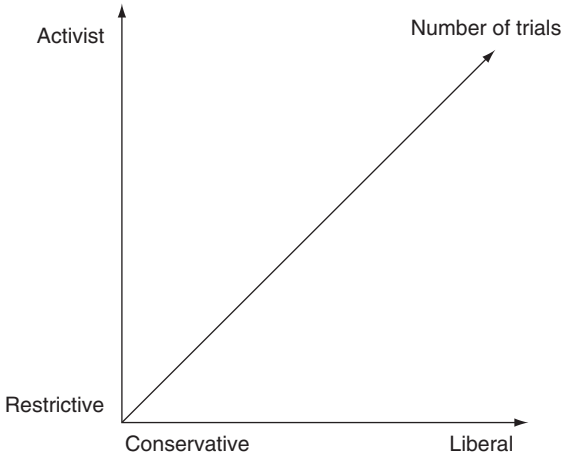



Table 2.1 below plots the two ideal-type executive positions against the four ideal-type judicial positions. For the sake of simplicity, we depict the judge's position as "not independent" or "independent," even though independence is not subject to dichotomies in real life.

**Table 2.1 Executive and judicial policy positions and degree of judicial independence**

| | | JUDGE | | | |
|---|---|---|---|---|---|
| | | Not independent | | Independent | |
| | | Favors trials | Opposes trials | Favors trials | Opposes trials |
| EXECUTIVE | Favors trials | TRIALS | TRIALS | TRIALS | **NO TRIALS** |
| | Opposes trials | NO TRIALS | NO TRIALS | **TRIALS** | NO TRIALS |

There are eight possible outcomes: four situations in which we may expect trials to occur and four situations in which trials are not expected. Notably, as indicated in the bottom row, fifth column, if a judge favors trials *and* is free to act independently, trials are likely to occur *even when the executive does not favor them*. Equally important, we may (at least theoretically) encounter situations in which the executive officially favors prosecution of the military but an independent court/judge refuses to

hear these types of cases, citing legal arguments. The result then would be no trials, *even though the executive favors them*. These two scenarios constitute a test case of judicial independence. Where the executive favors prosecution and the judiciary is independent, it would be hard to attribute the policy outcome of trials to the influence of one over the other without in-depth study of the particular trial(s) in question. This is a problem I will discuss in more detail in the empirical chapters, particularly in Chapter 5 on Uruguay.

There is one more important inference to be drawn from table 2.1: we may not, logically, always expect independent judges to rule in the favor of trials. Independence must be distinguished from policy preferences and from personal conviction regarding the proper role of courts and judges in a given society. However, the main point is that a certain degree of judicial independence allows judges a minimal *space for independent action,* which they may or may not take advantage of. Although it is the job of the executive and legislative branches to make the laws on which the judiciary is forced to rule, there may be instances in which the judiciary revises the law by applying judicial review and declaring laws unconstitutional. Activist judges would be expected to achieve more in this way than judges who rule according to the principle of restraint. By contrast, as suggested by table 2.1, an independent judge may very well apply an existing amnesty law by arguing that, legally, her hands are tied in these matters. One cannot, therefore, automatically expect independent judges to behave differently from dependent judges in human rights matters. But the existence of judicial independence broadens the scope for judicial action.

## The Legal Basis for Prosecution

Judicial independence, then, may be a necessary condition for trials, but it is certainly not a sufficient condition. Since we are dealing with legal cases, it is ultimately up to the judge to rule in these matters. Yet, a judge is not always free to interpret the law, nor free to apply the law conscientiously. Also, there are instances in which judges are independent in principle, but in practice the material or legal basis for their actions is restricted. As mentioned, executives or legislatures may effectively hinder legal prosecution of human rights violators by putting in place amnesty laws or other legislation that restricts the type of cases on which a judge may act. It is therefore crucial that courts have *sufficient legal basis* on which to prosecute. The crimes in question must be punishable and thus prosecutable under domestic law. If the crimes violate international law (such as the International Covenant on Civil and Political Rights), the constitutional status of the international law in domestic legislation will be important. A final legal point: criminal acts are subject to statutes of limitation under

most domestic laws.[28] That means that prosecution may be precluded if a certain number of years have gone by (typically 15–25 years, depending on the country and the type of crime). This is of particular relevance to human rights cases, where violations may have taken place in the distant past. To sum up, if there is sufficient legal basis and the judge is free to apply the law, there will be trials, assuming that there is sufficient evidence to prosecute the offender.

If my hypothesis is correct, we should expect to see more prosecutions of and verdicts against human rights perpetrators in countries and in periods where there is more judicial independence and where there is a legal basis for prosecutions, other factors remaining constant. We would also expect to see new interpretations of existing amnesty laws in countries and in years where there is more judicial independence and where at least some judges are either liberal, activist, or both in these matters. These reinterpretations should extend the scope of human rights cases on which the judiciary can rule.

## Three Protagonists in Human Rights Trials

Taking as a premise that the independence of judges matters, we may then narrow the focus to the interplay between three protagonists in human rights trials: (a) the judges (who rule in the case and decide the outcome), (b) the military (the defendant), and (c) the victims of human rights violations.[29]

I have suggested that we cannot understand the behavior of judges without also understanding the political environment and the institutional constraints that judges work within. Though judges in Latin America are not elected by the people (as are some judges, for example, in the United States), they are appointed or, alternatively, hired and fired by individuals or bodies that, at least ideally, are democratically elected. Like politicians, judges as individuals and courts as collective bodies respond to external pressures and influences. *Complete* independence is not desirable, but freedom from *undue* external influence is.

Let us assume for the sake of argument that judicial reform in the form of constitutional increases in judicial independence tilts the power balance between the executive and the judiciary more toward the judiciary and possibly also regulates the internal workings of the judiciary, loosening up its hierarchical structure and making the exercise of judicial independence more likely at all levels. Another heavyweight political actor in the Latin American context that has been largely ignored in the theoretical literature on judicial independence is the military. In Latin America, the judiciary, like the executive, has been vulnerable to military threat. Judges could find themselves out of a job if they took on unpopular cases that threatened the integrity and reputation of the military during or after military

rule; in the event of a coup, the entire court might be replaced. In an analysis of changing institutional arrangements and shifting civil-military relations in a post-transitional setting, it may therefore be reasonable to assess the presence of the military in politics. We might expect a reformed judiciary to rule independently only where the military is considered to be safely in the barracks. This condition may be reformulated into a testable claim: *The absence of credible military threat is necessary for the judiciary to operate independently.* More specifically, one would expect a judge to be more disposed to take on cases of human rights violations when the military is weaker.

The failure to prosecute the military for human rights violations immediately after a transition could therefore be attributed to the existence of credible military threats to destabilize the new democracy rather than to executive dominance over the courts per se. If this explanation were correct, we would expect judges to rule more independently and the likelihood of trials against military personnel to increase as the influence of the military in politics wanes over time. Though many Latin American judiciaries in the past were known to be conservative and supportive of military rule, it is safe to assume that most judges in most countries now support democracy. If we further assume that preserving democracy is an overriding concern for the judiciary, then judges would be susceptible to military influence if they think that decisions made by the courts could provoke a coup. Ultimately, all nonpartisan judges would punish the military as a way of enforcing the rule of law, given that there is a legal basis for prosecution and sufficient evidence.

Because of the way the justice systems in Latin America operate, judges can only rule on matters that are brought before them; they cannot initiate cases on their own.[30] A key feature of human rights violations stemming from prior authoritarian regimes, distinguishing them from ordinary crimes committed during a democratic regime, is that they are old cases: years have passed since the crime took place. Much of the evidence of human rights violations may have been recorded during the dictatorship. In many instances, these cases have already been reported to the police and dismissed. They may even have been brought to court and dismissed by judges (often because of an alleged lack of evidence) during the dictatorship period. For these cases to be dealt with by the courts after the return to democratic rule, somebody needs to activate or reactivate them and present a claim and evidence to the relevant court. In Latin America, human rights organizations and their lawyers have to a large extent been the ones to present cases on behalf of victims and their families to court.

This gives a second testable claim: *A sustained demand for justice is necessary for an independent judiciary to take on cases of human rights violations.*[31] Assuming this is correct, we would expect judiciaries to take up human rights cases only when there is a sustained, though possibly latent, domestic demand for trials from sectors such as human rights

NGOs, lawyers' associations, and the public. That means that countries that have a strong and active civil society should be more likely to see trials than countries that do not.

To sum up, I have identified some minimal conditions that should be present in order for trials to be held in a post-transitional setting. *The proposed hypothesis is that where judges display a relatively high degree of independence from the executive (and in the case of lower court judges, independence from their superiors), judges should be able to prosecute the military—irrespective of whether the executive, which forms policies in response to public pressure, favors trials or not, on the condition that there is a legal basis in terms of both law and factual evidence for such prosecution.* Countries where judges are free to apply the rule of law without executive interference are thus more likely to have trials than countries where they are not. Two more preconditions must be present: Since judges may also be subject to pressure from the military, who want to protect themselves from prosecution, judges can only be expected to act independently in human rights matters where military threat is low. Finally, judges can only rule in cases that are brought before them, which means that there must be a certain degree of activity in bringing cases of human rights violations during military rule to the courts, years after the violations actually occurred.

We now turn to a simple test of how constitutional reforms that increase structural judicial independence in Latin American countries correlate with the presence or absence of trials for gross human rights violations in a post-transitional setting.

## Evaluating Some Necessary Preconditions for Trials in the Latin American Context

Almost all the countries in Latin America that have gone through transitions from authoritarian to democratic rule since the late 1970s had brutal military regimes that committed serious human rights violations against their own populations. Only Argentina successfully put a handful of its generals on trial right after the transition. If my argument holds true, we would expect post-transitional justice in the form of trials to occur in countries where the judiciary has become more independent over time, where the military is considered (more or less) safely back in the barracks, where there is a reasonably strong demand for retributive justice, and where a legal basis for prosecution exists.

In this section I will examine the first three of these conditions in the Latin American context for the period 1995–2000, defined here as the period for the onset of post-transitional justice in the form of trials of military personnel. All trials, against both top-level and lower-level officials, are counted.[32] While some trials produced a guilty verdict, others ended without conviction. Including both types enables us to distinguish

between the judiciary's ability and willingness to hear cases, on the one hand, and the merits of the cases heard, on the other. Cases accepted by the Supreme Court but passed over to military courts because of lack of evidence will not be counted as trials. Neither will cases that were taken on by the courts but have stalled for years, even decades, as judges have failed to move the case forward. I also exclude from this analysis other human rights policies implemented to deal with the abuses of past authoritarian regimes, such as truth commissions, reparation measures, and memorial projects. Though one may argue that these policies too may contribute to justice, for reasons of time and space I choose to focus on the legal processes of prosecution where the end result is trials.

In evaluating indicators of judicial independence, I will, as a preliminary step, look only at constitutional changes that affect the degree of formal judicial independence. There are two reasons for this choice. First, I consider de jure independence to be a prerequisite for de facto independence, as explained in the second section of this chapter. Second, for the purpose of a cross-national, medium-size preliminary study, it is important to choose a working concept that is applicable across countries without too much subjective evaluation. The five criteria I use are appointment procedures, length of tenure for Supreme Court justices, establishment of judicial councils, expansion of judicial review powers of the Supreme Court, and constitutional guarantees of judicial independence (as defined earlier in this chapter). If constitutional changes along these five dimensions between each country's date of transition and December 1999 receive a score of 0–2, I record judicial independence as "less." A score of 3–5 is recorded as "more" (see appendix 2 for individual country scores).

Moving on to the first of the two preconditions for trials examined here: assessing the degree of military threat is a judgment call, based on a democratic regime's length of survival and on the presence or absence of coup attempts during that time. The number of years that have passed since the year of transition, or since the military's last attempted intervention, serves as an indicator of the level of credible military threat. This is because the longer the country sustains uninterrupted democratic rule, the less likely it is that the military will try again to intervene in politics by force. One may assume that as old generals retire and new officers with better training rise through the ranks, the military gradually becomes less inclined to interfere in domestic politics. In particular, as time goes by, fewer and fewer officers who could potentially be charged with human rights violations remain in power. The death of Pinochet and its effect on the Chilean military is a case in point. Conventional wisdom has it that in most, though not all, Latin American countries, the military is now safely in the barracks and relatively unlikely to attempt coups.[33]

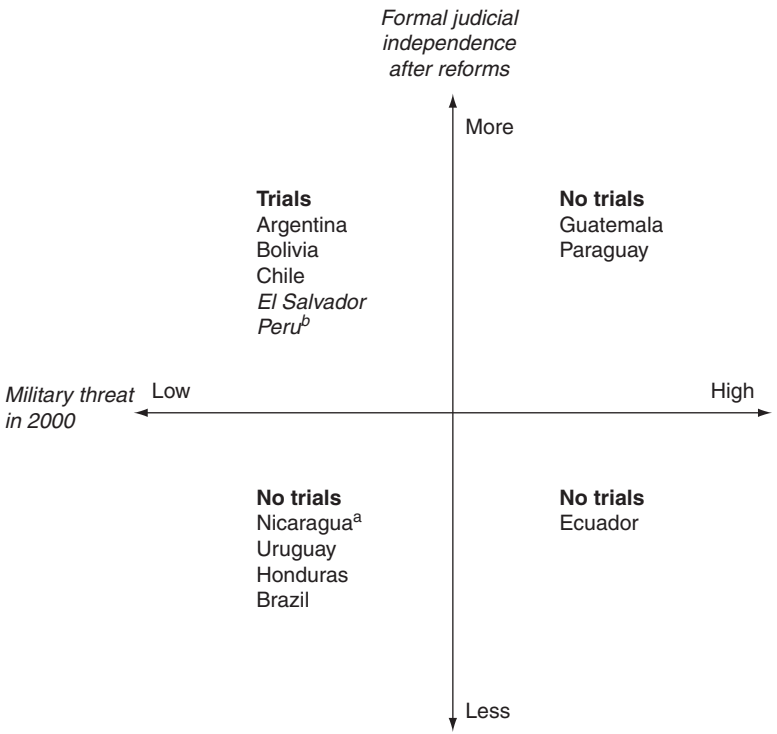
Using this definition of military threat, I have recorded the level of threat in 2000 as "high" in three countries where the military arguably still played a prominent role in politics at that time: Ecuador, where a coup in January 2000 briefly interrupted 22 years of civilian rule; Guatemala, where threats against human rights initiatives were common (and Bishop Juan Gerardi was killed after he released a human rights report in 1998); and Paraguay, where it was too soon to tell whether the new government was stable since the overthrow of the Stroessner dictatorship in 1993. By contrast, though El Salvador and Chile had only eight and ten years of democratic rule, respectively, when the data were collected, scholars agreed that their militaries were back in the barracks and that the probability of military intervention in politics was very small. All other countries in Latin America had enjoyed uninterrupted democratic rule for between 15 and 35 years and are hence recorded as having "low" military threat.

Regarding the second precondition: I have, for the moment, excluded information about civil society's demand for justice, as this would require detailed empirical analysis for each country. Instead, I have used the extent of gross human rights abuses (including extrajudicial executions, forced disappearances, and torture) as a proxy for public demand for justice. The assumption is that the more violations, the more victims and families of victims will demand justice, and the more cases may be brought to court. This proxy measure is not unambiguous, however. One could certainly, on the one hand, argue that where violations have been most extensive, fear is likely to prevent people from demanding justice. At the same time, where violations are more extensive, anger too is likely to be widespread, and anger may fuel demand. These limitations should be borne in mind when analyzing the situation in Latin American countries at the end of the 1990s.

As a first-cut approach to examining the argument that trials are more likely to occur in countries that have strengthened their judiciaries through constitutional reform, where the military is considered (relatively) unlikely to pose a threat, and where there is a reasonably strong demand for justice (here using the extent of human rights violations as a rough proxy for demand), figure 2.5 provides an overview of evidence from Latin America with regard to changes in formal judicial independence due to constitutional reforms and the presence or absence of the military in politics. I have included only those countries that have both (a) undergone transition from authoritarian to democratic rule (this excludes Costa Rica, Colombia, Venezuela, and Mexico) and (b) experienced serious human rights violations in the past (this excludes the Dominican Republic and Panama). This leaves 12 countries. Expectations of trials or no trials are marked in bold.

The figure suggests that all countries fit the predictions except two: El Salvador and Peru. A rough preliminary analysis based primarily on high

**Figure 2.5 Expectations of trials based on military threat and formal judicial independence**




*Sources*: For Argentina, Chile, Uruguay, Honduras, El Salvador, and Guatemala, figures are taken from truth commission reports (see Chapter 1). See Hayner (1994, 2001) for summary evidence. For all other countries, I have relied on secondary sources describing the authoritarian periods and the abuses that took place.

[a] The transition in Nicaragua referred to here is the end of the Somoza regime.

[b] In Peru, human rights violations were worse after the return to civilian rule in 1980 than they had been during the military dictatorship (1968–80). The numbers of dead and disappeared recorded from mid-1985 through 1987 under the government of Alan García was one-third of the levels for the 1983–84 period under the Belaunde administration. See Hunter (1997) for details.

scores in formal (de jure) judicial independence in combination with low military threat suggests trials for Argentina, Bolivia, Chile, El Salvador, and Peru in a post-transitional setting. In line with prediction, trials had been held in Argentina, Bolivia, and Chile by 2000. Contrary to expectations, no trials had been held by that time in El Salvador or Peru. A closer look at these two countries explains why. In El Salvador, very few of the judicial reforms included in the 1983 Constitution or passed in the

1990s had been implemented. Moreover, the human rights movement in El Salvador after the end of the civil war and the signing of the peace agreement in 1992 was exceptionally weak and was unable to put forward strong claims of justice to the judicial apparatus.[34] Similarly, the judicial reforms in Peru carried out under President Fujimori in the 1990s were mainly for show. Judges were hired and fired at the president's whim, and the judicial system was reported to be far from independent (Lawyers Committee for Human Rights 2000). This illustrates well the potential discrepancy between de facto and de jure independence discussed earlier in this chapter. In sum, in spite of apparent increases in formal judicial independence, it is not surprising that judges in these two countries were still refusing to take on cases of serious human rights violations at the turn of the century. We know that Peru, Bolivia, and El Salvador have all had trials in more recent years—as predicted by the model.[35] This raises important questions as to whether the time horizon for assessing the impact of reform has simply been too short, in that the positive effects of reform may have kicked in at a later stage.

A crucial need, therefore, is to determine whether constitutional changes had been implemented and had any effects—and to identify and assess in more detail the factors external to and internal to the judiciary that may have affected judges' propensity to take on human rights cases and give them a fair hearing. For instance, the legal basis for judicial action has not been examined here. The fact that most Latin American countries during the period under study had effective amnesty laws may have presented an obstacle to judicial action in human rights cases.[36] Clearly, the argument tested above is streamlined, ignoring many of the factors and much of the context that judges are likely to respond to or be constrained by. Yet we have identified some important minimal conditions for trials to take place, and these may serve as a point of departure for examining in more detail the causes of post-transitional justice in three specific country contexts—Argentina, Chile, and Uruguay. For this empirical in-depth analysis the time horizon is extended to cover the period 2000–9, which allows us to examine the longer-term effects of reform on judicial behavior and assess whether the hypotheses presented here stand up to the passage of time. Since judges do not operate in a vacuum, but rather in a complicated social, economic, political, and institutional context, the empirical analysis will also try to take into account some of this complexity.

## Preliminary Conclusions

The testable hypothesis presented in this chapter is that given a reduction in military threat, sustained pressure for justice from human rights activists outside the government, and sufficient legal grounds for prosecution, post-transitional justice in the form of trials is more likely to

take place *in countries and during periods in which the judiciary is more independent*. From this main hypothesis, I have extracted three testable preconditions: (a) the absence of credible military threat is necessary for the judiciary to operate independently, (b) a sustained demand for justice is necessary for an independent judiciary to take on cases of human rights violations, and (c) a legal basis for prosecution of human rights violations must exist (either in national domestic legislation or in international law) for the judiciary to act on these cases. The first two preconditions are likely to be products of time, whereas the third is closely linked to political decision making and law making. An alternative explanation would be that the executive branch, bargaining with pressure groups such as the military and human rights groups, accounts for whether or not trials occur. The empirical part of the analysis will attempt to determine whether post-transition trials are primarily the result of executive policy making or primarily the product of altered judicial behavior in response to judicial reform and changes in the opportunity structure for judges.

Though this provides a useful starting point for empirical analysis, political reality obviously is much more complex than what is indicated above. The next three chapters concentrate on the new role of the judiciary during the democratic consolidation phase. I analyze the shifting relationship between the executive and the judiciary as well as contextual factors at the regional and international levels that might have influenced judicial behavior with respect to human rights. A central concern is the new political space that has developed with the shifts in the power balance and how these institutional and political changes may have altered the space of action for judges.

The chapters on Argentina, Chile, and Uruguay focus on four main types of relationships. First, I systematically examine judicial-executive relations and the shifting balance of power between these two central state actors. In order to capture some of the tension or possible disparities between de jure and de facto independence, I take into account the formal constitutional powers granted to the judiciary and the extent to which these have actually been implemented; actual executive interference with nomination procedures and judicial decision making; and official policy statements by the executive on human rights issues, which may help us evaluate the executive position in this regard. A plausible counterhypothesis is, of course, that executive preference in human rights matters remains decisive in determining whether or not trials occur. Disentangling judicial policy preferences from executive policy preferences is thus a main undertaking in the empirical analysis.

To examine the first precondition—that a reduction in perceived military threat is necessary before the judiciary will take on controversial court cases involving military personnel—I will trace judicial-military relations

over time by identifying episodes of actual military interference. These include both interference in politics (coup attempts, which presumably would worry the judiciary because of their vulnerable position in dictatorship settings) and interference in judicial decision making (such as attempts to block certain human rights cases by putting pressure on the executive or on judges or by intimidating witnesses). I also identify special situations, as when military officers are charged with abuse or corruption, in which the military might have been expected to cause trouble but did not. The absence of military action in such cases could be interpreted as signaling a lack of threat.

A second precondition for trials to take place is that cases must be brought to court, since judges cannot initiate legal proceedings. Because individuals who suffered during the dictatorships typically have used lawyers working for human rights organizations to present their grievances in court rather than hiring private lawyers, we may assume that the type and number of cases brought to court will vary with the activity of the NGO community. It was the human rights organizations that received claims of abuse during the dictatorships, and they therefore possess much of the legal material on which recent court cases are built. When examining this second claim, we may ask whether the activity of human rights NGOs has remained constant, increased, or decreased since the transition. In what ways has it shifted, and with what consequences? What kinds of issues have NGOs focused on over time? Have national NGOs received support from international human rights networks? Has the public actively engaged in the human rights debate? Have judges been sensitive to the demands for justice from the human rights community and the public?

To examine the third precondition for trials, a sufficient legal basis for prosecution, I will look at existing amnesty laws as well as the status of international human rights law in domestic law and the ratification of international human rights instruments (covenants and institutions). How have amnesty laws fared in the region? Have governments become more committed to international human rights norms? Have judges taken initiatives to bypass amnesty laws and reinterpret statutes of limitations?

Finally, the analysis of the three Southern Cone countries is set against the backdrop of national, regional, and international legal developments in the area of human rights. We know that the borders of national versus international jurisdiction in cases that violate international conventions on human rights have become increasingly blurred. A more favorable international climate with respect to human rights issues is likely to constitute an enabling condition for judges in some countries and a direct source of influence in other countries. However, the exact mechanisms by which changes in international human rights norms and standards influence the

ideology and behavior of judges are hard to identify and can only be determined by careful empirical analysis.

To examine the importance of the new international legal human rights framework, I will look at the propensity of judges to invoke or refer to international conventions and cite court rulings handed down by international courts, such as the Inter-American Court of Human Rights. International pressure has also arguably played an important role in encouraging or pushing Latin American judges to reopen cases of human rights violations or search for loopholes in existing legislation that allow them to redefine or reinterpret amnesty laws. It is therefore useful to identify situations in which governments have been subject to explicit pressure from international NGOs or foreign governments on particular human rights cases. Ongoing cases against Latin American military personnel in various European courts and related extradition requests may have influenced Latin American judges who are dealing with similar cases on home turf. Along the same lines, I will consider how changes in the "prosecution climate" may have influenced the other principal actors on the trial scene, in particular NGOs. All these factors come into play in the three case studies of Argentina, Chile, and Uruguay.

# Chapter 3

# Argentina: From Trials to Pardons to Trials

During Argentina's "dirty war," from 1976 to 1983, one of the darkest practices was the kidnapping of newborn children, delivered in secrecy in the dank basements of torture centers by women who were never seen again. Unlike in Chile and Uruguay, where the repression mainly targeted men, women made up almost one-third of the 12,000 or more people who disappeared in Argentina. Many of these women were young, educated activists, fighting against the military regime. Some were pregnant when they were seized by the security forces, and gave birth in captivity; others already had young children, who were kidnapped with their mothers and then taken from them. One of Argentina's first human rights organizations, the Abuelas de Plaza de Mayo, or Grandmothers of the Plaza de Mayo, estimates that more than 400 infants were separated from their parents. The children were adopted by military or civilian couples, who later claimed to have been unaware of the infants' origins and the fate of their parents. Now in their twenties and thirties, these children are referred to as "the living disappeared."

A decade and a half after the return to democratic rule, the struggle to locate these children and restore their identities spurred the first court trials in Argentina's post-dictatorship period. This marked the beginning of a process in which a large number of former human rights abusers were brought to justice. In 2010, Argentina was second only to Chile among Latin American countries in the number of former military and security agents either accused, detained, on trial, or imprisoned for gross human rights violations committed during authoritarian rule.[1] Most recently, the so-called ESMA trials, which started in December 2009, are unraveling the operations of one of Argentina's most infamous detention centers in the heart of Buenos Aires, where as many as 5,000 people were tortured and where many children were born to kidnapped mothers.

This legal development is rather spectacular given the reputation of the Argentine judicial system as dependent, corrupt, inefficient, and lacking in autonomy. The judiciary failed dismally to protect people against unlawful detention, torture, murder, disappearance, and forced exile during the repression. It also declined to respond to thousands of claims for *recurso de amparo* and *habeas corpus* that survivors and their families presented to court, often with the backing of human rights organizations and their lawyers, during military rule (Helmke 2005, 71).[2] The courts' failure to act, despite heavy international pressure, is hardly surprising. The first military junta sacked all the Supreme Court justices, along with some federal appellate court judges and the provincial supreme court justices, and replaced them with politically conservative jurists who "shared the military's basic outlook and ideology" (Helmke 2005, 69).[3] Since the return to democracy, Argentine judges have struggled to regain legitimacy and credibility, but political and institutional features have made this difficult. Nonetheless, Argentine judges have made more progress in addressing their country's dark past than most other judiciaries in the region.

This chapter seeks to explain the onset of post-transitional justice in Argentina, focusing on the period 1996–2001. The establishment of a truth commission and the legendary trials of nine former junta leaders under the first Alfonsín government (1983–89) raised hopes for truth and justice, but sweeping pardons under the first Menem government (1989–94) brought the courts back under executive power.[4] This discouraging reversal, which played out against the backdrop of a severe economic crisis, made further prosecutions seem unlikely. Yet, a wave of post-transitional justice began toward the end of the second Menem government (1994–2000) and continued during the short presidencies of de la Rúa (2000–3) and Duhalde (2002–3). Legal developments under the governments of Néstor Kirchner (2003–7) and Cristina Fernández de Kirchner (2007 to present), treated only briefly here, demonstrate the continued close interplay between politics and prosecution in the Argentine context.

## Politics of Truth and Justice Under Alfonsín

After Argentina lost the Malvinas-Falklands War against Britain in 1982, the defeated military was forced to step down. The newly elected government of Raúl Alfonsín then faced the classic dilemma that confronts democratic governments taking office after periods of state abuse: should it punish or pardon the perpetrators?[5] Principled commitment to the rule of law had been one of Alfonsín's campaign themes, and there was a general expectation that the new government would investigate and punish the military.[6] Politically, the new president could not afford to ignore the widespread demands for truth and justice presented by ordinary Argentines, human rights organizations, and the international

community (Burns 1987, 158; Mignone 1996). Since the military was weak and deeply discredited after losing the war, Alfonsín initially had political leeway to undertake a series of bold measures.[7]

First, he repealed the national security doctrine and the military's self-amnesty law of September 1983.[8] The military had received assurance from the Peronist Party in pretransition negotiations that the amnesty law would not be derogated and that no investigation of human rights abuses would take place. However, when Alfonsín's Radical Party unexpectedly won the first elections in a landslide—the first electoral victory ever against the Peronists—the military was left without protection (Vacs 1987).

Second, Alfonsín replaced the entire Supreme Court by removing the unconstitutionally appointed de facto judges (who did not enjoy the constitutional guarantee of life tenure) and replacing them with judges endorsed by the Senate. This upset the plans of the military, which before the transition had made "concerted efforts to keep the judges on the bench under the next government" (Helmke 2005, 74). The military had even tried to pass judicial reforms to secure the tenure of Supreme Court justices. But after the military's humiliation in the Malvinas-Falklands, the Supreme Court judges had no choice but to step down. The new Alfonsín court was not politically homogeneous; it was "best characterized as composed of individual 'stars' rather than as a team of players with a common set of objectives" (Helmke 2005, 77).[9] The president also made important changes to the federal courts.[10] Alfonsín renamed judges who were considered relatively liberal and technically competent, so there was some carryover from the previous regime.[11] Knowing that the human rights trials would take place in the lower courts of appeal, particularly in the Buenos Aires Federal Appeals Court (Cámara Federal de Buenos Aires), Alfonsín took care to "appoint judges with established records on protecting human rights" to this court (Helmke 2005, 78). All the nominations were submitted for senatorial approval (Llanos and Schibber 2008).

Third, in line with his campaign promises, Alfonsín decided to pursue a strategy of "truth and (limited) justice." The first pillar of this strategy, the formation of a truth commission, was in line with evolving approaches in other countries of the region. The second pillar was groundbreaking: Alfonsín moved to prosecute the top echelons of the Argentine military for crimes committed during the dictatorship.

## Seeking Truth: The *Nunca Más* Report

Two weeks after taking office, the new government established the National Commission on Disappeared Persons (Comisión Nacional Sobre la Desaparición de Personas, CONADEP).[12] In investigating the repression, the truth commission focused especially on the issue of the "detained-disappeared." To clarify the whereabouts of the disappeared,

judges began ordering exhumations in early 1984, but progress was initially slow due to the lack of experience in forensic matters.[13]

The CONADEP report, published in November 1984 under the title *Nunca Más* (Never Again), documented the forced disappearance of 8,960 people. The list of names was not exhaustive, as many disappearances were never reported officially (CONADEP 1991, 479). The government later estimated that at least 12,000 people had disappeared. Amnesty International (1987) estimated 15,000 victims, and some human rights organizations set the figure as high as 30,000.

The third section of *Nunca Más* examined the role of judicial power in the forced disappearances. It covered such aspects as *habeas corpus,* the treatment of detained persons by the courts, and the forced disappearance of lawyers and others attempting to defend victims of gross human rights violations. The Argentine *Nunca Más* was the first report of its kind and served as a model for other Latin American truth commissions, which issued similar reports in Uruguay, Brazil, and finally Chile. The Argentine report, which Carlos Nino (1996, 91) called "extraordinary in its impartiality and thoroughness," effectively established political and ethical, but not juridical, responsibility for acts of repression. Nevertheless, the judges were forced to react to it, because the information about human rights abuse it set forth was to serve as a basis for hundreds of court cases.[14]

## Seeking (Limited) Justice: The Trial of the Generals

Even before he established CONADEP, Alfonsín issued a presidential decree ordering prosecution of the nine high-ranking officers who had headed the first three juntas.[15] He wanted to keep the trials strictly limited, for though the military was weakened, Alfonsín knew that broad prosecution of military men was likely to unleash political conflict that could destabilize the new democracy. Moreover, Alfonsín (1993, 18) believed that "punishments are morally justified only if and when they are effective in preventing society from suffering greater harm" and that the revelation of the truth followed by public condemnation would serve society's interests just as well. According to Acuña and Smulovitz (2001), the strategy, elaborated in secret collaboration with the military, was to go for limited prosecutions in which the military would identify the officers to be prosecuted, carry out self-purges in military courts, and receive pardons before Alfonsín left office.

Alfonsín therefore encouraged the military to try their own people in courts headed by the Supreme Council of the Armed Forces.[16] However, after 12 months of inaction, the military tribunal declared itself unable to complete the proceedings against the junta leaders, adding that the orders issued by the junta for the purpose of combating terrorism were

unobjectionable (Snow and Manzetti 1993, 42). Facing increasing public and international pressure, the government finally transferred the cases to the federal civilian court (Cámara Federal de Buenos Aires) on October 4, 1984. Many human rights organizations criticized this delay, since it meant that the cases were losing their initial momentum. For their part, the former commanders complained that the change of venue violated their constitutional rights, and they insisted on being tried exclusively by a military tribunal. The Alfonsín-appointed Supreme Court dismissed the complaint and upheld the civilian court's jurisdiction.

The eyes of the world then turned to Argentina as the government put the nine junta leaders on trial in April–December 1985.[17] The trial of the Greek generals in 1975 was the only direct model, although precedents go as far back as Nuremberg. In the first round of Argentine trials, the nine officers were tried: General Jorge R. Videla, Admiral Emilio E. Massera, General Roberto E. Viola, Brigadier Orlando R. Agosti, Admiral Armando Lambruschini, Brigadier Omar Graffigna, Lieutenant General Leopoldo Galtieri, Admiral Jorge I. Anaya, and Brigadier Basilio Lami Dozo. Based on about 700 cases, five of the nine were convicted of crimes ranging from aggravated homicide to robbery. The remaining four were found not guilty on these charges but were tried and convicted by a military court for mismanagement of the war against Great Britain.[18] A second round of trials in December 1986 concluded with the sentencing of General Ramón Camps, former chief of the Buenos Aires police, to 25 years' imprisonment and three other army and police officers to shorter terms.[19]

Alfonsín had considered it impossible to purge all those involved in human rights abuses under the juntas, as that would have involved dismantling the entire military. In an effort to quiet the widespread clamor for justice, therefore, he opted for selective trials. This compromise drew heavy criticism from both the human rights community and his own legal advisers (Malamud-Goti 1998a, 1998b). Dissatisfied with the trials' limited scope, the human rights community intensified its demands for justice. This provoked four military rebellions in the next couple of years, demonstrating that the military was still a potent force in Argentine politics.

## The Amnesty Laws

Critics of transition theory note that the balance of power is seldom static after transition from authoritarian to democratic rule. This has been particularly clear in Argentina. The trials of the junta generals produced an outburst of optimism and the filing of new complaints against hundreds of middle-ranking officers. The threat of sweeping prosecutions made the military set aside their previous splits and close ranks. Alfonsín's honeymoon was over.

Military discontent forced the Alfonsín government to adopt a conciliatory line. In 1986, while the trials were still under way, the Ministry of Defense issued instructions to military prosecutors designed to radically reduce the number of new prosecutions (Acuña and Smulovitz 2001, 106). At the end of that year, Alfonsín had Congress push through a statute, the Ley de Punto Final, or "full stop law," setting a 60-day period for the submission of new complaints of crimes committed during the dirty war.[20] The government deliberately set the 60-day period to coincide with the end-of-year holidays, when Argentine courts are closed and few judges are available to receive complaints. But the law proved unsuccessful, because efficient human rights activists mobilized stunning public support and rushed forward thousands of complaints in the short time allowed. Six federal courts suspended their holidays to work on these cases, and human rights–friendly lower court judges worked around the clock to start as many procedures as possible. According to one of Alfonsín's principal advisers, the Punto Final law had the unintended effect of "awakening the courts of the interior who were presumably unwilling to be responsible for the eternal impunity of some criminals" (Nino 1991, 2628). By the time the 60-day window closed, some 450 officers had been indicted.

Military dissatisfaction over the prosecutions that followed led to a barracks uprising during Easter Week of 1987, under the command of Lieutenant-Colonel Aldo Rico in Campo de Mayo, Buenos Aires. The so-called *carapintadas* (named for the face paint they wore) were responsible for three similar revolts later the same year and the following year, spurred by displeasure with the moves against the military and cuts in military spending. Each protest won new executive concessions. The Easter Week mutiny led Alfonsín to ask Congress for a measure that would further reduce the scope of prosecutions. The Ley de Obediencia Debida, or "due obedience law," that passed on June 4, 1987, eliminated all pending indictments against junior officers, though it did not stop the prosecution of colonels and generals.[21] As a result, only about 40 of the close to 370 officers who were due to be prosecuted for alleged human rights violations could now be tried (Roniger and Sznajder 1999, 73). The law presumed that, with certain exceptions, officers who followed orders did so under coercion and had no possibility of resisting such orders (Garro 1993, 16). That meant that the fourth principle of Nuremberg—that a person who followed superior orders is still legally responsible for his actions "if a moral choice was in fact possible to him"—could not be applied. Passage of the Ley de Obediencia Debida was intended to appease the new army high command, whose members had been junior officers during the dirty war, but it failed to calm the senior retired officers who still faced prosecution.

The Ley de Punto Final and Ley de Obediencia Debida were clearly unconstitutional interference in judicial matters, as the Supreme Court would conclude almost two decades later. Some scholars contend that this was perhaps the only way Alfonsín could hope to ease civil-military tensions and avoid a serious military threat of interference with constitutional rule (Nino 1991). Though the legal critique of Alfonsín's move was strong in some quarters, and though some lower courts initially refused to apply the law, declaring it unconstitutional, the Alfonsín-appointed Supreme Court in 1987 upheld the constitutionality of the Ley de Obediencia Debida in a 4-1 decision.[22]

Passage of the law sparked several days of protest across Argentina, as tens of thousands of people opposed the military's rebellion and Alfonsín's concessions to amnesty demands.[23] This in turn provoked two new military mutinies under the Alfonsín government, one in December 1987 and the second in December the following year. The uprisings were quelled through negotiation, but they laid bare the discontent within the army. Alfonsín grew increasingly unpopular, partly because of his handling of the human rights matter and partly because of an increasingly grave economic crisis.[24] Finally, he reluctantly agreed to step down and allow Carlos Menem of the Peronist Party to take office six months early. The inauguration of Menem on July 8, 1989, marked Argentina's first constitutional transfer of power since 1916 from one democratically elected president to another (Garro 1993, 8).

Alfonsín left behind seven generals in prison, a disgruntled military, a dependent Supreme Court, and a divided and angry civil society. He was heavily criticized at the time for backtracking on human rights policies, even though he did so in the face of military threat, and even though Alfonsín, more than any other Latin American president, actually made substantial progress in pursuing retributive justice.[25] Menem would go even further than Alfonsín in retreating from the initially bold human rights policies and ensuring political control over judicial matters.

## Pardons and Impunity: Back to Square One

With his focus on curbing hyperinflation, Carlos Menem quickly made clear that human rights would not be a priority under the new Peronist government.[26] To ensure legal backing for his economic as well as human rights policies, Menem swiftly moved to pack the Supreme Court by increasing the number of justices from five to nine.[27] The Peronista majority in Congress approved this proposal in April 1990 amid severe national and international criticism, including from the five sitting justices on the Supreme Court. Two of the five resigned in protest, effectively ensuring that Menem would have support from a majority on the bench.

As Helmke (2005, 86–87) points out, "much has subsequently been written about the justices' paltry qualifications and close personal ties with the president" and their "shockingly little professional experience as judges." Menem thus secured a loyal—but severely delegitimized—Court.

## Presidential Pardons and Post-Pardon Blues

Three months after taking office, on October 6, 1989, Menem issued three decrees that pardoned almost 400 people. They had been sentenced to prison for human rights abuses before the Punto Final law was issued and they were not covered by the Ley de Obediencia Debida.[28] On December 10, 1990, Menem issued another set of sweeping pardons that released from prison those already convicted, including Videla, Massera, Agosti, Viola, Lambruschini, and Camps. He also pardoned 60 Montoneros (left-wing guerrillas) in prison for "terrorism." The president argued that it was necessary to forgive past trespasses—he himself had been a prisoner of the military junta for two years—and look to the future. In essence, it was a policy of forgive and forget. The generals walked free, and Alfonsín's faltering pro–human rights policy was in some ways brought back to square one. But it was an irrevocable fact that trials had been held and had made legal history not only in Argentina, but in all of Latin America. It should be noted that Menem pursued a more favorable human rights policy in the non-prosecution area by allowing investigations into the fate of disappeared children and ordering reparations for victims (Guembe 2006).

The decree of pardons was a clear example of the executive taking control of the judiciary. The presidential order overturned the decision of the Supreme Court, which had issued the sentences. Constitutionally, Menem's move was suspect (Nino 1996, 103–4). However, the Menem-packed Supreme Court did not challenge the constitutionality of Menem's package of pardons, or *el indulto,* as it was known in Argentina.[29]

Menem took heavy criticism for his decision to let the convicted generals off the hook. More than a hundred thousand people marched in the capital in protest. In spite of *el indulto,* tension between military factions continued to increase. In December 1990, Menem was faced with a new coup attempt organized by many of the same officers, known as *carapintadas,* who had earlier revolted against Alfonsín. However, Menem retained the loyalty of the bulk of the armed forces and crushed the uprising. Several weeks later, he pardoned the remaining 12 officers who were serving sentences for human rights violations. A civilian court tried and convicted the leaders of the *carapintadas* uprising in 1991. Menem thus gave the impression of being tougher on the military than Alfonsín. Indeed, some scholars noted that Menem used "presidential

pardons in exchange for military subordination" (Roniger and Sznajder 1999, 77).

The presidential pardons had a negative impact on people's faith in the fragile democratic institutions. Many Argentines who had felt betrayed by Alfonsín's wavering were even more disappointed with Menem. Nearly 80 percent of those polled opposed the pardons. According to Carlos Nino, a former legal adviser to Alfonsín, Menem's actions "clearly damaged the rule of law" (1996, 104). The impact on the courts was particularly negative. The judiciary, which had been praised for its innovation and hard work in convicting the military of human rights violations during the Alfonsín government, saw its popularity plummet again (Helmke 2005, 87).

After these executive moves, all legal criminal cases against the military were considered a closed issue. The higher-ranking officers had been granted impunity through pardons. The federal courts could not continue the prosecution of lower-level officers because of the Ley de Obediencia Debida. This meant that the executive had effectively tied the judges' hands. However, there was one type of crime that was exempted from both the Ley de Punto Final and the Ley de Obediencia Debida: crimes against humanity *(crimenes de lesa humanidad)*. The kidnapping of children falls into this category.[30] This particular issue would be brought up again years later, after a long period of inactivity in the human rights field.

The only human rights organization that continued to actively pursue legal redress through the judicial system was the Grandmothers of the Plaza de Mayo. Because the full stop and due obedience laws explicitly did not cover crimes against humanity, "the kidnapping of children was always under investigation. . . . There were always open cases."[31] Responsibility was investigated at two levels: who kidnapped the child (direct responsibility) and who adopted the child (indirect responsibility). However, there was relatively little progress in these court cases. According to one of the principal judges in child-kidnapping cases, there were "some convictions," though he did not know exactly how many.[32] Most of the cases lay dormant in the courts for years. Whether this was because judges failed to gather the necessary evidence or because they were not particularly interested in solving the cases is hard to say. What is clear is that almost ten years after passage of the two amnesty laws and six years after Menem had pardoned the generals, there was a marked change both in the level of public interest in kidnapping cases and in judges' attitudes toward these cases.

## Cracks in the Wall of Silence: Military Confessions

In the mid-1990s, events took a new turn with the unexpected confessions of various military personnel in three Southern Cone countries,

acknowledging their participation in the torture, killing, and disappearance of thousands of people. Captain Adolfo Francisco Scilingo, an Argentine retired navy officer, was the first to go public. Speaking to the media in Buenos Aires in 1995, Scilingo confessed that he had personally been involved in the drugging and dumping of hundreds of people from helicopters into the ocean in 1976–77. Apparently tormented by his participation in these acts, Scilingo stated that "unless we [the military] tell the truth regarding the disappeared, no peace will be possible." He further admitted that "we are to blame for the mystery, since there remain the [9,000] disappeared, of whom 4,000 [disappeared] from the ESMA . . . I am proud of having participated in the war against subversion and on the other hand I keep hiding the truth."[33] This unprecedented revelation caused uproar and disgust among Argentines.[34]

The military was no longer impermeable. Possibly encouraged by Scilingo's confessions, the chief of staff of the Argentine army, Lieutenant-General Martín Balza, publicly acknowledged and apologized for the army's involvement in killings and disappearances.[35] He declared that the Argentine military forces henceforth should act "within the strict limits of constitutionality and morality" (Roniger and Sznajder 1999, 116). In May 1995, Julio Simón, a policeman known as "El Turco Julián," admitted active participation in kidnappings and torture and declared, "I regret nothing" (CELS 1995, 131). A year later, navy officer Alfredo Astiz proudly acknowledged involvement in the same crimes, also defending the military's conduct. By 1998, eight military members had given accounts of their involvement in killings and disappearances.[36]

President Menem and some of the navy commanding officers tried to depict Scilingo as a petty criminal, and Admiral Massera, who had been convicted in the 1985 trial, tried to counteract Scilingo's and Balza's confessions by declaring that no crimes had been committed and that no one was killed illegally. But it was too late. The confessions triggered a vigorous new public debate on the human rights issue (CELS 1996). The families of the victims in Argentina now knew for a fact what they had suspected all along: that the military had systematically planned and executed the kidnapping and possible murder of thousands of people. Likewise, Argentines who had supported or sympathized with the military regime could no longer pretend that they did not know what it had done.

The Argentine military confessions had direct spillover effects in neighboring countries, as will be discussed in subsequent chapters. Inside Argentina, Scilingo's confession galvanized the human rights community into renewed action after its period of quiescence following Menem's sweeping pardons.[37] The impact of Scilingo's announcement was heightened by its timing, just before the twentieth anniversary of the coup. Human rights NGOs marked the date with rallies, conferences, and other

activities (CELS 1996). Encouraged by the newly invigorated human rights movement, survivors and their families—frequently with legal backing from the human rights organizations—filed a number of new cases of human rights violations with the courts. The confessions also pointed to the internal split within the military apparatus over guilt for past crimes—a weakness the courts picked up on.

## The Onset of Post-transitional Justice, 1996–2001

Years after Menem thought he had closed the door on retributive justice by pardoning the generals, it was once again firmly on the political and judicial agenda. Two groups of cases began coming to court: the *juicios por la verdad,* or truth trials, demanding the truth about the fate of the disappeared, and the *juicios por sustracción de menores,* centered on the kidnapping of newborn children of the disappeared, a crime informally referred to as *robo de bebés*—baby theft.

These cases dealt with the two worst forms of human rights violations that had been left unresolved after the return to democratic rule. The *juicios por la verdad* were considered purely administrative cases, whereas those concerning baby theft were criminal cases. Though the two groups of cases were of different judicial character, they had several elements in common. First, all were facilitated by innovative interpretation of laws, as lawyers and judges used loopholes in national legislation to raise new cases. Second, all of the cases fuelled civil-military tensions. Third, they resulted in court appeals and a series of new legal disputes in which the Supreme Court had to intervene, leading to some unexpected outcomes. Since these court cases started under the last Menem government and continued under the government of President Fernando de la Rúa, they offer an excellent opportunity to examine changes in judicial-executive relations and the factors explaining changes in judicial action in human right matters.[38]

### The Argentine Judicial System

The Argentine judicial system, unlike Chile's and Uruguay's, follows the principle of federalism and is divided into provincial and federal courts.[39] Where a court case is run depends on what kind of offense is committed and who is party to the crime (in criminal cases only) or who is party to the case (in civil lawsuits). Matters involving the federal government or any of its agencies—including the military—are usually handled by the federal courts.[40]

The provincial system includes courts at three levels. At the lowest level are first instance courts (*juzgados de primera instancia*) and justices of the peace (*juzgados de paz* or *alcades*), which try only minor

offences. Each of the 24 provinces, including Buenos Aires, has its own provincial appellate court (*cámara de apelaciones*) and its own superior court (*tribunal superior de justicia*). The highest provincial court in the capital is called the Suprema Corte de Justicia de la Provincia de Buenos Aires.

Courts at the federal level also follow the three-tier system. At the lowest level are the federal district courts of first instance (*juzgados nacionales de primera instancia*), for matters that are to be tried at the federal level. The federal appellate courts (*cámaras nacionales de apelaciones* or *cámaras federales de apelaciones*) act as courts of appeal for the lower courts on the federal level. There are nine appellate courts at the federal level. As Buenos Aires City's federal judiciary is fairly large, there are different appellate courts, depending on the issue. The Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal (Buenos Aires Federal Appeals Court) takes care of criminal cases. It has two chambers. The Cámara Nacional de Apelaciones en lo Civil y Comercial Federal, divided in three chambers, handles civil and trade affairs, while the Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal is responsible for administrative affairs.[41] The appellate courts that have jurisdiction beyond Buenos Aires City are the Cámara Federal de Apelaciones de San Juan, the Cámara Federal de Apelaciones de La Plata, and so on. The appellate courts in all jurisdictions are usually divided in units (chambers) of three judges, who receive the cases by drawing lots.

The federal criminal justice courts are called *cámaras nacionales en lo criminal y correccional*. They are responsible for dealing with criminal cases at the appellate level and are equivalent to circuit courts in the United States. The federal Supreme Court, or Corte Suprema de Justicia, is the highest court in the nation; its jurisdiction includes all provinces and the federal capital. Since there is no constitutional court (unlike in Chile), the Supreme Court has the last word in all cases that are appealed.

The human rights cases against military officials were only advanced through the federal courts system and normally started in the lower courts of appeal. This means that the role of the "investigating judges" was very important in the years following the transition. Under the old procedure, in accordance with the civil law system, the judge played both the investigative and the deciding role, in both the provincial and federal courts. "Investigating judges" were responsible for the *instrucción*, or pretrial investigation. The investigating judge was in charge of gathering information (usually from the police, who were responsible for the initial investigation) and building the case against the defendant. The defense or prosecutors could add information approved by the judge. Once the investigation was completed, the same judge would reexamine the information in the case he or she had built and arrive at a final decision in the case (Brinks 2008, 111).

The criminal justice reform of 1992, which introduced oral hearings, changed the court proceedings in criminal cases.[42] A division of labor was introduced between the prosecutor and the judge, and responsibility for the initial investigation was transferred from the police to the prosecutor.[43] The prosecutor can now formally receive complaints and build a case against the defendant. The prosecutor must then ask a *primera instancia* judge (district judge) to issue an indictment. Conversely, the judge, who can also carry out investigation, needs a prosecutor to accuse before the judge can issue the indictment. This process takes place within the *juzgado de instrucción* (Brinks 2008, 112). If it is determined that the case fulfills the requirements for proper legal standards and if the investigating judge finds enough evidence to raise an accusation, the investigation is closed. The case is then transferred to the trial court, composed of three judges, who are in charge of the oral hearing stage.[44] The trial phase then begins before a three-member trial court (*cámara federal*).[45] These *cámaras federales* played a central role in initiating post-transitional justice.

Constitutionality issues are decided by the federal appellate courts (*cámaras federales*). If there is any dispute over jurisdiction, the case may be appealed to one of the specialized courts of the Cámara Nacional de Casación en lo Criminal y Correccional de la Capital Federal (National Criminal Cassation Chamber). This judicial body was established in 1992 in connection with the criminal justice reform; it is not directly connected to the Supreme Court or to the federal courts. Rather, it is a special court of appeals restricted to the interpretation of law, not to gathering evidence. The National Criminal Cassation Chamber is divided into four specialized chambers (*salas*) with a total of 13 judges, all of whom enjoy the same status as appellate court judges. The fourth chamber specializes in cases of military justice.[46] At the beginning of the post-transitional justice period in 1996, the new division of labor and competence between the different courts that was established by the 1992 reforms had not yet been properly worked out. Thus, repeated appeals were made to the National Criminal Cassation Chamber to interpret the law.

## Truth Revisited: *Juicios por la verdad*

The first court cases involving a large number of retired and active military personnel in Argentina concerned the demand for truth about the fate of the disappeared. The right to truth is established in Argentine national law as well as in international law, framed as an obligation of the state to investigate, as in the landmark *Velásquez Rodríguez* (1988) ruling of the Inter-American Court of Human Rights (CELS 1995; Roht-Arriaza 2005, 101).[47]

Ever since the onset of military rule in 1976, the Madres de Plaza de Mayo (Mothers of the Plaza de Mayo) had been demanding the truth about the fate of their children and the other disappeared. The Mothers were later joined by other human rights organizations including the Grandmothers of the Plaza de Mayo, the Families of the Detained-Disappeared (Familiares de Desaparecidos y Detenidos por Razones Políticos, or Familiares), and HIJOS, an organization of children of the disappeared. They worked together on many cases, frequently filing common petitions. Although thousands of claims were filed during the dictatorship period, judges had been reluctant to look into these matters. There was a burst of judicial activity right after the transition, but the amnesty laws and Menem's pardons effectively halted all investigation into the cases of the disappeared.

After Scilingo's riveting declarations, the Center for Legal and Social Studies (Centro de Estudios Legales y Sociales, CELS), a nongovernmental organization, launched the first of a new wave of cases. The cases of Emilio Mignone and Carmen Aguiar de Lapacó were presented to the Buenos Aires Federal Appeals Court in April and May 1995, respectively. Mignone and Lapacó both had young daughters who had disappeared early in the dictatorship era. Referring to decisions of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, CELS argued that even though the amnesty laws precluded prosecution for gross human rights violations, the victims' relatives and Argentine society had a right to know the truth. The Argentine state therefore had a duty to investigate disappearances and report the truth to victims' families and the society. This was the first time the existence of a "right to truth" under international law had been argued before Argentine courts. The Buenos Aires Federal Appeals Court in a 3-2 ruling affirmed the right to truth in its decision in the *Mignone* case on April 20, 1995 (Mallinder 2009a, 96–98).

The other case, *Lapacó,* went through several rounds of appeal. The Buenos Aires Federal Appeals Court affirmed the right to truth and the right to mourn the dead in 1997 and initially ordered the state to carry out more serious investigations. However, the Court later reversed course after the ministry denied that it had any information in the case, and it refused to order other agencies to provide the necessary information (Roht-Arriaza 2005, 101).[48] Upon appeal, the Supreme Court in 1998 found the case inadmissible and denied Lapacó's appeal by a 5-4 vote.[49] However, the Court backtracked in another similar case and acknowledged the right to *habeas data,* or access to information. Having exhausted the domestic route of appeal, Lapacó, with the support of several Argentine NGOs, next took the case to the Inter-American Commission on Human Rights (IACHR). This brought international pressure on the Argentine government, and in 1999 the IACHR brokered

a friendly settlement between the Argentine government and the petitioners. The state acknowledged the right to truth and its obligation to adopt measures to remedy the alleged violations.[50]

The truth trials were well under way when a human rights lawyer, Dr. Alberto Pedronsini, presented a new legal complaint on behalf of the Familiares to the Buenos Aires Federal Appeals Court in 1996. Encouraged by the Court's decision upholding the right to truth in Lapacó, other lawyers followed suit, presenting cases to other federal appellate courts in different parts of the country. The federal court judges again invoked the right to truth as a principle derived from the American Convention on Human Rights (also known as the Pacto de San José de Costa Rica), which was incorporated into the Argentine Constitution in 1994 in connection with the constitutional reforms. The first point of contradiction was the constitutionality of the federal courts' ruling that the families of the disappeared have the right to know the truth about the disappeared.

These cases only dealt with establishing the facts of what happened—that is, the fate of the disappeared and the location of the bodies. Consequently, the *juicios por la verdad* carried out in federal appellate courts all over Argentina were considered purely administrative cases. Nobody could be convicted of a crime. Even so, many of the human rights organizations and their lawyers hoped that once the truth was revealed, it would lead to prosecution of the military later.[51] Though their "criminal" content had almost disappeared, the truth cases were taken on by federal criminal judges. Because disappearance had been classified as a continuing crime as long as the body is not found, these cases never lost jurisdiction in the criminal courts.

By July 2000, the federal appellate courts (*cámaras federales*) of Buenos Aires, La Plata, Bahía Blanca, and Córdoba had issued rulings confirming that the families of the disappeared and society at large had a right to know the facts about the fate of the disappeared. In order to arrive at this common conclusion, each of the four federal courts had chosen to follow its own strategy in the truth trials, with mixed results.[52] The Cámara Federal de Buenos Aires prosecuted General Massera of the second junta, who had previously been pardoned by Menem. When the military personnel who were asked to testify refused to give information, the Buenos Aires federal court instead started using military registers and directly asked military personnel in order to get the information they needed. The court finally managed to get enough information to confirm the fate of certain disappeared persons. This so-called *habeas data* seems to have functioned well in the Buenos Aires federal court.

The Cámara Federal de Bahía Blanca, by contrast, followed a more aggressive strategy in mid-1999. It continued to call lower-ranking military officers as witnesses, and the military kept refusing to give

information. Consequently, the Bahía Blanca court, invoking the military code of justice (*código militar*), started detaining officers for shorter periods for failure to comply with court orders. In two cases the court gave them prison sentences until they decided to talk. The sentences were appealed and were overturned by the National Criminal Cassation Chamber, after which the detained officers were freed.

The Cámara Federal de Córdoba summoned military personnel by invoking yet another article of criminal law (*artículo procesal*), whereby the court may detain a person for up to 48 hours. The military argued that detention was a criminal sanction and that this could not be permitted in administrative cases such as the *juicios por la verdad*. In addition to causing quite a stir within military ranks, the federal judges' quests for hard facts about the fate of the disappeared also gave rise to several legal disputes.

It was not clear where this new type of case belonged in the reformed Argentine judicial system. Judges were confused as to what law to apply and how to apply it. The main legal disputes had to do with jurisdiction. Did the truth cases belong under civilian jurisdiction, in the specialized court called the National Criminal Cassation Chamber, or in a military court? The main protagonists in the *juicios por la verdad* deeply disagreed on this point.

The human rights organizations and their lawyers wanted the truth trials to remain under civilian jurisdiction in the federal criminal courts. By contrast, the detained officers and their lawyers pushed to have the cases transferred to the federal military courts. They tried several routes of appeal. First, they tried to have the cases transferred to the National Criminal Cassation Chamber, a special appellate court restricted to the interpretation of law, but this was not successful.[53] The Cámara reportedly had no interest in taking on these cases, because it would, according to one informant, be "a monstrous amount of work to investigate the right to the truth."[54] Nobody, including the three judges on this specialized court, thought that the court could handle the administrative burden involved in investigating the disappearance of thousands of people. But this was ultimately a legal issue: the Supreme Court was therefore called upon to clarify jurisdiction and ruled in favor of the federal court judges, who had argued that the National Criminal Cassation Chamber had no jurisdiction in the case. This was the first time such a dispute had arisen since the latter body was created with the criminal justice reform in 1992. The areas of responsibility for each institution had not been defined clearly at that time, and the *juicios por la verdad* thus became test cases for the competence areas of the various courts.

The military then tried another route of appeal, namely, to have the cases transferred to the Consejo Superior de las Fuerzas Armadas (CONSUFA), a military administrative and disciplinary body. This

attempt did not succeed, as there was no legal basis for such a transfer. Probably foreseeing this outcome, the chief of the armed forces in July 2000 suggested removing the cases from the judicial apparatus altogether. He proposed that the government instead establish a *mesa de diálogo,* or roundtable, based on the Chilean model (see Chapter 4), where representatives of the military and human rights organizations would sit down together and discuss the issue of the disappeared. Ideally, the military would give information about the disappeared in exchange for guarantees that the information would not be used to hold them legally responsible. The human rights community flatly refused.[55] Many legal scholars agreed that the military was not likely to give up any more information than they had provided already. As one lawyer put it in the heat of the discussions, "I am convinced that the Argentine military will die without giving a single piece of information. None, because the Argentine military have a profile very similar to that of Pinochet. They would never admit that they have made a mistake."[56]

The government of President de la Rúa wanted investigations into the disappearances to continue, but it also wanted the cases to be transferred from the federal criminal courts to the federal civilian courts. This would transform all the *juicios por la verdad* into civilian cases so that no more military personnel would be detained. The government, quite possibly with good reason, feared that the human rights organizations and their lawyers would continue to press for the detention of high-ranking military officers. The government's reluctance to go this route was probably not because they feared military intervention. According to one informant, "the government is not afraid of the military, nor are they allied with the military."[57] Rather, it was likely political: de la Rúa was concerned with public opinion yet leaned on the far right within the Radical Party, according to one analysis.[58] Continuing investigation while precluding detention would placate both sides, at least to an extent. Moreover, de la Rúa was not popular with the courts, and his rather weak government was not interested in opening another front of possible confrontation. Nevertheless, further contradictions between the judiciary and the government arose in the next set of court cases.

## New Demands for Justice: Juicios por sustracción de menores

The second set of human rights cases making their way through the courts were the baby-theft cases. As one journalist put it, "the missing children are the final, and perhaps the most testing, moral dilemma of the junta years."[59]

Given that the abductions (and subsequent illegal adoptions) of children were defined as crimes not covered by the final stop and due obedience laws, the Grandmothers of Plaza de Mayo had

continued searching for their disappeared grandchildren throughout the post-transition period. Of the approximately 400 babies they believed had been kidnapped with their mothers or born in captivity, the Grandmothers thought that as many as 230 might still be alive in the mid-1990s.[60] The government had supported their efforts by establishing the National Genetic Data Bank and the National Commission for the Right to an Identity (CONADI) to help locate the children and clarify their identifies (Mallinder 2009a, 104).[61] A number of individual cases had also been brought to court over the years. Although some had been solved, many had stalled for ten years or more because of missing information.[62]

In 1995, both angered and encouraged by Scilingo's confessions, human rights activists renewed their efforts to bring baby-theft cases to court. While prior efforts primarily had sought the truth about the location and identification of these children, some of the new cases aimed at retributive justice and resulted in the conviction and imprisonment of military personnel.

The first court cases were judicial attempts to establish individual guilt, both of the military agents who had kidnapped the children and of the couples who had adopted them illegally and concealed their identities. In 1997 first instance investigating judge Roberto Marquevich, based on a complaint from 1987 in the Bianco case, charged a military doctor and his wife with child kidnapping, falsification of documents, and suppression of the identity of a minor.[63] The same judge on June 9, 1998, ordered the detention of Videla (military president from 1976 to 1979) on charges related to the alleged abduction of children during his regime (CELS 1998, 88–102). This case was transferred to another first instance federal investigating judge, Dr. Adolfo Bagnasco. A few months later, on November 10, 1998, Judge Bagnasco ordered Emilio Massera (junta member in 1976) to give evidence about the alleged kidnapping of 15 babies born to mothers held in the ESMA detention center.[64]

On January 22, 1999, Bagnasco brought formal charges against seven other former senior officers for the disappearance of 194 babies.[65] This constituted the start of an emblematic court case that caused commotion in the Argentine judicial system. The initial charges were based on evidence brought to court at the end of 1996 by six representatives of the Grandmothers, claiming that the kidnapping of children of the disappeared was a systematic state plan.[66] Initially, Bagnasco had as many as 30 former military officers under investigation, and more were added to his list as the investigations proceeded.[67] Dr. Alberto Pedroncini, the seasoned Argentine human rights lawyer who had represented the Familiares in one of the major truth cases, represented the Grandmothers in this case too.[68] Unlike the *juicios por la verdad,* however, this *juicio por sustracción de menores* was a criminal case. The prosecution argued that since the kidnapping of children was classified as a crime against humanity,

both international law and rulings by the Inter-American Court rendered previous amnesties inapplicable.

Like the truth cases, this particular baby-theft case provoked several technical and legal disputes regarding both substance and jurisdiction. First, the two amnesty laws passed by the Alfonsín government precluded investigation into the repressive actions of the dictatorship.[69] Congress had repealed these two laws in March 1998, on the initiative of the Radicals and with extensive public support.[70] Repealing the amnesty laws "had the effect of removing the laws from the statute books, but it did not annul them, and so was a symbolic act without retroactive effect. This meant that cases where the laws had already been applied could not be reopened, which included most of the worst human rights violations" (Mallinder 2009b, 112). The human rights organizations would have preferred to have the laws annulled—that is, declared null and void—but there was insufficient political backing for this at the time (CELS 1998). Yet, the repeal probably signaled to the judges that the laws no longer enjoyed much public or political support.[71] To bypass them, the lawyers turned to a new argument: because the bodies of the disappeared had never been found, the disappearances were a "continuing crime." As a result, disappearances were not protected by the two amnesty laws, which gave prosecutorial immunity for crimes committed only between 1976 and 1993.

Second, because the generals had been tried for *direct* responsibility for the abduction of a small number of children in the 1985 trials (and had later been pardoned by Menem), technically they could not be tried again for the same crime. When Judge Marquevich ordered the detention of Videla, public defender Rita Moreno, openly backed by President Menem, argued that this constituted double jeopardy and that the Videla case should be turned over to the military authorities for resolution. The prosecutors argued successfully that the military had never been formally charged with the crime of abduction and illegal adoption of children as a *systematic plan,* and the proceedings continued.[72] Judge Bagnasco too invoked the argument of child kidnapping as a systematic plan when he started charging military officials.[73]

In other words, the lawyers and judges who worked on the case used an innovative approach to charge the military with *indirect* responsibility for the same crimes for which they had already been convicted. They were charged with planning the kidnapping, not with the actual execution of the crime, for which they had been sentenced before. In addition, the ex-generals were charged with kidnapping not in their capacity as military officers but as state officials. Together, these two tactics provided an unexpected opening for legal prosecution.

Once it became clear to the military that they could be put on trial, they reacted. Not with force, as in the past, but with legal arguments. The

highest military council, the Consejo Superior de las Fuerzas Armadas (CONSUFA), tried to pressure Judge Bagnasco to have the case transferred to military courts, but Bagnasco insisted that it was a criminal case and that there was no reason to transfer it to the military justice system.[74] CONSUFA then asked the Supreme Court to declare it competent to take the case. This caused a stir in Argentine society as it was rumored in the media that the military, through CONSUFA, had threatened the Supreme Court in an effort to gain jurisdiction in the case. After a confusing media battle of conflicting accounts, it turned out the Supreme Court had followed normal procedures and hence had not acted in response to explicit military pressure.[75] As a further proof of this, the Supreme Court ruled on August 2, 2000, that the case would remain in civilian courts in the hands of Judge Bagnasco.[76] At the time, the case was about to enter the oral hearing stage. Five military personnel had been prosecuted in the lower courts (*primera instancia*). The jurisdictional right to prosecution had been confirmed by the federal courts (*cámaras federales*).

By 2001, judges had become accustomed to exploring the exceptions to the amnesty laws: prosecuting military officials for child kidnapping, prosecuting civilians who were not part of the security forces, and investigating human rights violations that had taken place before the military coup. In short, "the exceptions had come to undermine the rule" (Roht-Arriaza 2005, 113). These new legal arguments and interpretations—along with the absurdity of being able to charge the military with kidnapping children but not with kidnapping (and presumably killing) their disappeared parents—inspired Judge Gabriel Cavallo to declare the Ley de Punto Final and Ley de Obediencia Debida unconstitutional and null and void.

Cavallo's ruling came in the Julio Simón case in March 2001, in which "El Turco Julián," among others, was sentenced to prison.[77] Judge Cavallo relied on both Argentine and international law regarding disappearance as a crime against humanity, and he drew extensively on national as well as international jurisprudence in crafting his 150-page decision. It was a landmark ruling in cases regarding the disappeared as well as those concerning the constitutional status of international law.[78] The Buenos Aires Federal Appeals Court upheld Cavallo's ruling on November 9, 2001.[79] These court rulings constituted an important step in the long journey to have the amnesty laws abolished once and for all. That was to happen under the next government, when Congress declared the two amnesty laws null and void in 2003, followed by the final Supreme Court ruling in the Julio Simón case in June 2005. The Supreme Court in *Simón* confirmed the Buenos Aires Federal Appeals Court's ruling and sentenced El Turco Julián to 25 years in prison, and it declared the Ley de Obediencia Debida and Ley de Punto Final unconstitutional.[80] This meant that cases that had been closed by the amnesty laws could now be reopened.

To sum up, the *juicios por la verdad* and the *juicio para sustracción de menores* sparked a series of legal disputes over the use and interpretation of international law as well as over the competence and jurisdiction of old and new judicial bodies (those created by the 1992 criminal justice reform and the 1994 constitutional reform). There was a clear reinvigoration of the human rights debate that many had feared—or hoped—was dead when President Menem pardoned the generals in 1990. By the end of the millennium, first and second instance judges had taken a renewed interest in cases of human rights violations stemming from the dictatorship period. Ten years after Menem's pardons, more military men than ever before were facing prosecution in Argentine courts. Post-transitional justice was under way.

The Supreme Court had been notorious for systematically siding with the executive in all economic and political cases of any importance, and it had been generally unfriendly to human rights. Nevertheless, toward the end of Menem's second government and during de la Rúa's presidency, the Court started, however reluctantly, to uphold innovative federal court rulings in important human rights cases. Most importantly, the Supreme Court upheld the right to truth and supported the new definition of disappearance as a continuing crime, which permitted investigating the cases of the disappeared. The central question of importance to this book is, why did Argentine judges decide to take on these cases and push for prosecution?

## Explaining the Onset of Post-transitional Justice

Several questions arise in connection with these legal-judicial developments. First, why did "investigating" judges Marquevich and Bagnasco decide to pursue the cases of the kidnapped children? They could have dismissed the cases by arguing, as many judges had, that these cases were a closed chapter because the military had already been charged with and served sentences for similar crimes. Instead, these judges, later followed by many other lower court judges, sought loopholes in order to bypass the amnesty laws. Second, what motivated some of the federal courts to support the *juicios por la verdad?* And, finally, why did the Supreme Court feel obliged to invoke international legal principles when upholding the rulings of lower courts? In short, what accounts for the apparent change in behavior at all levels in the Argentine judicial system at the turn of the millennium?

### The Three Preconditions for Trials

I have proposed that trials are more likely to take place during periods when the judiciary is more independent, irrespective of the policy position of the executive. Moreover, Chapter 2 suggested three necessary, though

not sufficient, preconditions for trials: the absence of credible military threat, a sustained demand on the part of civil society for truth and justice, and a sufficient legal basis for prosecution. Let us look at the three preconditions in the Argentine context.

*Absence of Military Threat*

After staging repeated but unsuccessful revolts under the Alfonsín and Menem governments in response to processes unfolding in the courts, the Argentine military returned to the barracks. By 2000, few people in Argentina thought there was any likelihood of a new coup.[81] When faced with renewed prospects of prosecution, the military reacted with legal dodges rather than with tanks. As argued by Acuña (2006, 222), because of political and judicial developments regarding human rights, "in the long run the military have lost the incentive to challenge constitutional governments." The perceived reduction of the military threat had an impact on other actors in the human rights arena, who gradually acquired more political space in which to act without fear of provoking instability or a new coup.

*Demand for Justice*

As in many other Latin American countries, the network of human rights organizations in Argentina has played a crucial role in securing justice for past violations. Compared with others, Argentina's human rights movement is particularly well organized and endowed with legal expertise. Human rights groups, working with victims and their relatives, organized early in response to military repression and continued to press claims for truth and justice throughout the junta period and afterward. CELS and the Permanent Assembly for Human Rights (Asamblea Permanente por los Derechos Humanos, APDH), among other groups, worked tirelessly to receive testimonies and provide legal services to victims and their families. The Mothers staged weekly marches on the Plaza de Mayo.

As noted, there was a period of low human rights activity after passage of the final stop and due obedience laws. But after the military confessions of 1995–96, a series of new human rights cases stemming from the dictatorship period flooded the courts. One of the principal judges in the *juicios por la verdad,* Dr. Horacio Cattani, affirmed that continued pressure from the human rights community was "essential" in bringing these cases forward.[82] Many legal scholars and human rights activists share this view.

An important factor in this renewed activity was the close connection between Argentine human rights organizations and transnational networks (Sikkink 1993, 2005, 2008). Argentine NGO representatives traveled to Europe to testify in European courts trying to process

Argentine citizens for dirty war crimes, and they used the Inter-American Court of Human Rights when domestic legal routes appeared blocked. This meant that the Argentine courts and government felt pressure for justice from both inside and outside the country.

However, in spite of the sustained pressure from the human rights sector, the second wave of court cases took off only after the mid-1990s. Why? Part of the answer rests with the *possibilities* for court action, which in turn are closely connected to the presence or absence of legal obstacles to prosecution.

*Legal Basis for Judicial Action*

The basis for legal prosecution in Argentina has changed radically over time. For the period examined, the legal framework was first broadened, then narrowed, then broadened again. Very briefly, four sets of laws together have determined what kinds of human rights crimes from the past may be pursued in domestic courts and what kinds of offenders can be prosecuted: national criminal laws and procedures, the amnesty laws, international laws (depending on their status in Argentina), and national laws on extradition.

Right after the transition, prospects for large-scale prosecution of the military were high, with the military's self-amnesty law abolished by the Alfonsín government. However, the two amnesty laws passed later severely restricted the scope for legal action. Congressional repeal of the laws in 1998 sent a political signal but had little practical effect.[83] Menem's wide-reaching presidential pardons and Duhalde's presidential pardons in 2003 constituted other roadblocks to progress in retributive justice.[84] The 1994 constitutional reforms, by contrast, broadened the scope for judicial action by granting constitutional status to international human rights law.

Finally, judges were constrained by legislation on extradition passed under the Menem government and upheld by the government of de la Rúa. A decree issued by Menem denied judicial assistance to those countries calling for extradition on the grounds that these prosecutions violated Argentina's sovereignty. De la Rúa formalized the government's position on extradition shortly before his resignation by signing Decree No. 1581. The decree established a general refusal to petitions of foreign courts, arguing that local courts should try crimes committed in Argentina. This made cooperation with governments in both Latin America and Europe more difficult.

The two preconditions of a reduction in the perception of military threat and pressure from individuals and NGOs to take up human rights cases from the past seem to have been met. The important points with respect to legislation are to what degree judges have perceived these laws as constraints and to what extent they have tried to get around them

through innovative interpretation of the law. Shifting attention to the supply side, what has made Argentine judges more receptive to demands for truth and justice? Have they followed official human rights policies, or have judges displayed more independent action in these politically volatile matters?

## Executive Preference or Judicial Politics

Referring to the first democratic government after the transition, Alejandro Garro noted that "never before in Argentine recent history was there a government so ideologically committed to the cause of human rights" (1993, 22). It is possible that the proactive role of lower court judges in prosecutions of the military *cúpula* early in the Alfonsín presidency may simply have reflected the dominant ideology of a human rights–friendly government. Yet, once Alfonsín reneged on his initial human rights policy and attempted to limit the scope of trials, the judicial activism displayed by lower court judges in trying to corner military officers was no longer in line with executive policies. Judges, especially in the federal courts, acted independently and courageously and managed to restore the judiciary's tarnished public image to some extent (Acuña and Smulovitz 2001; Helmke 2005). The Supreme Court, however, remained passive in human rights issues throughout the Alfonsín period. The explanation is partly structural: the human rights cases started at the appellate level in the federal courts system and had not reached appeal to the Supreme Court by the end of Alfonsín's term.

Turning to the first Menem government, judicial inaction in human rights cases may be attributed to a combination of factors: the existence of the two amnesty laws, a political climate decidedly in favor of closing the past and looking to the future, a Menem-friendly judiciary, and an explicitly Menem-loyal Supreme Court. In addition to packing the Supreme Court by expanding the number of judges, Menem also took steps to gain control over judges further down in the system. He created a new appellate court and doubled the number of judges in the capital province. All new judgeships required senatorial approval by a simple majority, but since the Peronists controlled the Senate, Menem did not encounter problems. Although there are no detailed studies of these appointments, it is fair to assume that Menem sought control over the main courts. Rather than make the courts more efficient and independent, these reforms contributed to increased executive control over the courts.

As the top of the judicial hierarchy, the Supreme Court was staffed with Menem's "business associates, friends or members of his political party, [none of whom] had particularly distinguished legal careers" (Roht-Arriaza 2005, 98). Helmke notes that after Menem's reelection, "the

image of the Court went from bad to worse." Menem's last appointment to the Court, Adolfo Vázquez, was seen as a "third-rate jurist" and "was denounced as a particularly egregious example of the administration's lack of respect for judicial independence" (Helmke 2005, 89). Facing widespread criticism, corruption charges, rock-bottom legitimacy ratings, and multiple threats of impeachment, judges at all levels arguably lacked independence.[85] It is therefore interesting that courts toward the end of the second Menem government started ruling against the president's wishes in human rights matters, as reflected in the truth trials and the baby-theft cases. Even the Menem-packed Supreme Court turned out to be a disloyal ally.

The trend continued under de la Rúa. The new president maintained Menem's policy of seeking closure on human rights matters, as demonstrated in the president's refusal to hear extradition cases. Unlike his predecessors, though, de la Rúa refrained from packing the Supreme Court with loyal supporters. Since de la Rúa inherited the Menem-appointed Supreme Court and the other Menem appointees, federal court judges pushing human rights cases forward and incriminating large numbers of military officials were hardly trying to please the executive. The courts seemed to have found their own dynamic in human rights matters, irrespective of executive preference and in spite of explicit executive effort to control the courts.

Helmke, in her detailed analysis of Argentine judges across time, attributes the increasing tendency to issue rulings against the government as strategic defection, that is, an attempt to secure future tenure and power in a volatile institutional setting by currying favor with the incoming (rather than the sitting) government. At the core of her argument is the idea that "judges rule against the rulers not because judges enjoy independence in a conventional sense but because they fear being punished by the government's successor" (Helmke 2005, 20). In my view this offers a simplistic view of judicial behavior, as judges surely have concerns beyond preserving their posts, power, and privileges.[86] Besides, in the Argentine context, strategic defection has not protected judges from being sacked by the next president once a change of government takes place. But Helmke has an important point that is worth pursuing here: What does "judicial independence" mean in the Argentine context? And to what extent may we attribute these observed changes in judicial behavior to changes in (formal and actual) judicial independence?

As I have argued, judicial behavior is conditioned by many institutional, legal, and individual factors at the national, regional, and international levels. Some degree of formal judicial independence is a minimal condition for the exercise of actual judicial independence, though it does not guarantee it. The underlying assumption is that once formal guarantees of judicial independence are in place, and these guarantees are

respected, then judges can freely (that is, without undue external or internal pressure) interpret and apply the law to facts and make their rulings without fear of repercussions. In the absence of judicial independence, judges are much more likely to follow official policies, particularly in controversial cases.

## The National Context

To understand changes in judicial behavior, it might be useful to first take a look at the structural conditions for judicial action. Institutions, as we know, provide both opportunities and limits in shaping behavior. The question is how. The powers and autonomy granted to the courts through constitutional guarantees are key to understanding the minimal conditions for independent judicial behavior.

### *Constitutional Guarantees of Judicial Independence*

A peculiar feature of the Argentine judicial system is the discrepancy between constitutional guarantees of judicial independence (considered relatively strong in the Latin American context) and the practical dominance of executive power. Every new president appoints his "own" court. In fact, the Argentine Supreme Court was completely replaced six times between 1946 and 1994—in spite of constitutional guarantees of life tenure for Supreme Court justices (OAS 1994). The courts of Alfonsín and Menem fit neatly into this historical picture. Only de la Rúa refrained from packing the Court when he replaced Menem in 1998, possibly because he was in power for only a few months. With this exception, Argentine Supreme Court justices have, as a general rule, been hired and fired at the whim of the executive. Life tenure on paper has thus had little practical meaning. Indeed, Supreme Court justices spent an average of only 11 years on the bench in the period 1862–1946 and a dismal five years in the period 1947–99 (Helmke 2005, 65–67). Controlling the Supreme Court has allowed the executive to secure legal support for policy making in all fields, not only with respect to past human rights violations. Because Supreme Court appointees normally reflect the dominant political ideology of the ruling party/incumbent government, it is hard to distinguish judicial preferences from political preferences. If they overlap, can one then speak of judicial dependence when a court rules in line with government preferences?

Executive control of the judiciary has been further strengthened by the hierarchical structure of the Argentine federal court system and its appointment procedures. Prior to reforms, the Supreme Court was responsible for the appointment and discipline of lower court judges. The effects of the close ties between the executive and the Supreme Court thus

permeated the system. As a result, the Argentine judiciary was generally considered partial and lacking in autonomy.

A series of reforms in the 1990s attempted to address long-standing problems of inefficiency, corruption, unfilled vacancies, and other perceived deficiencies. Alfonsín's initial package of proposed judicial reforms was voted down. Ironically, it was Menem, who packed the Supreme Court and set out to control the judiciary at all levels, who also pushed through a series of wide-reaching judicial reforms. With the 1992 criminal justice reform, he attempted to modernize the courts by introducing oral testimony into criminal trials and increasing the number of judges to decrease backlogs.[87] The wide-reaching 1994 constitutional reforms, which included the creation of a judicial council, were certainly not motivated by human rights concerns. The catalyst was simply Menem's desire to secure presidential reelection in the Constitution. In the Pacto de Olivos, a personal pact signed by Alfonsín and Menem, a deal was made: in exchange for promising to grant the support needed to change the one six-year presidential term to two four-year terms (article 90) the year before the 1995 presidential elections, the Radicals would receive a Consejo de la Magistratura (Judicial Council) and various other changes reducing the executive's power over the Supreme Court. This included Peronist promises that three judges would leave the Court and that the Radicals could name two of the new judges. The Radicals also negotiated the inclusion in the new Constitution of an article on the constitutional status of international law (Skaar 2002).

### *Constitutional Changes Potentially Strengthening Judicial Independence*

The constitutional reforms passed by the Argentine Congress in 1994 reached into a number of different areas. Five changes affected the judicial apparatus: (a) the creation of a Consejo de la Magistratura, or Judicial Council (article 114); (b) the installation of a Jurado de Enjuiciamiento, or Disciplinary Council (article 115); (c) the declaration of the Public Ministry as an independent organ (article 120); (d) changes in nomination procedures for Supreme Court judges; and (e) the expansion of review powers (article 75, section 22).[88] The first four were intended to enhance the independence of the judiciary, but only the creation of the Judicial Council led to discussion about potential future changes in the power balance between the executive and the judiciary. The fifth change was intended to broaden the legal basis for judicial action.

Prior to the reform, all judges were named by the president with the advice and consent of a simple majority of the Senate. This produced "highly subordinate judges," as they were selected on the basis of a "triple conformity criterion": conformity to accepted jurisprudential norms, conformity to norms of professional behavior, and conformity to

norms of social behavior, emphasizing conservatism and abstention from public and political debate (Brinks 2005, 132). With the 1994 constitutional reforms, the power to appoint lower and appellate court judges was transferred to the Judicial Council, which was composed of 20 appointed representatives from Congress, the judiciary, the executive, the federal bar, and the law schools.[89] The Judicial Council was given wide-ranging powers, including active participation in the selection of federal judges (except Supreme Court judges, who continued to be appointed by the president with senatorial approval), supervision of the budget and organizational aspects of the courts, and disciplinary authority over the judiciary. In theory, at least, this would make lower court judges more independent of their superiors, increasing internal independence within the judicial system. The Center for Legal and Social Studies called the establishment of the Judicial Council "an absolute necessity," as the old system had created backlogs (CELS 1995, iii).

The initial idea behind the Judicial Council was to reduce the direct influence of the president over the judiciary. However, the effects at the end of 2001 were far less profound than expected. The Judicial Council only became operative in February 1999, illustrating the often slow implementation of judicial reform. Over the next year and a half the council successfully nominated only two new judges to the more than 70 vacancies that had accumulated since the reform took place in 1994.[90] Interviews with council members as well as other judges and lawyers suggest that the workings of the council were far from satisfactory. According to Judge Cattani, who was actively involved in designing the Judicial Council, its actual composition turned out very different from what was intended, mainly because the guidelines in the constitutional text were not clear.[91] The opposing opinions and political preferences of the council members made it difficult to reach any agreements. Judge Cattani pointed out that Argentine law frequently looks more impressive on paper than it is in practice, and the Judicial Council seems to be a prime example of this. Opinions among judges on the future effects of the council ranged from moderately optimistic to rather negative. In the opinion of Judge Maier, the council did not do much to ensure higher-quality or more independent judges, but he admitted that the council had slowed down the conquest of judicial power.[92] Judge Bagnasco predicted that the Judicial Council would reduce the efficiency of the Supreme Court, and that the Supreme Court would become more dependent, not more independent.[93]

The Jurado de Enjuiciamiento, which is in charge of disciplining national judges, except for Supreme Court judges at the federal level, has suffered a fate similar to that of the Judicial Council. The Judicial Council has a committee for discipline and accusation, which decides on when and how to discipline judges. The Jurado de Enjuiciamiento evaluates

the arguments of this committee. This work was previously undertaken by Congress, which after the reform retained these prerogatives only for the Supreme Court.[94] Because the work of the Jurado de Enjuiciamiento is tied directly to that of the Judicial Council, it too has been slow in fulfilling its new function.[95]

The new article 120 of the 1994 Constitution states that the Public Ministry is an independent organ with functional autonomy and financial self-sufficiency, but it fails to offer clear guidelines on the ministry's position in relation to the three branches of government. This tempted specialists in constitutional law to call it an extrajudicial organ. Commenting on the new ministry right after its establishment, CELS (1995, 81) cast doubt on its functional and operational autonomy, as well as its autonomy with respect to the executive. Garro (2000, 360) points out that greater independence from the executive did not necessarily mean that prosecutors would use this power to strengthen the rule of law and respect for human rights. Being understaffed and underbudgeted, the Public Ministry failed to deliver, at least during the period examined here.

Finally, the 1994 constitutional reform also changed the procedures for nomination of Supreme Court judges by increasing the simple majority of senatorial approval needed for a nomination to two-thirds of members present in the Senate (CELS 1995, 80). This makes it harder for one political party to have its cronies appointed, which means that over time, we should expect more independent and professional judges to sit on the bench. Overall, then, the Supreme Court reform substantially increased the formal powers of the courts.[96]

To sum up, the judicial reforms included in the 1994 Constitution were impressive on paper but less so in practice. By 2000, they either had not been implemented or had been implemented for only a short time. It was therefore too soon to evaluate the effects of these formal changes on the actual independence of judges.[97] According to a prominent Argentine legal scholar, the constitutional changes were an important first step in bringing about changes in the judiciary, but real reforms would require a change in the judges' way of thinking.[98] The first signs of innovative judicial reasoning in human rights questions came when judges started to apply international human rights law. The first and perhaps most important reason for this was the incorporation of international human rights treaties in the 1994 Constitution. The expansion of review powers therefore merits a separate discussion.

### *Incorporation of International Law into the 1994 Argentine Constitution*

Janet Koven Levit noted toward the end of the 1990s that "international law is as potent as nations' proclivity to obey" and "the Argentine

experiment highlights that naked constitutionalization will not enhance compliance with international law" (1998, 281–82). Though I agree in principle with the first part of this statement, I would contend that the incorporation of international human rights treaties as part of the 1994 Argentine Constitution (article 75, section 22), which has given international human rights law precedence over national law where the two differ, was the single most important event broadening the legal scope for judicial action in human rights cases.[99]

Though most international conventions were adopted and signed at the beginning of Alfonsín's government, judges had paid little heed to international human rights law. Once United Nations and Inter-American conventions and treaties became part of the Constitution, however, it became increasingly difficult for judges to ignore them, as doing so would mean not only breaking the law but also violating the Constitution.[100] As Horacio Verbitsky noted in 2001, "the human rights treaties which now have constitutional rank oblige the state to respect the protected rights, guarantee that they are respected and implemented, and adopt the necessary measures to put them into practice."[101]

Though few judgments in Argentina invoked international human rights treaties before the 1994 reform, there was at least one important precedent. In the case *Ekmekdjian, Miguel A. c/Sofovich, Gerardo and others* of July 7, 1992, the Argentine Supreme Court held that the "interpretation of the Pact should be guided by the jurisprudence of the Inter-American Court of Human Rights"—one of whose objectives is the interpretation of the Pact of San José (Estatuto, article 1).[102] In a subsequent ruling on April 7, 1995, the Court in the case *Horacio David Giroldi y otro/recurso de casación* continued the same line of reasoning when it stated explicitly that the 1994 reform had given constitutional status to the American Convention on Human Rights (Abramovich and Courtis 1997; Levit 1998).

After the 1994 constitutional reform, the primacy of international law over national law in human rights cases was first reflected in two paradigmatic cases concerning the extradition from Argentina of two former Nazis, Josef Franz Leo Schwammberger and Erich Priebke. Both had to do with the "rights of people" (*jure gentium*) (Schiffrin 1997). In the Priebke case the judges confirmed that the signing of international human rights pacts and treaties obliged the Supreme Court to consider Priebke's crimes as crimes against humanity; thus they ordered him extradited to Italy, where he was eventually tried and sentenced.[103] Importantly, "the *Priebke* case established that crimes against humanity, even those that happened long ago, were subject to prosecution" (Roht-Arriaza 2005, 100). In the Schwammberger case Judge Schiffrin found crimes against humanity to be imprescriptable under customary international law, which was directly applicable in Argentina.[104] Though both of these cases concerned

extradition requests, the legal arguments employed by the judges were later echoed in domestic judgments.

From the mid-1990s, also, Argentine judges increasingly had to pay heed to the rulings of regional human rights judicial organs. In particular, some of the early rulings issued by the Inter-American Court of Human Rights and reports from the Inter-American Commission on Human Rights had a noticeable impact on both lower instance and appellate court rulings. One important case was *Velásquez Rodríguez,* in which the Inter-American Court of Human Rights in 1988 established that all states "should prevent, investigate and punish any violation of the rights recognized by the Convention" and make repairs or compensate the victim where possible.[105] The chief reason that this case and other similar rulings could no longer be ignored was the incorporation of the American Convention on Human Rights into the Argentine Constitution in 1994. Once international treaties gained constitutional status, judges were forced to apply them, just as they have to apply all other relevant laws to any given case. With the legal precedent set by *Velásquez Rodríguez,* it became increasingly difficult for Argentine judges to turn down this type of cases because doing so would mean not only disrespecting international treaties but, more importantly, would mean failing to comply with the Argentine Constitution. For instance, it is hardly accidental that the *juicios por la verdad* started in the Argentine courts in 1995—the year after the Constitution formally incorporated the American Convention on Human Rights, which made statements on the "right to truth." Similarly, the incorporation into the Constitution of the 1990 Convention on the Rights of the Child granted constitutional status to the child's "right to identity"—which was used in the struggle to locate the disappeared children. Interestingly, prior to the 1994 constitutional reforms, the Grandmothers of the Plaza de Mayo had frequently appealed cases of child abduction to international courts when Argentine judges had given negative rulings.[106]

Several legal scholars during this early period of post-transitional justice pointed out the importance of granting constitutional superiority to international law. In the opinion of legal specialist Dr. Roberto Saba, "incorporating those treaties into the Constitution was a way of making them more seriously regarded by judges. Now you cannot reject or neglect to apply these treaties because they are part of the Constitution." According to Saba, this was "very important for human rights."[107]

Another important principle of international law, the right to truth, has been used actively by Argentine federal judges in the *juicios por la verdad*. According to one of the judges dealing with these cases, the principle had gained increased acceptance by 2000, though some federal courts continued to dismiss claims of the right to truth on the basis that these were civilian cases and did not belong in the criminal justice system. Indeed,

one federal judge confirmed that the deciding factor in moving these cases ahead was the personal willingness of individual judges to take them on.[108] Importantly, the incorporation of international law into the Constitution obliged the Supreme Court to uphold the various appellate court rulings of the right to truth in accordance with the American Convention on Human Rights. This was seen, for example, in the Lapacó case, in which three appellate court judges in Buenos Aires (Cattani, Irurzun, and Luraschi) recognized the right to truth and the obligation to respect the right to mourn in connection with disappearance cases (CELS 1995).

There is thus extensive evidence that the incorporation of international human rights law broadened the space for judicial behavior in human rights matters—a point later confirmed by a number of scholars (Mallinder 2009a; Roht-Arriaza 2005). Though a relatively small number of judges at first applied international laws actively, it became a trend. As Judge Cattani said about his own federal court, they were two [out of three] who had made a lot of progress in the field of international human rights law. However, he added, though Argentina has reformed its Constitution, and though international law has much more prudence now than it had only a few years ago, it will take time to fully internalize these new laws and norms.[109]

## The Regional Context

The incorporation of international human rights law into the Argentine Constitution reflected a regional and worldwide trend of greater concern with human rights norms and rights protection. This changing climate may also have provided judges with a new frame of reference in which to make their judicial decisions. It is therefore useful to place Argentina's constitutional reform and subsequent legal development in a larger regional context. Argentina and Chile, in particular, have always watched each other closely in human rights matters. Beginning in the mid-1990s, a remarkably similar process of legal development took place in both countries, reflected in common legal concerns regarding the regional Operación Cóndor and reactions to the arrest of Pinochet and his subsequent prosecution in Chilean courts—the so called "Pinochet effect."

### *Addressing the Legacy of Operación Cóndor*

During the 1970s and 1980s, the military regimes in Argentina, Chile, and Uruguay (as well as those in Brazil, Peru, Paraguay, and Bolivia) saw themselves as allies in a battle against communism. They organized a regional network called Operación Cóndor that carried out joint actions of repression, traded secret information and prisoners, and covered up the crimes.

Two decades later, judges in all seven countries were actively assisting each other by exchanging information and archives that could help

resolve some of the human rights cases stemming from the dictatorship period. Because many Chileans and Uruguayans disappeared in Argentina, Argentine judges received requests for information from their Chilean and Uruguayan counterparts. Several of the bodies found in Argentine mass graves turned out to be citizens from neighboring countries. Argentine judges were increasingly drawn into a larger regional effort to uncover the facts about the past.[110]

Some judges became more directly involved in these efforts than others. Judge Bagnasco was assigned the cases that fell under Operación Cóndor *por sorteo;* he did not choose to take them on. It was therefore a coincidence that two of the most high-profile human rights cases during the onset of post-transitional justice—the *juicio para sustracción de menores* (the child-kidnapping case) and Operación Cóndor—landed in the portfolio of the same investigating judge. Bagnasco's personal motivation no doubt was an important factor in the rapid progress of these two cases. Yet it is quite plausible that other judges in the same court would have done what Bagnasco did, had the cases been assigned to them instead. As Bagnasco himself put it, once somebody did something successful, everybody wanted to jump on the bandwagon.[111] It is quite possible that judges nurtured hopes of making headline news, media coverage of human rights cases being extensive in Argentina at the time. Yet external events also encouraged other judges to follow Bagnasco's legal reasoning. A central one was the arrest of Chilean ex-dictator Pinochet in London in 1998 and his return to Chile to face prosecution.

### *The "Pinochet Effect" in Argentina*

Pinochet's arrest and the ensuing legal procedures in Chile brought to the fore at least three issues that may have directly affected legal processes in Argentina. The Pinochet drama showed that state leaders and retired dictators were no longer necessarily protected by national amnesty laws and that the application of international law could have unexpected consequences. And it sent a message that touched on both national sovereignty and judicial pride: if Chile could use its national courts to prosecute its former junta leader and its own military, so could Argentina.

Pinochet was arrested in London in response to an extradition request by Spanish judge Baltasar Garzón, signaling that international human rights law could be used to arrest perpetrators outside the country where the crime was committed. This led to increased insecurity among former repressors, many of whom feared to travel abroad because of the possibility of being arrested in another country (Weller 1999). This included notorious Argentine torturers sought by European courts.

More importantly, the legal developments in Chile after Pinochet's arrest, detailed in Chapter 4, demonstrated that amnesty laws designed to protect the military from prosecution no longer did so. Like Chilean

judges, Argentine judges increasingly invoked international human rights law in their judgments, which entailed finding loopholes in existing national amnesty laws. This meant, in practice, that some of the amnesty laws that earlier protected the military from prosecution were gradually sidelined. Both the truth trials and the baby-theft cases invoked international law and human rights treaties, such as the conventions against torture and genocide.

Argentine judges may have been inspired by their Chilean counterparts who brought Pinochet as well as dozens of other Chilean military men to court. Though this influence by example is hard to prove, it is clear that cooperation between judges in the three Southern Cone countries became more extensive after procedures were established for the exchange of information about Operación Cóndor.

In sum, the arrest of Pinochet and his return to Chile may very well have encouraged and accelerated court proceedings against Argentine military personnel in Argentine courts. Yet I would argue that Pinochet's arrest acted as a catalyst for rather than a cause of the trials against Argentine military, for several reasons. First, Argentina already had recent experience with prosecuting its own military, though those sentenced were later pardoned. Second, certain human rights cases had remained open, though little progress had been made in the years following Menem's pardons. Third, with respect to the second wave of court cases from the mid-1990s onward, Judge Marquevich detained Videla on charges of child abduction in June 1998—four months *before* Pinochet was arrested in London. Likewise, the cases that Judge Bagnasco raised against Massera and other high-ranking military officers in the subsequent months had been carefully prepared since the end of 1996. Hence, though the arrests of military men in Argentina in the late 1990s coincided with the arrest of Pinochet, one can hardly be said to have caused the other. More likely, they are similar reactions to common factors or circumstances. The Pinochet case is merely the best known of many cases in which European judges have accused Latin American military leaders of gross human rights violations.

## The International Context

Just as Argentine judges were increasingly forced to respond to legal developments in Latin America, they were also challenged by European judges to clean up unresolved court cases stemming from the dirty war. Since Argentina arguably is the Latin American country with the closest ties to Europe, legal processes in Europe had a particularly marked impact on domestic legal processes in Argentina.

### *Spanish Extradition Requests and the "Garzón Effect"*

In attempting to explain why Argentine judges resumed trying to prosecute retired and active-duty military men for past gross human

rights violations, it is hard to get past the influence of Spanish judge Baltasar Garzón. Though he is best known for ordering the extradition of Pinochet, Garzón also raised cases against a number of Argentine retired officers, including many of the former junta members. Interestingly, Garzón applied for the arrest of Videla before Argentine judge Marquevich ordered his detention in 1998. Garzón also issued an international warrant against General Galtieri, one of the Argentine junta leaders. By the end of 1999, Garzón had a list of 98 Argentine citizens whom he charged with genocide, torture, and terrorism.[112] He ordered the detention of Adolfo Scilingo, the original "confessor," in August 2001.[113] Garzón summoned witnesses from Argentina in many of his cases, including representatives from many Argentine NGOs.[114]

Garzón acted and "the Argentine courts followed suit."[115] In the early phases of post-transitional justice, Argentine judges willingly admitted to having been inspired or influenced by Garzón. For instance, Judge Bagnasco, who was assigned the cases that involved Spanish nationals who had disappeared in Argentina—*los juicios de España*—by chance, acknowledged that Garzón had been an important model to him and to many of his colleagues.[116] Though some Argentine judges were positive to Garzón, others systematically refused to extradite alleged criminals on Garzón's request, arguing that this was interference in internal matters. This attitude was very much in line with the policy position of the second Menem government, as Menem consistently refused to cooperate and openly criticized Spain for trying to interfere with Argentina's sovereign power. According to a British journalist, "the arrest warrants issued by Garzón were a slap in the face to the Argentine government which has based its policy around appeasement and pardons to the top military."[117]

Presidents de la Rúa and Duhalde initially adopted very much the same policy line as Menem. A month before assuming the presidency, de la Rúa criticized Garzón's arrest warrants for 98 Argentines on charges of genocide, terrorism, and torture. And right after taking office, he declared that international arrest warrants issued by Garzón against former Argentine military rulers would have "no effect" in Argentina.[118] Shortly afterward, however, de la Rúa said that local courts should decide the officers' fates.[119] De la Rúa had to take positions on a number of different extradition requests, and following the policy of his predecessor, he generally refused to comply with them. De la Rúa opposed the Spanish request for extradition of Cavallo, an Argentine torturer arrested in Mexico, insisting on the principle of territoriality in the application of criminal law.[120] A Mexican court ruled in January 2001 that Cavallo could be extradited to Spain to face charges of genocide and torture.[121] Though de la Rúa opposed the extradition, the Mexican government upheld the ruling in February 2001. This was the first time a judge anywhere had extradited a person to a third country. Human Rights Watch backed the

decision, calling it "an extraordinary gain in establishing responsibility for human rights abuses."[122]

Another important legal precedent was set in September 2001 when an Argentine court ordered the arrest of 18 people (including one judge and 17 retired military and police officers) who were sought in Spain for alleged human rights abuses. For the first time, a court in Buenos Aires agreed to accommodate an international arrest warrant issued by Garzón, who had been investigating the death and disappearance of Spanish nationals in Argentina for some time. Only the year before, an Argentine court had rejected Judge Garzón's request for the arrest of 48 former military officers.[123] However, this time too, the executive branch refused to grant extradition. Clearly, tensions were growing between the executive and the judiciary regarding the question of extradition. Before leaving office, de la Rúa issued a presidential degree specifically prohibiting the extradition of Argentine nationals to stand trial abroad.[124] This, of course, furthered hampered the work of judges.

Garzón is the most prominent European judge who has been pursuing legal processes against Latin American human rights offenders. Yet the processes in Spanish courts regarding Latin America military personnel were initiated not by Garzón but by a lower-profile, less media-keen, and less charismatic judge. Moreover, judges in four European countries in addition to Spain had been pushing for trials against Argentine (former) officers for gross human rights violations against their own citizens, but more quietly than Garzón—and long before Garzón caught the world's attention.

*Pressure and Inspiration from European Courts*

Prior to Pinochet's arrest, Argentine judges had already been sensitized to the application of international human rights law by judges in Germany, France, Italy, and Sweden, who since the beginning of the 1990s had sought prosecution of Latin American military officials, including a number of Argentines, for crimes committed against their nationals on Latin American soil. This has a partly demographic explanation: Argentina, a nation of immigrants, has substantial populations of Italian (about 40 percent of the population) and German origins. An estimated 600 people of Italian descent and around 100 people of German descent feature among the disappeared. Argentina was also the second-largest recipient of Jewish immigrants (after the United States) at the turn of the twentieth century. Jews account for about 10 percent of victims of repression but only about 2 percent of the population (Roht-Arriaza 2005, 129–35). This picture helps explain why European courts were so keen on prosecuting Argentine citizens for dirty war crimes.

Prosecution of high-ranking Latin American military officers by European courts dates back to 1990, when a French court sentenced

Argentine former naval officer Alfredo Astiz *in absentia* to life in prison for the kidnapping of two French nuns who had worked with the Mothers during the military dictatorship. Astiz, nicknamed the Angel of Death, was one of the officers who unrepentantly "confessed" his sins in 1996. Years later, Sweden too sought Astiz's extradition for the killing of Dagmar Hagelin, a 17-year-old Swedish girl who disappeared in Buenos Aires during the dictatorship. These two incidents marked the start of a trend in which foreign courts attempted to bring to justice former heads of state and others implicated in human rights abuses, with different courts frequently seeking the same individuals for different violations.[125] The Argentine government refused both requests for the extradition of Astiz.

Court cases in Italy and Germany involved Argentine judges and also forced the Argentine government to react, frequently causing tensions between the judiciary and the executive. The governments of presidents Menem, Duhalde, and de la Rúa also had to deal with the legal pursuit of Argentine nationals in Europe, as requests for extradition have frequently been transmitted from a European judge or government to the Argentine government. As a general rule, all three presidents refused to cooperate with Garzón and other judges requesting help or information, arguing that these requests encroached upon national sovereignty.

Besides Spain, Italy has been one of the most active countries in pushing for trials against Argentine military. However, of the approximately 600 Italian Argentines who disappeared in Argentina during the dirty war, only eight of these cases have come to court. Italy raised formal charges against the Argentine generals in 1999. Prosecutors asked for life sentences for seven former Argentine army officers accused of involvement in the kidnapping and murder of Italian citizens in Argentina during military rule. The trial in Rome started in March 2000, with the accused officers still in Argentina. They were convicted *in absentia* by an Italian court in December 2000.[126] Italian authorities in June 2001 requested the extradition of Astiz—already wanted by a French court—to stand trial in connection with the kidnapping and torture of three Italians. Breaking with earlier refusals to comply with extradition or arrest orders from abroad, Argentine judge María Servini de Cubria this time issued an arrest warrant, and Astiz was arrested by Argentine police in July 2001.[127] However, the Argentine government intervened and the police had to let Astiz go. Defense Minister Horacio Jaunarena said that denying Astiz's extradition was "the best way of preserving the essential principle of sovereignty."[128]

Germany too actively tried to bring Argentine ex-military personnel to justice. Families of the 100 or so Germans who disappeared in Argentina lodged a formal complaint with the German Justice Ministry in March 2001. In July of that year Germany issued an international arrest warrant

for Argentine retired general and former junta member Carlos Guillermo Suárez Mason. Suárez Mason was arrested in Argentina in October 2001.[129] However, on November 15, 2001, the Argentine foreign minister issued a declaration refusing to comply with the international arrest warrant and extradite Suárez Mason to Germany.[130] Thus, the Argentine government in both the Astiz and Suárez Mason cases refused to comply with external orders of extradition, thereby undermining the work of national judges and ignoring appeals to comply with international law.

The legal processes in Europe served as an eye-opener and an inspiration to some Argentine judges—though not all—by providing new models for applying international human rights law. They also provoked a kind of fear among Argentine (and other Latin American) judges, who felt that they might lose face in the eyes of their citizens and the international community if they failed to act. On the other hand, these legal processes also raised important questions of sovereignty that demanded both legal responses from judges and political responses from the Argentine government. Interestingly, judges in general reacted much more favorably to this international legal development than did the Argentine government. A BBC review of coverage in European dailies toward the end of the de la Rúa presidency concluded, "international justice [is] reaching out ever further, although human rights still appear to play second fiddle to politics." The Spanish newspaper *El País* wrote that "one of the most encouraging phenomena of these globalization times is the tendency toward the globalization of justice."[131]

As human rights cases involving Argentine nationals unfolded in national and foreign courts, Argentine judges were forced to relate to both processes. They thus became important protagonists in the quest for retributive justice. As judges stepped up their efforts to pursue the military at home, they became noticeably more receptive to extradition requests and information requests from foreign judges. The governments headed by Menem and de la Rúa, by contrast, staunchly refused to cooperate with Garzón and foreign governments in cases against Argentine military personnel in foreign courts. Menem was perhaps more explicitly opposed to dealing with human rights, at both the national and international levels, than de la Rúa. However, de la Rúa too was reluctant to engage in dialogue about the abuses of the past. We may therefore tentatively conclude that it was judges, not politicians, who drove progress in the court cases against the Argentine military from the mid-1990s onward.

## CONSOLIDATING POST-TRANSITIONAL JUSTICE, 2001–2010

As post-transitional justice gained momentum, the focus shifted temporarily from human rights to economic rights in response to a severe economic crisis and mass unemployment. The economic turmoil led

to a period of intense political instability and a succession of helpless presidents.

## Economic and Political Turmoil

After months of social and political unrest claiming at least 25 lives, de la Rúa was forced to step down in December 2001.[132] He left behind an economy in shambles, an enraged and impoverished middle class, record-low approval ratings of 4 percent, and a discredited Congress and judiciary.[133] The crowds in the streets of Buenos Aires chanted, "!Que se vayan todos!"—roughly translated, "throw the bums out!" This included the judges.

A series of interim presidencies followed. These included the one-day presidency of Ramón Puerta (December 21–22, 2001), the one-week presidency of Adolfo Rodríguez Saa (December 23–30, 2001), and the one-year presidency of Eduardo Duhalde (January 2, 2002, through May 25, 2003). The main preoccupation of all these presidents was the economic crisis. However, the *juicios por la verdad* and the *juicios por sustracción de menores* were disrupted but not halted by the unrest. They continued in spite of the fact that Duhalde actively opposed domestic prosecutions and was known to have put pressure on the Supreme Court to validate the amnesty laws "in an effort to close the book on justice" (Mallinder 2009a, 114).

The end of the Duhalde presidency marked the start of a new era with respect to retributive justice. Perhaps more than any prior period, the next years would demonstrate the close links between presidential policy preferences and judicial activity in the human rights field.

After the series of interim presidents, a decisive shift in official human rights policies took place with the two Kirchner presidencies. Néstor Kirchner (May 25, 2003, to December 10, 2007) was immediately succeeded by his wife, Cristina Fernández de Kirchner, who was still in office in 2010. The presidential couple, both lawyers and devoted supporters of human rights, instituted a series of legal and institutional reforms that radically changed the domestic scene for human rights trials in the first decade of the new millennium. The onset of post-transitional justice turned into a sustained demand for, and to some extent supply of, justice.

## Renewed Official Quest for Truth and Justice

Little known nationally prior to the election campaign, Néstor Kirchner demonstrated his commitment to human rights soon after taking office in May 2003. Meeting with the human rights community, he signaled that he wanted the Supreme Court to annul the two amnesty laws

and Menem's pardons, and he introduced a string of legal and political measures to achieve these goals (Mallinder 2009a, 116).

First, he purged the military high command by presidential decree, one of the largest reorganizations of the armed forces since the end of military rule. He also dismissed 80 percent of the high command of the federal police and improved oversight of the provincial police. The human rights community welcomed these moves (Mallinder 2009a, 116–17).

Next, Kirchner set out to renovate the discredited Supreme Court, an institution widely perceived as illegitimate since Menem packed the Court in 1989. One scholar noted, "Kirchner appears to have placed great faith in the notion that an independent judiciary can play a critical role in guarding the rule of law and providing a horizontal check on ultrapresidentialism" (Walker 2007, 117). Presidential Decree No. 222 stated that judges should have moral integrity, be technically competent, *and* demonstrate a "commitment to democracy and human rights."[134] The appointment process was made more transparent and was broadened to include the opinions of the general public, NGOs, professional bodies, and academic institutions.[135]

Following the introduction of the new appointment procedures, three judges left the Court. The unpopular chief justice was forced by Kirchner to resign on June 27, 2003, just weeks before Congress was due to start impeachment hearings against him (Mallinder 2009a, 118). Congress requested the suspension of another judge in September, and in October, Judge Guillermo López renounced his position after facing charges of corruption. New Supreme Court members, appointed with civil society participation, included Raúl Zaffaroni, a noted legal theorist and expert on criminal law, and Carmen Argibay, a judge on the International Criminal Tribunal for the former Yugoslavia (Sikkink and Walling 2006, 317). These new members dramatically changed the ideological profile of the Court.

Legal reforms included changes to the extradition laws issued by de la Rúa. On July 26, 2003, Kirchner signed Decree No. 420, which revoked Decree No. 1581 and restored to the judiciary the power to decide extradition cases on a case-by-case basis. Perhaps not coincidentally, this decree came only one day after Argentine judge Rodolfo Canicoba Corral, upon request from Spanish judge Baltazar Garzón, ordered the preventative detention for extradition purposes of 46 former military officers accused of human rights violations (Mallinder 2009a; Sikkink and Walling 2006).

Meanwhile, the quest to have the amnesty laws overturned continued. On August 8, Kirchner signed Decree No. 579, ratifying the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. This gave the treaty constitutional status and obligated the government to punish these crimes, thus providing

Congress with "additional reasons why the amnesty laws should be seen as contrary to international law and to the Argentine Constitution" (Sikkink and Walling 2006, 318). Congress, with support of the Kirchner administration, then unexpectedly declared the Ley de Obediencia Debida and Ley de Punto Final null and void (Mallinder 2009a, 119–20; Sikkink and Walling 2006, 317). Many legal scholars saw this congressional decision as an encroachment on judicial powers, as "annulment of legislation is the purview of the judiciary" (Mallinder 2009a, 121). President Kirchner signed the measure into law on August 28, 2003.[136] However, the Supreme Court still had to rule on the matter.

Following a number of different lower court decisions in different human rights violations cases finding the amnesty laws unconstitutional, the Supreme Court on June 14, 2005, in a 4-1 ruling finally upheld the Buenos Aires Federal Appeals Court's 2001 judgment in the Julio Simón case. The highest court in the country had now found the two amnesty laws unconstitutional. The Supreme Court in a 400-page judgment cited the Inter-American Court of Human Rights jurisprudence in the Barrios Altos case, which "provided that amnesty laws for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance are incompatible with the American Convention on Human Rights to which Argentina is a state party" (Mallinder 2009a, 125).[137] Interestingly, three of the judges who issued this ruling had previously taken part in the 1987 verdict that found the amnesty laws constitutional. This may have signaled an ideological shift among the judges, or it may be that the judges acted under pressure in the Alfonsín years. Alternatively, the judgment may simply reflect the legal and normative changes that had taken place in human rights law and jurisprudence in the two decades between 1987 and 2005.

The final legal hurdle in the quest for justice was dealing with the pardons issued by Menem. Efforts in September 2003 to have them annulled failed to get parliamentary support. However, in 2004 Judge Rodolfo Canicoba Corral declared unconstitutional the presidential pardons for high-ranking military officers accused of human rights violations, invoking the constitutional status of international law (Mallinder 2009a, 126). Several lower courts followed Canicoba's example in 2005 and 2006, declaring the presidential pardons unconstitutional in different court cases. The Supreme Court finally upheld these judgments in July 2007 and in a 4-2 vote found the presidential pardons issued by Menem for human rights violations both unconstitutional and in violation of international law.[138]

With this legal development, a speedy increase in the number of trials was expected. Indeed, there was great effort among victims, families, their lawyers, and the human rights community to bring new cases to court and

to reopen old ones, now that the overturning of the amnesty laws permitted the reopening of hundreds of cases that previously had been shielded from prosecution (Sikkink 2008). In just a couple of weeks following the extradition decree, more than 40 former officers were arrested, along with the infamous Alfredo Astiz.[139] Many of these cases were still going on in 2010.

Yet, for all the new cases brought to court, progress in trials for truth and justice has been notably slow in Argentina. When President Néstor Kirchner handed the presidential sash to his wife at the end of 2007, about 800 trials were pending against former military officials on charges of kidnapping, torture, forced disappearance, and baby theft inside Argentina, as well as the persecution of leftists and other dissidents outside the country's borders.[140] Very few trials had reached the oral stage and very few military officials had been convicted. This in spite of the fact that Néstor Kirchner, in a May 2007 presidential decree, had created a "Truth and Justice" program intended to expedite the criminal cases related to the dictatorship period.[141] The lag may simply have been due to inefficiency. However, it could also suggest that the high priority the Kirchner government had placed on the human rights issue did not match public preferences—or, more importantly, the preferences of the judiciary.

## After 2007: Pro–Human Rights Policies Continue

Cristina Fernández de Kirchner became the first elected female president of Argentina, winning the elections by one of the largest margins since the transition to democracy in 1983. She too has pushed hard to continue the quest for justice. Efforts include erecting memorials, increasing the number of judges, making DNA testing mandatory in child kidnapping cases, and ordering the military to declassify all documents related to the Dirty War.[142]

Yet progress has been slow. At the end of 2009 there were about 500 cases pending involving around 1,000 accused. Earlier the same year CELS reported that only 40 of the accused had been tried, 38 of whom had received sentences. About 200 cases were considered to be "in motion," but only 17 percent had reached the oral stage.[143] Both the human rights community and the government have criticized the judiciary for the slowness of the trials, the minister of justice using phrases like *juicios de chicle* (chewing gum trials). Members of the judiciary respond that criminal justice takes time and that human rights cases are no exception. They further lament the lack of resources, particularly the small number of judges, although the government claims to have made resources available. President Cristina Kirchner apparently ordered 137 more judgeships in 2008, up from 29 the year before.[144] However, many of these judgeships remain vacant. It is hard to say why, but the Consejo

de la Magistratura, responsible for the appointment of lower court judges, does not seem to have been doing its job.[145]

Some have argued that a factor in the slowness of trials is the role of the prosecutor. In the civil law system, prosecutors are obliged to investigate the cases that are brought before them. In practice this means that the prosecutor does not have discretion to drop cases and must pursue less important cases with the same judicial fervor as the big cases. This can strain "an already overburdened judicial system by forcing the pursuit of cases that the prosecutor deems unnecessary" (Brown 2002, 218).

A final argument is that the National Criminal Cassation Chamber, Argentina's highest criminal court, apparently stacked by former president Menem with sympathizers of the military regime, has been a "bottleneck" for human rights cases and has relaxed its criteria for releasing suspects on bail.[146] In protest, human rights lawyers representing 61 victims in March 2007 requested the dismissal of the four Cassation Chamber judges "for sitting on case files, obstructing the work of oral tribunals and contradicting themselves, in order to favour accused military personnel."[147] When criticized, the president of the Cassation Chamber, Alfredo Bisordi, reported that the delays were due to the constant stream of cases reaching the court without accompanying increases in resources.

In December of the following year, the National Criminal Cassation Chamber ordered the release of nearly 20 officers, including former naval officers Jorge Acosta and Alfredo Astiz. The judges again argued that the defendants had been held too long while the trials were progressing—some more than the legal limit of three years. Human rights activists called the decision "outrageous" and said that it "clearly demonstrates that the justice system wants impunity" for those accused of human right abuses. In many ways, the president has seemed eager to push for more progress in the courts than the judges have been willing or able to provide. Another warning signal that not all sectors of Argentine society are happy with the prosecutions is that death threats have been issued on occasion against both victims and witnesses, and at least one accused was killed just as he was scheduled to appear in court and possibly present evidence.[148] The large number of pending trials and slow progress may thus be attributed more to the inefficiency and unwillingness of the judiciary than to presidential preferences.

Notwithstanding heavy criticism of the courts, as of early 2010 many trials are still pending in Argentina. Though there are numerous small and large cases at different stages in many different courts around the country, three sets of cases merit particular attention: the Operación Cóndor trials, the ESMA trial, and the truth trials. They jointly illustrate how the Argentine justice system has come almost full circle since 1989.

In the Operación Cóndor trials, the same governments (Argentina, Brazil, Chile, Paraguay, and Uruguay) that previously aided each other

in torturing, executing, and disappearing so-called subversives have now formed a network where they have pledged to exchange information, archives, and extradite suspects to stand trial. In February 2010, former general Jorge Rafael Videla and 15 other Argentine ex-military brass were asked to appear in court to answer for dirty war crimes committed within the Operación Cóndor framework.[149] Although many of the defendants are either dead or retired, some justice is likely to be achieved for at least some victims and their families.

The ESMA trials are based on claims from some of the survivors of this Buenos Aires torture center, where around 5,000 Argentines were imprisoned and where special facilities were set up to deliver the babies of kidnapped women. Since December 2009, the court has had 19 former junta leaders and senior officials, including the infamous Alfredo Astiz, in the docks on charges related to ESMA crimes.[150] In many ways the circle seems to be closing: just as *los juicios* placed Argentina on the international transitional justice map in 1989, today the ESMA trials are causing worldwide headlines. Courts in a number of European countries are closely following the domestic trials of alleged human rights perpetrators whose extradition from Argentina they have requested.

With respect to the truth trials, the issue now is not whether justice will be done, but *when* and *how* it will be done. As of the beginning of 2010, the Grandmothers had identified over 100 children, and several more cases are close to clarification. The first court case has been raised by a disappeared child against her adoptive parents.[151] Meanwhile, the twins of a newspaper magnate are fighting against being DNA tested as they do not want to know their true identity. Perhaps ironically, the current debate in Argentina is not over the right to truth but over the right *not* to know the truth, now that genetic testing of suspected children of the disappeared has been made mandatory.[152] This illustrates how much progress in truth—and, for at least some, justice—has been made since the Grandmothers brought the first baby-theft case to court at the end of 1996.

## CONCLUSIONS

Argentina today is heralded as a protagonist of post-transitional justice. Not so long ago, though, the military dictatorship and its repression appeared to be a closed chapter in this country's history. The shadow of a restless military hung over the political and judicial process. An early wave of trials following the democratic transition came to nothing as the results were quickly reversed. As late as the mid-1990s, prospects for retributive justice appeared dim. But human rights organizations sustained their demand for truth and justice, encouraged by unexpected military confessions and by constitutional reforms that widened the space for judicial action. Meanwhile, the military threat subsided to the point

where a military coup was considered highly unlikely. By 2000, with a second wave of trials in progress, the phase of post-transitional justice was well under way. This shows that power structures, policy preferences, and resulting policy outcomes in the human rights field have all been subject to substantial changes since the time of transition.

Judges worked in constraining domestic circumstances during the first presidencies. Though bringing the military to court had been one of Alfonsín's campaign promises, *realpolitik* trumped moral arguments. When the military closed ranks and threatened the fragile democracy, Alfonsín tried to shut down legal processes against the military through amnesty laws—even though this meant encroaching on the power of judges and contradicting his stated aim of strengthening the rule of law. Under the two governments of Menem, presidential pardons took precedence over prosecution. Presidents de la Rúa and Duhalde followed Menem's policy of no extradition. Though de la Rúa declared some support for prosecution in national courts, Duhalde was explicitly opposed to domestic prosecution. He demonstrated this by, among other measures, issuing presidential pardons for convicted human rights perpetrators. In spite of the poor reputation of the Argentine judiciary, some liberal-minded and dedicated judges in the lower courts worked hard to counteract presidential orders and decrees in human rights matters under all four presidents. In particular, many lower court judges displayed professional independence and vigor in human rights cases toward the end of the Alfonsín government, but that stance was undermined by Menem's court packing and renovation of the lower courts.

The Supreme Court was subject to even more direct executive control. The informal practice of court packing led to close overlap between executive policy preferences and the dominant ideology of Supreme Court justices. Thus it is unclear to what extent judges' propensity to prosecute the military can be attributed to independent judicial action. Although the 1994 constitutional reforms included measures to increase the independence of judges, these appear to have been incompletely implemented by the time the second-wave trials started; hence it was too soon to evaluate their impact on judicial behavior.

Nevertheless, the constitutional reforms appear to have provided more leeway for discretion. In particular, granting constitutional status to international human rights law expanded the legal basis for judicial review. Indeed, this is arguably the single most important factor accounting for the onset of post-transitional justice in Argentina. Without this institutional change, it is doubtful whether Argentine judges at all levels would have responded so favorably to national demands for truth and justice, or to foreign governments' demands for extradition. The complex web of national and international court cases and Argentine NGOs seeking both domestic and international avenues for their complaints certainly

provide an important backdrop to the legal developments unfolding in national courts. But without the 1994 reforms, these changes would likely have proceeded at a much slower pace and on a smaller scale, as the "opportunity structure" for judges would have remained very limited.

Specifically, the incorporation of international human rights treaties into the Constitution forced judges to take international law into consideration when prosecuting the military for past human rights abuses. When responding to local demands for truth and justice, Argentine judges increasingly had to pay heed to rulings by the Inter-American Court of Human Rights, and this in turn has created new legal precedent within the country. They also had to take positions on international human rights legislation within the framework of their cooperation with other Southern Cone judges in clarifying the crimes committed under Operación Cóndor.

Moreover, Argentine judges have had to deal with requests for information and for extradition of Argentine military personnel in connection with court cases in European countries. Argentine judges admit that individual foreign judges, such as Garzón in Spain, have provided both personal inspiration and models for innovative interpretation of international law. In sum, the increased sensitivity of judges to international law combined with a reduction in military threat and renewed human rights activism together offer a plausible explanation for why Argentine judges gradually have taken on a more active role in human rights issues since 1996.

The increases in judicial activism initially took place mainly at the lower and appellate court levels. The appellate court ruling in the Julio Simón case stands out as the single most important legal decision in the post-transitional justice period. A principal reason for the importance of the appellate level is that this is where most human rights cases start. Another is that lower court judges have, on average, been less directly exposed to executive interference than have higher court judges, freeing them to take on these contentious cases. But innovative legal decisions and new human rights norms gradually trickled up in the system and gained acceptance in the judicial hierarchy.

The changes in the Supreme Court's position on prosecution of past human rights violations is notable. Though staffed with new judges, several of them liberal, the Supreme Court under the Alfonsín government upheld the constitutionality of the two amnesty laws. The new Court packed with Menem supporters in 1990 remained conservative and largely "Menemista" throughout the presidencies of Menem, de la Rúa, and Duhalde. The fact that the Supreme Court gradually started to uphold rulings favoring human rights demonstrates that changes also reached the highest court—as illustrated when the Supreme Court ruled the two amnesty laws unconstitutional in 2005.

The judicial quest for retributive justice gradually gained executive support, even enthusiastic presidential support under the two Kirchner governments. After Néstor Kirchner came to power, human rights were placed firmly on the executive agenda. Congressional annulment of the two amnesty laws in 2003 was an important move. For a short period the judiciary and the executive appeared to move in tandem, but in recent years the executive-judicial dynamic seems to have been reversed. Whereas the executive once tried to stop or limit court cases seeking truth and justice, and judges strived to overcome legal obstacles in an unfavorable political setting, the executive is now pushing for more and faster trials and judges seem to be dragging their feet. Are we witnessing justice fatigue? Or is this symptomatic of the conservative nature of judiciaries in general? Politics can change overnight, whereas judicial culture and legal precedents may take years—even generations—to shift.

The next chapter shows that Chile started at a very different point than Argentina in dealing with human rights matters but ended up with strikingly similar policy results.

# Chapter 4

# Chile: From Truth to Trials

*How can Chile, which has a constitution written by its ex-dictator, an operative amnesty law guaranteeing the military impunity for all political crimes, and a political elite that has demonstrated no particular degree of goodwill toward the human rights issue, still be the country in Latin America that is arguably now one of the leaders in dealing with the abuses from its dark past through legal processes?*

—Hugo Gutiérrez[1]

Chilean human rights lawyer Hugo Gutiérrez posed this pointed question at the turn of the millennium. A decade later, Alexandra Huneeus drew attention to another apparent paradox: "Why did so rights-averse a judiciary suddenly place itself in the thick of the country's most contentious rights issue, at times pushing beyond the government in its zeal for prosecution of the very claims it once denied?" (2009, 3).

The empirical reality that Gutiérrez and Huneeus refer to is this: at the time of transition, in 1990, Chilean courts were flatly unwilling to deal with violations committed under the previous regime. By the end of 2000, however, these same courts had convicted 28 individuals for gross human rights violations committed during authoritarian rule (Hilbink 2007, 178). By the end of December 2009 the number of convictions had soared to 204, with 59 of those convicted serving confirmed custodial sentences. The total of 59 in prison in Chile represented "the highest single total of former repressors sentenced for these crimes anywhere in Latin America" (Universidad Diego Portales 2010). Contrast this with Argentina, the other forerunner in post-transitional justice, where only two repressors were serving confirmed custodial sentences at the end of 2009.[2] Chile also had 325 active investigations under way into past human rights crimes.

In spite of its relatively late transition, Chile was one of the two pioneers in Latin America—with Argentina—in pushing for post-transitional justice, and as of 2010 it is the country that has made the most progress

in holding the military to account for past abuses. It has had to overcome a number of legal, institutional, and political obstacles in the process. This chapter takes up the questions suggested by Gutiérrez and Huneeus: how and why was accountability for past abuses transferred from the political to the legal sphere in Chile, and why have Chilean courts become protagonists in the quest for justice in the post-dictatorship era?

Throughout the dictatorship period, while Chile was under the authoritarian rule of General Augusto Pinochet, Chilean judges were notoriously indifferent to human rights violations.[3] They refused to hear all but ten of around 5400 petitions for *recursos de amparo* filed by human rights lawyers between 1973 and 1983 (Constable and Valenzuela 1991, 122).[4] By the time democracy was reintroduced in 1990, almost 3,000 people had been executed or "disappeared," and an estimated 28,000 had been tortured; hundreds of thousands more fled the country for exile in other Latin American countries or Europe (CNVR 1991; Comisión Nacional Sobre Prisión Política y Tortura 2005; Sznajder and Roniger 2009).

When Chile emerged from 17 years of authoritarian rule, one of the most challenging political and legal questions facing the democratically elected government of Patricio Aylwin was how to address the pressing issue of past human rights violations. During Aylwin's presidency (1990–94), legal advances were limited to two cases, both reluctantly taken on by the Supreme Court under heavy pressure from the U.S. and Chilean governments.

However, once Pinochet was arrested in London in 1998, in response to an extradition request by Spain, the number of trials against Pinochet and hundreds of other ex-military officers in Chilean courts exploded. This surge continued after the former dictator was returned to Chile in 2000 to be prosecuted by Chilean national courts. When Pinochet died in custody in 2006, he was facing charges of murder, torture, and genocide in dozens of separate cases set in motion by approximately 300 separate private complaints made against him. He also faced charges of fraud and tax evasion. Though no formal verdicts had been issued against Pinochet by the time he died, the legal processes surrounding the former dictator and his allies constituted a judicial watershed in Chilean human rights policies. This contrasts with the Chilean courts' reluctance to deal with other rights issues, such as social and cultural rights, making the courts' 180-degree turnaround in the human rights question all the more intriguing.[5]

This chapter provides an empirical analysis of the legal advances and setbacks in the human rights field in Chile since the transition to democratic rule in 1990.[6] It demonstrates that the process of *post-transitional justice* was set in motion even before the arrest of Pinochet. As we will see, the years 1998–2001 saw a breakthrough with respect to accountability for gross human rights violations due to increased independent judicial

action in these matters. By tracing the legal changes and developments in Chile during the presidencies of Ricardo Lagos (2000–6) and Michelle Bachelet (2006–10), the analysis shows that independent judicial action in human rights matters has become the norm rather than the exception.[7] Public backing from presidents favoring accountability for past human rights violations has been helpful, but their support was not of decisive importance to the outcomes of human rights cases. Chilean judges seem to have gradually regained their independence and their historical role as upholders of the rule of law, though their role as rights protectors broadly speaking continues to be questioned.

## Early Attempts at Retributive Justice

Justice for past human rights violations was a pressing issue at the time of transition, but the balance of power was not conducive to pursuing full-fledged trials under the first government of Patricio Aylwin. Only a few years into the government of the second elected president, Eduardo Frei, did political and legal openings allow for some progress in retributive justice.

### Politics of Truth and Limited Justice under Aylwin, 1990–1994

When Patricio Aylwin became the democratically elected president of Chile on March 11, 1990, he stated in his inaugural speech that one of his greatest desires was to achieve reconciliation and that complete knowledge of past human rights violations was essential to achieving this aim. Moreover, he promised to "bring to trial anyone who had committed particularly atrocious abuses under the old regime" (Correa Sutil 1997, 132). But pursuing justice through full-fledged military trials turned out to be utopian, as Aylwin's hands were legally, constitutionally, and politically tied.

#### *Obstacles to Prosecution of the Military*

The most obvious constraint to pressing for trials in Chile immediately after the transition was the power of the military, still very much intact after a "pacted transition." Pinochet had just barely lost the elections and he still enjoyed solid support among right-wing sectors of the Chilean population; moreover, he had granted himself power to remain head of the army. Pinochet staged two episodes of military unrest, the so-called *ejercicio de enlace* in December 1990 and the *boinazo* in May 1993. These came in reaction to lawyers' efforts to speed up court cases against the military and to corruption cases involving Pinochet's family members, including the so-called *pinocheques* case. The unrest sent a strong signal

that the military was still able and willing to flex its muscle in the first years after the return to democratic rule.[8]

Legally, the Amnesty Law of 1978 effectively granted impunity for criminal offences, including forced disappearances, extrajudicial executions, and torture, committed by uniformed agents between September 11, 1973, and March 10, 1978, also known as the "state of siege period."[9] Criminal justice therefore had to be limited to offences committed after 1978 and to the only pre-1978 crime that was exempted from the amnesty, the Letelier-Moffitt assassinations. This meant that the worst abuses that had taken place under military rule were effectively shielded from legal prosecution. Furthermore, the statute of limitations for criminal cases entailing murder meant that the crimes committed at the height of the repression, between September and December 1973, passed the 15-year limit in 1988.[10] Crimes committed in 1978 reached the limit in 1993. Thus, those crimes not protected by the amnesty law had already exceeded the time limit for opening cases toward the end of Aylwin's presidency.

A Pinochet-friendly judiciary was certainly not going to take the initiative to bring about retributive justice. This was especially true of the Supreme Court. Unlike the high courts in most other Latin American countries, whose judges typically were replaced by military appointees during authoritarian rule, the Chilean Supreme Court remained untouched by the military. Ideologically sympathetic to the overthrow of Allende in 1973, the Supreme Court presented no threat to the military regime. In effect, it became an active institutional support for the Pinochet dictatorship.[11] In a further effort to forestall charges of human rights violations after the transition to democratic rule, Pinochet had packed the Supreme Court before leaving office by offering all nine judges large monetary compensation for stepping down in favor of younger judges whom he would subsequently appoint. Five of the judges accepted the offer, thus ensuring that Pinochet-friendly judges would most likely dominate the highest judicial organ in Chile for many years.

Given the hierarchical structure of the Chilean judiciary, this conservative Supreme Court effectively set limits on the action of lower court judges. Unlike in Argentina, where Supreme Court judges are appointed according to presidential preference rather than on judicial merit, Chilean judges may realistically aspire to one day become judges of the highest court. Because the Supreme Court effectively controls the promotion of lower court judges through the appointment system, lower court judges are directly or indirectly discouraged from making unpopular decisions that could damage their careers. These structural limitations certainly curbed most activist aspirations among appellate court judges, to the extent that they had them. The suspension of Judge Carlos Cerda of the Santiago Court of Appeals for having taken on human rights cases

is a noted example (see Collins 2010b; Garro 1993; Hilbink 2007). However, the disciplining of Cerda stands out as the only such case that has received widespread scholarly attention. This suggests that either appellate court judges were effectively held in line by the Supreme Court or, alternatively, that constraints on lower court judges may have been largely unnecessary because most judges were ideologically committed to the regime.

Finally, the 1980 Constitution had been designed to permanently exclude left-wing parties from political power through a series of measures. After the 1989 constitutional revisions, the Constitution still guaranteed that General Pinochet could remain in his position as commander in chief of the army until 1998 and could become senator-for-life when he stepped down as head of the armed forces; as a parliamentarian, he would enjoy lifetime immunity under Chilean law. Furthermore, to ensure the presence of Pinochet loyalists in the Senate, the Constitution specified that eight senators would be designated by Pinochet; they could include former commanders in chief, ex-presidents who had served more than a certain number of years, and so on. When these appointees joined forces with elected senators from right-wing parties, the result was a conservative majority able to veto any constitutional reform proposal that threatened to erode the military's privileged position. This included any possible attempt to annul or change the Amnesty Law of 1978 as well as legal reforms designed to make it easier to prosecute perpetrators of crimes during the dictatorship.

### *Truth and Possible Justice*

A constitutional lawyer and the son of a former Supreme Court president, Aylwin was a staunch defender of human rights. But rather than press for Argentine-style trials, he chose to concentrate on revealing the truth and to achieve justice "en la medida de lo posible"—to the extent possible.

Aylwin successfully established the National Commission for Truth and Reconciliation (Comisión Nacional de Verdad y Reconciliación, CNVR) by Supreme Decree No. 355 of 1990. The truth commission's report, known colloquially as the *Informe Rettig* after its chairman, Raúl Rettig, was issued in February 1991. It documented 1,068 confirmed cases of extralegal or summary execution (by court martial) and 957 confirmed cases of forced disappearance between 1974 and 1990. There were also 641 cases on which the commission could not form a "conviction" and 449 on which it did not have sufficient information to investigate effectively (CNVR 1991, annex II).[12] The following year, the Aylwin government set up a follow-up commission, the National Corporation of Reparation and Reconciliation (Corporación Nacional de Reparación y Reconciliación, CNRR), to further clarify some of these cases.[13] The

final official number of disappearances, extrajudicial executions, or deaths under torture was set at 3,197.[14]

The *Informe Rettig* did not document the tens of thousands of incidents of nonfatal torture. It was only allowed to name the victims, not the perpetrators, and it had no legal authority. Nevertheless, the fact that various human rights organizations had carefully recorded human rights abuses from the very beginning of the dictatorship made the numbers presented in the Rettig report probably more accurate, and certainly more credible, than those presented in the *Nunca Más* report in Argentina or the truth commission reports in Uruguay. In particular, the Vicaría de la Solidaridad, an organism of the Chilean Catholic Church and one of the largest human rights organizations in Chile, had lent the truth commission its full support and offered access to its archive and documentation section, which was considered among the most complete in all of Latin America. This information was to become useful for later legal processes against the military, in Chilean and European courts, beginning in the mid-1990s.

The truth commission report sharply criticized Chile's courts—the Supreme Court in particular—for their evasive response to human rights violations during the dictatorship. This angered the Supreme Court, and when Aylwin asked the courts to take action, they refused. Knowing that the conservative, Pinochet-friendly judiciary (especially the Supreme Court) would continue to actively obstruct justice, Aylwin made two abortive attempts to reform the judiciary in order to make it more modern and more independent from the foregoing authoritarian regime and eliminate the archaic penal code. The first reform attempt sought to create a national judicial council, set mandatory retirement ages for judges, increase the size of the Supreme Court and divide it into specialized chambers, and amend the Chilean concept of separation of powers.[15] When it became clear that the reforms would not go through, a more limited reform package was sent to Congress in 1991. The modified proposal included the establishment of a national judicial council (Consejo de la Magistratura) and an increase in the number of Supreme Court justices. At the justice administration level, reforms were proposed that would change the entire criminal procedure system. The reform package, known as the Leyes Cumplido after the minister of justice, Francisco Cumplido, met with strong opposition from the Supreme Court and was voted down by Congress.

Aylwin next tried to bypass the 1978 Amnesty Law by proposing a new bill on August 3, 1993, that was intended to speed up the judicial processes concerning murders, torture, and disappearances that took place during the toughest years of repression under Pinochet. In brief, Aylwin tried to strike a deal with the military by offering to keep witness testimony secret and promising no punishment in exchange for

information that could lead to the clarification of cases of gross human rights violations.[16] Aylwin also suggested the appointment of 15 new judges to work specifically on these cases for two years. However, the so-called Ley Aylwin was voted down in the Chamber of Deputies in 1993 because of a Pinochet-friendly majority in the Senate, effectively stalling judicial reform. The wiggle room for legal action was hence very limited.

Shortly after coming to power, Aylwin requested that the Supreme Court reopen the Letelier murder case. The assassination of Orlando Letelier, minister of foreign affairs during the Allende government, and his coworker Ronnie Moffitt in September 1976 in Washington, D.C., had been exempted from the 1978 Amnesty Law in response to U.S. pressure.[17] In July 1991, the Supreme Court designated newly appointed Supreme Court judge Adolfo Bañados, regarded as a "decent, efficient, and honest" judge, to carry out the investigations.[18] Bañados succeeded in indicting General Manuel Contreras Sepúlveda, former chief of the Dirección de Inteligencia Nacional (Pinochet's secret police, known as DINA), as well as the DINA second-in-command, Brigadier Pedro Espinoza. The ruling came two days before the 15-year statute of limitations for the crime expired. In November 1993, Contreras and Espinoza were sentenced to seven and six years of prison, respectively. This first successful court case against the military in Chile has been characterized as a first sign of judicial independence, but the judiciary would probably not have started investigating the case without explicit pressure from the Aylwin government.[19] However, the speedy resolution of the case may be attributed to the good work of a devoted judge.

Though judges in general were very reluctant to take on human rights cases in this period, there were a few exceptions. After almost nine years of investigation, on September 28, 1993, appellate court judge Milton Juica raised a case against 17 former policemen for the killing of three human rights defenders and communist activists in 1985.[20] The final verdict in the so-called Caso Degollados (the throat-slitting case, referring to the way the victims were killed) was reached shortly after Aylwin handed over the presidential banner to his successor, Eduardo Frei. However, in spite of these positive developments—one concluded trial and one indictment—Argentine-style prosecutions of the military *cúpula* seemed highly unlikely at the time Aylwin left office in 1994.

## Legal Openings under Frei, 1994–1998

When Eduardo Frei Ruiz-Tagle became president on March 11, 1994, he inherited an array of challenges in the human rights and judicial arena.[21] Unlike his predecessor, Frei had no known ambitions in the field of human rights (de Brito 1997, 185). Indeed, after assuming the presidency, Frei hardly ever addressed the topic explicitly in his public speeches. Looking

back on Frei's term, the president of the Fundación de Ayuda Social de las Iglesias Cristianas (FASIC), a leading human rights organization in Chile, delivered a harsh verdict: "President Frei did absolutely nothing."[22] Nevertheless, several important human rights cases came up during his six years in office.[23]

First, the final verdict in the Caso Degollados was reached shortly after Frei became president.[24] The case was considered a test of the Chilean judicial system's ability and will to condemn those responsible for violations of human rights under military rule. One of Chile's leading newspapers asserted that the case would "turn into a compulsory point of reference in Chilean judicial history" (La Nación, April 1, 1994).

In a surprise ruling the following year, the Supreme Court upheld the 1994 appellate court verdict against Contreras and Espinoza in the Letelier case. Described as "the most notorious and protracted case dealt with in military and civilian courts in Chile since the 1970s" (Roniger and Sznajder 1999, 118), the Letelier case signaled that even the Pinochet-loyalist Supreme Court was gradually becoming more willing to demonstrate a certain degree of independence from Pinochet. It may, however, also have been significant that this crime was committed by the DINA, which Pinochet dissolved in 1977 in response to public pressure, and that the Amnesty Law explicitly excluded the Letelier case.[25] Nevertheless, adherence to the law superseded judicial deference to the ex-dictator. Interestingly, judicial independence in this context meant independence from the *previous* government (headed by Pinochet), rather than from the sitting government.

The Supreme Court ruling predictably caused a stir, as the military protested vehemently against the prison sentences imposed on Contreras and Espinoza. But this time there were no tanks in the streets. Even so, the Frei government bowed to military pressure and compromised on the conditions under which the accused would serve their sentences.

The Degollados and Letelier cases together illustrated two important, though gradual, changes. First, the Chilean justice system, so carefully designed by Pinochet to protect the military, was not impermeable after all. Second, the military was no longer prepared to react with force to perceived threats to its interests. The most important test of the judiciary's willingness to act on charges of human rights abuse would come when Pinochet was arrested in London. But the legal ground for judicial response was already taking shape.

Most importantly, Frei set in motion a series of judicial reforms that were to have a big impact on how the judiciary would handle the rapidly increasing number of court cases concerning human rights violations. The proposed reforms affected the composition of, and rules for making appointments to, the Supreme Court, increasing the number of members from 17 to 21, reserving five posts on the Court for lawyers from outside

the judiciary, setting a compulsory retirement age of 75, and shortening the term for the Supreme Court president from three to two years. A central feature of the new appointment procedures was that new Supreme Court justice appointees would require approval by two-thirds of the Senate. This meant that the executive would lose some control over the nomination procedures, but that consensus over a broad part of the political spectrum would be required. Congress unexpectedly approved the so-called Supreme Court Reform Bill in 1997—and equally unexpectedly, the Supreme Court did not declare the law unconstitutional. The reform in 1998 brought 11 new judges to the Court, including five lawyers from outside the judicial hierarchy.[26] The Court's profile had started to change.

## The Onset of Post-transitional Justice, 1998–2001

The beginning of large-scale trials in Chile is frequently attributed to the unexpected arrest of Pinochet in London in October 1998.[27] But it should be recognized that very significant legal changes were under way in Chile *prior* to the former dictator's arrest, preparing the ground for what was to follow.

First, and most importantly, 12 cases had already been brought to the Santiago Court of Appeals against Pinochet for involvement in gross human rights violations. Gladys Marín of the Communist Party lodged the first complaint in January 1998—several months before Pinochet traveled to London.

Second, the first court ruling marking the onset of novel jurisprudence in human rights cases was handed down the month *before* Pinochet's arrest. The most obvious impact of the newly constituted *sala penal* (criminal chamber) of the Supreme Court came with the landmark ruling in the long-running Poblete-Córdoba case in September 1998. The Supreme Court in a 5-1 ruling declared that disappearance where no body has been found amounted to kidnapping, and that kidnapping, as a *delito permanente* or continuing crime, was not covered by amnesty.[28] This was the first time the Supreme Court had accepted the binding nature of international humanitarian law. This concept of a "continuing crime," allowing the judge to bypass the 15-year statute of limitations, was to become extremely important for future judgments in cases of forced disappearance. For the time being, attention rapidly shifted to international affairs soon after the Poblete-Córdoba ruling.

### The Pinochet Case

The surprise arrest of Pinochet in London in October 1998 and subsequent legal developments have raised a series of important issues related to national sovereignty and the application of international law.[29] The

domestic dimension of the much-quoted "Pinochet effect"—the prime focus of this analysis—encompassed three main developments. First, the military's reaction to the arrest and its subsequent behavior proved that the military threat was indeed waning. Second, civil society was revitalized. Third, Chilean judges were forced to take a stance on the issue of human rights crimes stemming from the dictatorship period. Thus, the former dictator's arrest in London functioned as a catalyst for, *rather than the prime cause of,* the wave of trials against other retired and in-service military personnel in Chile that have taken place since the end of 1998.

Straddling two successive democratic Concertación governments, those of Eduardo Frei and Ricardo Lagos, the Pinochet case offers an opportunity to examine the evolution of the government's position on human rights issues. Perhaps better than any other court case in Chile, the legal dealings in the Pinochet case demonstrate the changes in court behavior regarding human rights matters stemming from the dictatorship period. The period 1998–2001 saw the most noticeable changes in Chilean courts' responses to demands for "truth" and "justice"—and not only with respect to Pinochet. Some of the court initiatives taken toward the end of the Frei presidency bore fruit after Lagos came to power. During this relatively short time span, the courts seemed to find their own direction on these matters, irrespective of official human rights policies—and sometimes even in contradiction with the policy preferences of top government officials.[30]

The legal drama that unfolded in Chile after the return of Pinochet to his native soil illustrated the unpredictable character of Chilean courts. Courts at different levels in the judicial hierarchy handed down one sentence after another that either shocked or gladdened Chileans, depending on which side of the ideological-political conflict they were on. The tug-of-war between the Santiago Court of Appeals and the Supreme Court initially concerned two major issues on which the courts had to take a stand: the question of immunity granted to Pinochet in his capacity of self-appointed senator-for-life and the question of Pinochet's alleged poor health, which had been the argument invoked by the British government for sending him back to Chile instead of extraditing him to Spain.[31]

Pinochet's return immediately put the Chilean judiciary on the spot: would it prosecute Pinochet, as Frei had promised to do when pushing the British government to return Pinochet to Chile? The first step was to make the former dictator prosecutable by stripping him of his senatorial immunity, a process known as *desafuero.* According to Chilean law, the immunity issue must be addressed on a case-by-case basis (Roht-Arriaza 2009a). Less than a week after Pinochet landed in Santiago, appellate court judge Juan Guzmán Tapia, to the surprise of many, asked the Santiago Court of Appeals to lift Pinochet's immunity in connection with the so-called Caravana de la Muerte (Death Caravan), a killing spree that

took place shortly after Pinochet assumed power in 1973.[32] Guzmán had singled out this case among the 66 complaints that he was currently investigating as the basis for legal prosecution because he believed that it was the case in which the chain of command was most clear. He convinced the Santiago Court of Appeals: the majority (3-2) ruled in favor of the *desafuero* of Pinochet in the Caravana de la Muerte case on June 5, 2000, thus stripping Pinochet of his senatorial immunity guaranteed by the 1980 Constitution.[33] The Supreme Court, in a historic decision of August 8, upheld the appellate court decision.[34]

Now two more legal obstacles prevented Pinochet from standing trial: the state of his mental health and the Amnesty Law of 1978. The Santiago Court of Appeals ruled on November 2, 2000, that Pinochet should undergo psychological and neurological tests before appearing in court. But on December 1, 2000, before the test results could be released, Judge Guzmán issued a formal arrest order against Pinochet, accusing him of direct involvement in the Death Caravan case, one of 177 complaints by then pending against Pinochet.

On January 29, 2001, Judge Guzmán indicted Pinochet as a co-conspirator in the murders and kidnapping of 75 people in the Death Caravan case. The Santiago Court of Appeals then ruled in March that Pinochet must face trial: he was charged not with the crimes themselves, but on the lesser count of covering up the crimes.[35] However, in a surprise ruling in July 2001, a three-judge panel at the Santiago Court of Appeals in a 2-1 decision suspended charges against Pinochet on grounds that he was medically unfit to stand trial under Chilean law because he suffered from "a mild form of dementia."[36] A year later the Supreme Court, in a 4-1 decision, confirmed the appellate court ruling, reversing its own previous ruling on the health issue. This permanently closed the case against Pinochet for involvement in the Death Caravan crimes (Roht-Arriaza 2009a, 89).[37]

Thus, after almost three years of legal wrangling, Pinochet was let off the hook—though, as it turned out, only temporarily. The intriguing question is, why did both courts make a 180-degree turn on their own decisions? The appellate court's reversal between 2001 and 2002 suggests that the court had all along wanted to strip Pinochet of his immunity but had not been prepared to prosecute him. Although "widely expected," according to the press, the Supreme Court's upholding of the appellate court ruling allegedly came after an initially prosecution-friendly court changed its position. According to one of the case lawyers, this happened when one of the judges on the Court, Amanda Valdovinos, was subjected to "direct executive pressure" (Collins 2010b, 87).

As the Death Caravan case had unfolded, the number of complaints against Pinochet had risen to over 200. A new *desafuero* procedure would be necessary for each complaint that became a case. Judge Guzmán in

2003 twice again attempted to strip Pinochet of his immunity in two separate cases: the murder of former Chilean vice president Carlos Prats and his wife in Buenos Aires and the Calle Conferencia case.[38] The Santiago Court of Appeals denied both requests on health grounds.

The prospects that Pinochet would be prosecuted for human rights violations seemed dim, but a year later hopes were rekindled through an unexpected turn of events. The Riggs Bank scandal revealed that Pinochet and his family had been involved in tax evasion and fraud, sending shock waves through right-wing sectors of the political parties and Pinochet's base of ardent supporters.[39] He was further discredited through a television appearance that gave the lie to claims that he was demented.

New judicial proceedings started, and this time around, both the Santiago Court of Appeals and the Supreme Court seemed determined to corner the ex-dictator. First, Judge Guzmán decided that Pinochet was fit to stand trial and indicted him for 20 disappearances in connection with Operación Cóndor, the regional network of repression in the Southern Cone.[40] The Supreme Court upheld the decision in August 2004.[41] A few months later, the appellate court stripped Pinochet of immunity in the Carlos Prats assassination case and formally indicted him. However, in March, the Supreme Court, in a 15-4 decision, surprisingly reversed the appellate court decision and upheld Pinochet's immunity in the Prats case, thus dropping charges against him.[42]

Pinochet continued to be investigated for violations in Operación Cóndor, but the Santiago Court of Appeals in June 2005 ruled that he was too ill to stand trial. However, the appellate court at the same time stripped Pinochet of his immunity from prosecution in the financial wrongdoing case. This divided ruling provoked human rights lawyer Eduardo Contreras to say that the ruling suggested money was more important than blood in Chile.[43] Pinochet was charged with fraud and placed under house arrest in November 2005. Two hours after he was released on bail, another judge, Víctor Montiglio, charged him in connection with the kidnapping of at least three dissidents by the security services in yet another case, Operación Colombo, which concerned the disappearance of 119 members of an armed revolutionary group in the mid-1970s.[44]

Returning to the question of money, in April 2006 the Santiago Court of Appeals followed suit by upholding charges of tax evasion and falsifying passports.[45] The Supreme Court in August confirmed that Pinochet could be prosecuted on charges of misusing public funds.[46] The last legal move against Pinochet took place in October 2006 when a new judge, Alejandro Solis, charged the general with kidnap, homicide, and torture in the Villa Grimaldi center, run by Pinochet's secret police, where thousands had been tortured between 1974 and 1977.[47]

On December 10, 2006, Pinochet died of heart ailments at the age of 91. He was facing two separate inquiries into financial dealings and human rights–related crimes. Although no trials against him had reached conclusion by the time of his death, he died as a discredited dictator rather than as a savior of the Chilean nation. Ironically, it was charges of financial fraud rather than gross human rights violations that finally knocked Pinochet from his pedestal in the eyes of previously loyal Pinochetistas.

## Cases Against Other Military Men

Although the Pinochet case stole the international headlines, separate cases were lodged in Chilean courts against hundreds of other military between 1998 and 2001.[48] A closer look at legal developments during the time Pinochet was under arrest in London reveals that as of May 2000, about 200 former or active-duty members of the Chilean military were under active investigation for various forms of gross human rights violations in Chilean courts. At least 27 Chilean judges were involved in the proceedings.[49] The number of new cases continued to grow, peaking in 2001 and then leveling off.

The vast majority of these cases had been filed years earlier and had laid dormant in the Chilean court system until they were reactivated by individuals and NGOs. Some entirely new cases were also brought to court after the arrest of Pinochet. Many of the cases against Pinochet also included charges against his subordinates, and the same persons were frequently accused of involvement in more than one case. The successful/completed trials during this period constitute only the tip of the iceberg, as many more cases were under investigation. Furthermore, many of the cases in which convictions were obtained remained open or inconclusive, since a large number of people were frequently involved in the same case, but at different levels of responsibility. No complete, up-to-date list exists of these cases as they have been (and are) held by many judges and have reached different stages of investigation; consequently, much of the information for this period is not officially available. Bearing in mind that prosecution of the Chilean military was (and still is, as of 2010) restricted by the 1978 Amnesty Law and the 15-year statute of limitations, this wave of prosecutions is nothing less than impressive.

This section offers a summary overview of some of the first and most important cases in this complicated legal web involving both civilian and military judges, as well as judges in other countries.[50] The list is not exhaustive. It covers mainly the cases that were brought to court in 1998–2001, which is when the most dramatic increase in the number of trials took place. The numerous (re)opened court cases stemming from the dictatorship period gradually involved a substantial number of judges in

courts at different levels, principally the Santiago Court of Appeals and the Supreme Court of Chile.

*The Santiago Court of Appeals*

The most high-profile judge spearheading the early phase of prosecutions was Judge Juan Guzmán, who was appointed *ministro de fuero* (special magistrate) for cases against Pinochet in January 1998, several months prior to Pinochet's arrest in London. Many of the more than 180 complaints against Pinochet that Judge Guzmán received during his first three years in office also named other military officers. Although the first complaints landed on Guzmán's desk by chance through the formal case distribution system (*por sorteo*), he quickly became the go-to judge for cases having to do with Pinochet. In order to handle this immense caseload, Guzmán singled out a few cases on which he based his main investigations. The most politicized case within his initial caseload, on which Judge Guzmán based his arrest order against Pinochet, was the Death Caravan (*Contra A. Pinochet y otros,* Rol No. 2182-98). Besides Pinochet, the accused in that case included General Arellano Stark and retired colonel Pedro Espinoza as well a number of other officers.

The other principal cases pushed by Guzmán were Pisagua, Operación Colombo, Colonia Dignidad, and Calle Conferencia. In Pisagua, named after a desert town in the north of the country, where a mass grave was discovered shortly after transition, a general and a retired noncommissioned officer were accused. Three other high-ranking military officers (including Manuel Contreras, already convicted for the Letelier murder) stood accused in the so-called Operación Colombo. Colonia Dignidad involved an infamous ex-Nazi settlement outside Santiago and its alleged relations with the DINA secret police, which oversaw the main period of repression in the 1970s. Charges were brought against a German citizen, Gerard Mücke, and an arrest order was issued for Paul Schaffer. In his fifth major case, Calle Conferencia, Judge Guzmán accused five people of the killing or forced disappearance of eight high-ranking members of the Communist Party; Manuel Contreras again was one of the accused. In this period Guzmán also carried out investigations regarding three former torture centers (Villa Grimaldi, Londres 38, and José Domingo Cañas), where hundreds of people were tortured and many died as a result. Convictions in these cases came only years later, if at all.

Though Guzmán was initially the principal judge in the quest against the Chilean military, a couple of other appellate court judges stand out. *Ministro en visita* (special or visiting judge) Sergio Muñoz Gajardo took two major cases: the assassination of Tucapel Jiménez in 1982 and the assassination of Juan Alegría on July 11, 1983.[51] Both cases fell outside the protection of the 1978 Amnesty Law. The Juan Alegría case was

the first time in Chilean legal history that a judge has been relieved of a case halfway through because of incompetence.[52] The dismissed judge had been sitting on the case for more than 15 years without making any progress; after Muñoz took over the case, he charged 25 people within six months.[53]

Another prominent appellate court judge, Milton Juica, was responsible for the Operación Albania case, concerning the murders of 12 young people in June 1987. Fourteen people from the army, the Carabineros (military police), and Investigaciones de Chile (the detective branch of the police) were accused. The case was appealed to the Supreme Court. It would take years for the case to reach a final conclusion: only in August 2007 did the *sala penal* of the Supreme Court confirm a life sentence for ex-general Hugo Salas Wenzel, former head of the Centro Nacional de Informaciones (CNI), DINA's successor, and hand down shorter sentences for 14 others.[54]

The only high-level Chilean female judge who was investigating crimes of human rights violations during this period, visiting judge Dobra Luksic of the Santiago Court of Appeals, was in January 2001 investigating 13 high-level army officers and Carabineros for the murders of four people in September 1986.[55]

*Other Civil Courts*

Several other judges from different civilian courts were also investigating cases of past human rights abuses. To give a few examples, in January 2001 the Ninth Criminal Tribunal of Santiago (Noveno Juzgado del Crimen de Santiago) had four people accused.[56] The Fourth Criminal Tribunal (Cuarto Juzgado del Crimen) was prosecuting a low-ranking army official for the disappearance of José Manuel Ramírez Rosales in 1974. Furthermore, another court had one high-ranking and two lower-ranking army officers on the hook for the disappearance of 24 people. All three officers were later released on bail, though, and did not serve any sentence.[57] Finally, the Fourth Criminal Court in San Miguel accused three ex-members of the Air Force Intelligence Service and one civilian of the kidnapping and murder of Alfonso Gahona Chávez in September 1986.[58]

*The Military Courts*

For the first time in Chilean legal history, the military courts were no longer automatically rejecting all human rights cases, as they had done throughout the dictatorship as well as during the first few years after the transition.[59] In the first case, the Fiscalía Militar de Santiago on July 12, 2000, sentenced three Carabinero captains to prison terms ranging from three to five years for the murder of Peruvian citizen Pery Arana

in Santiago on March 31, 1984. The military court had long refused to deal with this case, but under pressure from the Supreme Court it had been forced to continue the investigation in 1997. This particular case sent two signals: that the Supreme Court no longer automatically refused cases stemming from the dictatorship period and that the military would actually rule against its own people.[60] It was the first time in post-coup history that a military court had handed down a sentence in a human rights case. In another case, the Fiscalía Militar de Concepción detained five former CNI agents for the assassination of three people in 1984, all of whom remained among the disappeared.[61] These cases were atypical, though. More often, the military courts during this period would request transfer of the cases and then amnesty them.

*The Supreme Court*

Few domestic cases reached the Supreme Court before the turn of the millennium. One that did was a case in which the San Miguel Court of Appeals in 1997 condemned Osvaldo Romo Mena, a DINA agent from 1973 to 1990 and an infamous torturer, to 20 years in prison for the kidnapping and disappearance of a Swedish citizen, Gloria Lagos Nilsson, in August 1975. On appeal, the Supreme Court overturned this decision and transferred the case to the Military Court of Santiago (Segundo Juzgado Militar de Santiago), where, on October 6, 2000, military judge Adolfo Vásquez Moreno set Romo free *bajo fianza* (on bail).[62] The case was further appealed to a military court (*corte marcial*), which absolved Romo in 2003 in the Gloria Nilsson case. The lawyer in the case, Nelson Caucoto, next presented a *recurso de casación* to the Supreme Court in order to overturn the decision and have Romo convicted. Romo meanwhile was facing charges for other human rights violations in various courts, including the Supreme Court, and was sentenced to a total of 92 years in prison. The Supreme Court issued the last sentence against him only in 2009—two years after Romo died in prison.[63]

During this period, a trickle of international court cases started, involving other Southern Cone courts as well as a small number of European courts and governments. The Chilean Supreme Court was initially very reluctant to cooperate. For instance, the Italian government requested the Chilean Supreme Court to extradite Manuel Contreras Sepúlveda and Raúl Iturriaga Neumann for the attempted murder of Bernardo Leighton and his wife in Rome in October 1975, but the Supreme Court refused.[64] The Supreme Court also refused to cooperate when Argentine judge María Romilda Servini de Cubría of the Second Federal Court in November 2000 requested the Chilean Supreme Court to detain Pinochet, Iturriaga, Contreras, and Espinoza. The Supreme Court in 2002 further refused another Argentine extradition request, this time from judge Rodolfo Canicoba for the involvement of Manuel Contreras in Operación

Cóndor. Another high-profile case that received extensive media coverage in Chile due to its international character was the assassination of General Carlos Prats and his wife in Buenos Aires in 1974. In the Prats case, Argentine judge Servini de Cubría accused five high-level Chilean military (including retired officers Contreras and Espinoza, held responsible for the Letelier-Moffitt murders in Washington) and one DINA agent in Buenos Aires of crimes against humanity.[65]

To conclude, it appears that the Supreme Court had taken on a uniform profile in human rights cases. Although it had issued a progressive ruling in the Poblete-Córdoba case in 1998, it continued to be reluctant to impose sentences as well as to react positively to extradition requests from foreign courts and governments in this initial period of post-transitional justice. It may be worth recalling that the Supreme Court only barely upheld the June 6, 2000, appellate court decision to strip Pinochet of his immunity, indicating that there were still deep splits on human rights issues and how to deal with them. Though the second chamber was certainly more progressive and liberal than the unreformed Court, there were still conservative, Pinochet-friendly judges on the Supreme Court.

Nevertheless, lower courts in Chile, and the Santiago Court of Appeals in particular, had issued enough arrest orders and convictions to support a conclusion that there was very positive development in the field of legal solutions to past gross human rights violations in 1998–2001. Many military officers were brought to trial and many more cases were in the works. Typically, in the resolved cases, those sentenced to prison were retired military personnel. This is, perhaps, not surprising given that most of the crimes took place more than 15 years previously and the retirement age in the armed forces was relatively low (around 50 for lower-level officers, somewhat higher for those further up in the ranks). Also, the cases centered on forced disappearances as well as post-1978 murders, crimes that were not covered by the Amnesty Law. The first successful conviction for a crime that was theoretically covered by the Amnesty Law did not come until 2002.

Parallel to the breakthrough in prosecutions of the military, quieter but highly significant events were taking place in the human rights field that were to later directly affect the speed and energy with which the courts dealt with these cases.

## Prosecutions Continue: Business as Usual?

The unprecedented legal developments outlined above started toward the end of Eduardo Frei's presidency and continued under Lagos—in spite of rather than because of official human rights policies. When Bachelet succeeded Lagos, she provided executive support for efforts to address

violations of the past. But by that time, courts seemed to have established their own momentum in these cases.

## Softening Civil-Military Relations under Lagos, 2000–2006

After an election and runoff in December 1999 and January 2000, Socialist Party candidate Ricardo Lagos Escobar assumed the presidency on an electoral platform dealing with anything and everything but the human rights matters inherited from the Frei administration. Lagos's main focus was on employment and poverty: "the election was not so much about recriminations concerning the past but much more about policies for the future" (Angell 2007, 87). Pinochet's return to Chile came the month before Lagos took office, but Lagos had refrained from making Pinochet's fate a campaign topic and openly stated that he would leave this matter to the courts.[66] In spite of this official ambivalence, Chilean judges were forced to deal with several high-profile human rights cases during Lagos's presidency. The Lagos period saw a major revision of the past, largely due to the information on extensive torture and brutality documented by a special commission on torture in 2004. One of the most notable achievements during the early days of the Lagos presidency was a better relationship with the military—which was to benefit subsequent prosecutions.

The military decided to enter into dialogue with the government and civilian groups while Pinochet was still under arrest in London.[67] The Mesa de Diálogo, or roundtable, comprised lawyers from human rights organizations; representatives from all four branches of the military, including the Carabineros (military police); the Catholic Church, Methodist Church, Jewish community, and Masonry; and prominent academics.[68] The aim of the talks was to gather information from the military that would reveal the fate and whereabouts of more than 1,000 people who remained "disappeared." In return, the military were promised immunity against criminal proceedings.[69]

The talks became tense, and they quickly wound up when Pinochet was returned to Chile in March 2000. The report issued by the Mesa in January 2001 revealed little new information and was a huge disappointment to all parties (Lira 2001). Nevertheless, several important advances were achieved. First, the roundtable succeeded in making the "detained-disappeared" a public issue rather than just a concern of the victims' families and the human rights community. A commitment was made to search for the bodies. Second, for the first time since the transition, the military admitted guilt for having carried out unacceptable crimes (Roht-Arriaza 2009a, 89).

Third, and most importantly, the findings of the report were handed over to the courts, after which the Supreme Court appointed nine

full-time special judges (*ministros en visita*) to deal with these cases.[70] The government, after receiving some criticism from human rights lawyers, made President Lagos appoint additional special judges to speed up investigation of the cases of the disappeared. In March 2001, 60 special judges were designated to take over the majority of the civilian system investigations, adding these human rights cases to their normal caseload. Three more judges were appointed in October 2002 to help Judge Guzmán with the ever-increasing caseload he had accumulated against Pinochet. When Guzmán retired in 2005, he was replaced by Víctor Montiglio. Two more appellate court judges were appointed to jointly take care of around 200 cases in the Santiago Court of Appeals (see Collins 2010a).

Initially, the new appellate court judges were to deal only with the new information on disappearances that the Mesa report had revealed. However, their mandate was quickly expanded by the Supreme Court, which called in records of all outstanding human rights investigations from every court (Collins 2010b, 89). Although this greatly expanded the universe of cases that became subject to investigation, the cases being handled by the military tribunals were still excluded. The *ministros en visita,* many of whom were women, proved hardworking and dedicated to resolving these cases, also relying heavily on the active collaboration of a specialized branch of the civilian detective arm of the police force. By the mid-2000s, dozens of cases had reached the conviction stage (Roht-Arriaza 2009a, 89).

Finally, the Programa de Derechos Humanos (Human Rights Program), which had been set up in 1997 within the Ministry of the Interior to locate the remains of the dead and disappeared, was revitalized when the government decided that it should provide legal advice and support to relatives of the victims.[71] Although the program's lawyers initially were not allowed to bring court cases directly on behalf of relatives of the dead and disappeared, they could refer them to private human rights lawyers. Some of the Programa lawyers also represented these cases in a private capacity on their own time (Collins 2010b, 90). Over time the Programa lawyers started to provide additional evidence of past human rights abuse cases to the newly assigned *ministros en visita,* resulting in a number of new cases as well as a revitalization of old cases.[72]

## Vacillating Government Stance on Human Rights

The courts gained momentum, and halfway through his presidential term Lagos was forced to take a more active stance on the human rights issue. His official human rights initiative, "No hay mañana sin ayer" (there's no tomorrow without yesterday), launched in April 2003, gave further impetus to the Human Rights Program (Lagos 2003). This policy package included the setting up of a second truth commission to deal exclusively

with political imprisonment and torture, issues not covered in any detail by the *Informe Rettig*. It also included a package of symbolic and material reparations to survivors and victims' families. This was the first time since the transition that official human rights policies were broadened beyond the issue of the disappeared.

The Comisión Nacional sobre Prisión Política y Tortura (National Commission on Political Imprisonment and Torture, known as the Valech Commission) started its work in late 2003. Preliminary findings were made available in November 2004. The results of its investigations were detailed in a final report the following year, documenting over 28,000 cases of illegal detention and/or torture in over 1,000 clandestine detention centers across Chile (Comisión Nacional Sobre Prisión Política y Tortura 2005). In its wake came the first-ever official acknowledgment by the military that human rights abuses had been an institutional policy and practice. This admission signaled a military more committed to democratic practices but also a split between hard-liners and soft-liners within the ranks.

In November 2004, the month the preliminary findings of the Valech Commission were issued, the Supreme Court upheld a ruling by the Santiago Court of Appeals sentencing a number of military officers, including Manuel Contreras, to long prison terms in a case regarding the 1975 disappearance of Miguel Angel Sandoval.[73] The Court stated that amnesty should not be applicable to the crime of forced disappearance as it was a "continuing crime." This was the first time since Poblete-Córdoba (1998) that the Supreme Court had applied this principle. The Sandoval decision was also the first Supreme Court ruling on the nonapplicability of the Amnesty Law to a conviction and sentence (Lafontaine 2005, 469). Moreover, the Supreme Court also for the first time declared that, according to Collins (2010b, 93), "the DINA, its installations, detention centres and practices had all been manifestly illegal. The verdict issued a 'reminder' that the location of the remains would convert disappearance into amnestiable homicide." The Court was evidently sending a signal on how it intended to rule on the hundreds of cases in the courts that had not yet reached the trial stage.

Another party in this landmark case was the Consejo de Defensa del Estado (CDE), the government's legal agency, acting as an additional prosecution actor. The CDE argued that, in Collins's words, "although the verdict should be upheld in this particular case, the loophole should be closed to future claimants" and that "future disappearance cases [should] be treated as homicides even where the body had not been discovered or eyewitnesses could not be found" (Collins 2010b, 93). According to Collins, "accountability actors believed the CDE's position reflected a new government project to placate the military [...] aimed to minimise future convictions" (Collins 2010b, 93). This became clear when

the military reacted strongly in January 2005 to Manuel Contreras being forcibly removed from his home to serve his sentence.

Although the Lagos government certainly seemed more favorable to human rights halfway through its term than had the previous Frei government, its commitment to large-scale prosecutions may still be questioned. Worried about the speedy development in accountability cases in 2003–4, and possibly still concerned that the military might react as they had at the beginning of 2005, the government tried to place restrictions on prosecution through two different measures. First, the Supreme Court, allegedly under government pressure, proposed an Argentine-style *punto final* in the form of a six-month deadline for all the judges investigating disappearance cases to complete their work. This was followed by a government proposal to end the system of *ministros en visita*, which would entail removing a large number of investigating judges from the cases of the disappeared. According to Collins (2010b, 96), accountability actors and "even some judges rejected the idea, with the capital's Magistrates Association declaring it unacceptable interference with judges' freedom of action." Neither measure was enacted, but the initiative nonetheless strongly suggested that the government was trying to interfere with judicial proceedings.

## Legal Proceedings under Bachelet, 2006–2010

While Lagos tried to interfere in court proceedings, his successor from the same party, Michelle Bachelet Jeria, offered the courts her tacit support. A former minister of health and minister of defense under the Lagos government, Bachelet was the first woman to be elected president of Chile. She soon demonstrated an interest in rights protection and placed human rights, in particular women's rights and indigenous rights, high on her political agenda.[74] The daughter of a former air force general who died in 1974 after being tortured under Pinochet, Bachelet herself was tortured at the infamous Villa Grimaldi detention center and later spent time in exile in Australia and Eastern Europe. Thus it may not be surprising that Bachelet pushed for solutions to past violations (see Valenzuela and Correa 2009). Angell states that "the questions of human rights and civilian control over the military remain[ed] important" issues when Bachelet assumed power (2007, 108). He further notes that "her story was well known, and undoubtedly struck a responsive cord in those for whom human rights abuses were central in their memories of the Pinochet years" (117). Bachelet's attendance at the inauguration of a monument in commemoration of the three victims in the Caso Degollados shortly after she became president signaled her deep-felt sympathies for human rights victims and their families.[75] Her commitment to human rights continued throughout her presidency, though she focused

mostly on memorial projects rather than on prosecutions.[76] On October 31, 2009, she signed a decree establishing this date as the National Day of Victims of Political Execution, and she expressed the government's continuing commitment to respect human rights.[77]

Two highly important political-judicial events during Bachelet's presidency illuminate the relationship between the executive and the judiciary in human rights matters: the death of Pinochet and the arrest of Fujimori in Santiago, followed by his extradition to Peru to stand trial for gross human rights violations.

Pinochet's death in 2006 raised the question of whether he, as a former head of state, was entitled to a state funeral. Although Bachelet was initially persuaded to say that he was, after intense lobbying from lawyers and constitutional specialists she decided he was not.[78] Nor did she attend the private memorial service organized by the Military Academy, though she sent the minister of defense as the government's representative. Government buildings were forbidden to fly flags at half-staff as a signal of mourning; flags were to remain at full staff.[79] A new era had begun.

The next test case of the government's and judiciary's commitment to retributive justice presented itself when the former president of Peru, Alberto Fujimori, stopped in Chile on his way from Japan (where he was living in voluntary exile) to Peru. Fujimori was arrested in Chile at the Peruvian government's request. Although it was a politically sensitive question, it was also a matter that, under Chilean law, should be dealt with by the courts.[80] Because of its character, the case went directly to the Supreme Court, which issued two judgments. First, Supreme Court judge Orlando Alvarez, on July 11, 2007, rejected the extradition request on the grounds that the crimes in question were subject to statutory limitations.[81] Peru appealed the decision, which was next heard by the Chilean Supreme Court's *segunda sala* (criminal bench). In a decision that contrasted to its former handling of extradition cases, the Supreme Court on September 21, 2007, overturned Alvarez's ruling, hence approving the extradition. Fujimori was sent back to Lima to stand trial.

In April 2009, Fujimori became the first former head of state in the world to be prosecuted and sentenced to prison by a court in his own country. The Chilean justice system made this possible. Had Fujimori landed in Santiago a decade earlier, it is highly unlikely that the Chilean courts would have followed up on the extradition request. The Supreme Court's response in 2007 is probably closely connected to the Pinochet case. Pinochet, after all, had been extradited from England in 2000 at the request of the Chilean government (under Eduardo Frei) to stand trial on national soil. Although nobody at the time anticipated that Pinochet would actually be prosecuted, he most certainly was.

The Supreme Court followed up on its new position as a protector of the rule of law by honoring the obligation under international law and

human rights law that a government must either prosecute those guilty of grave crimes or make such prosecution possible through extradition. In August 2007 the Court upheld a life sentence for Hugo Salas Wenzel in the Operación Albania case, making Salas Wenzel the first senior official to receive a life term for human rights violations carried out during the reign of Pinochet.[82]

## The Trial Scene in 2009

By the end of Bachelet's presidency, the Chilean courts had come a long way in holding the military accountable for human rights violations. At the close of December 2009, there were 325 active investigations underway into past human rights violations, 293 of which concerned deaths and disappearances, covering 1,021 victims. This amounted to roughly a third of all known victims of these crimes. Cases involving a further 6 percent of victims had already been concluded. Regarding the defendants, a total of 779 former regime agents had been indicted, formally charged, or sentenced for past human rights violations. Since 2000, 280 former security agents had received a total of 493 guilty verdicts. Of these agents, 204 had fully exhausted the appeals process, meaning that their sentences had been confirmed by the Supreme Court. In addition, there were 3,105 formal investigations and indictments (*procesamientos* and *acusaciones*) pending against 563 former agents.[83]

In sum, the number of concluded and ongoing trials in Chile is impressive. Yet, there is a long way to go before all the human rights cases will have reached the verdict stage and closure. Roughly two-thirds of all reported victims had no case either in progress or concluded as of the end of 2009. Indeed, many reported deaths and disappearances had not even been brought to court, and they may never be. As these crimes from the dictatorship period recede deeper into the past, it becomes less and less likely that they will be presented as new cases to court in the future, according to human rights lawyers and the Programa de Derechos Humanos. Existing cases are being handled under the old investigating magistrate system, which is being phased out. Cath Collins, an expert in the field, notes "the desire of the courts not to have to carry this over any further into the new system."[84] Although a handful of new claims have recently been submitted to the courts by the Asociación de Familiares de Ejecutados Politicos, representing victims' families, Collins observes that "the rate and enthusiasm for case bringing has definitely slowed." She attributes this to loss of momentum after Pinochet's death and to a lack of resources and lawyers willing to work on the cases, among other constraints. On the whole, Collins thinks "there's unlikely to be a big influx unless the Amnesty Law gets overturned," which she considers unlikely.[85]

## Explaining the Onset of Post-transitional Justice

Prior to 1998, "the courts overwhelmingly had held that the amnesty meant that when the facts implicated the armed forces, no investigation should even be opened" (Roht-Arriaza 2009a, 88). There has clearly been an unprecedented legal development in human rights matters over the last two decades in Chile, with 1998–2001 being the peak period for new cases brought to court.[86] A core question is whether these processes have been judge driven or whether they are the outcomes of executive policy making. An answer requires tracing to what degree the official position of the Chilean government on these issues has hindered or supported the work of the judges over time. This reveals important changes in executive-court dynamics in the post-authoritarian period, with the most notable shifts taking place during the onset of post-transitional justice.

### Judicial Affairs or Politics?

Following the transition to democratic rule, Aylwin, a pro–human rights president, pushed hard for judicial reform, partly in order to enable prosecution. But the Pinochet-loyal Supreme Court, fiercely independent of the new government, ensured that little progress was made in the legal field. There was a clear shift in the official position of the Chilean government after the presidential election of 1999–2000. Whereas President Frei sought a "political solution" to the human rights issue, the Lagos government initially left these matters to the courts.

The Frei government harshly criticized the British government when Pinochet was arrested in London, arguing that Chilean national sovereignty was abused. After the lengthy legal battles described earlier, Frei succeeded in getting Pinochet back from England by appealing for his release on humanitarian grounds. In an address to the nation right after Pinochet's return to Chile, Frei stated that "it will be the Chilean courts that will decide whether Senator Pinochet is responsible for the crimes imputed to him."[87] However, it quickly became clear that Frei had a hidden agenda. Before leaving office, Frei had been quietly pushing a constitutional reform that would erect an important hurdle to resolving the Pinochet case on home ground.

Soon after Lagos took power, the constitutional amendment was approved by a large majority in the plenary session in both houses of Congress (111 in favor and 29 against in the lower house). It granted all former presidents immunity from prosecution and guaranteed them a financial allowance.[88] The vote came only two weeks after Judge Guzmán had presented his case against Pinochet before the Santiago Court of Appeals. Although Lagos had stated that he was going to leave Pinochet to the courts, the amendment made this less likely, as Pinochet would

retain his parliamentary immunity from prosecution even if he gave up his position in the Senate.[89] This controversial move appears to have been a deal between the center and the right aimed at persuading Pinochet to retire from active politics; in any case it indicated that there were still attempts at political meddling in judicial matters. As expected, a group of deputies and senators on the left wing of the governing coalition fiercely opposed the bill, but there were too few of them to block its passage.

After several court rulings in the Pinochet case and procedures set in motion against several other military figures, right-wing politicians tried again a year later to interfere with judicial proceedings—this time without success. A leading conservative Chilean newspaper reported on February 27, 2001, that the conservative party Renovación Nacional was trying to find a "political solution" to the human rights problem. The president of the party, Alberto Cardemil, said he was trying to establish a parliamentary alliance with the "more moderate" parties of the Concertación in Congress in order to agree on a mutually acceptable way of dealing with the increasing number of court cases against Chilean military officers. This was a follow-up to the so-called Figueroa-Otero proposal launched by ex-president Frei in 1995 in an effort to establish the whereabouts of the disappeared. However, Cardemil's proposal was voted down by both Congress and the Senate. The political profile of the Senate had evidently started to change as Pinochet-appointed senators had stepped down after their terms ended in the late 1990s.

In spite of repeated attempts at political interference, the criminal court proceedings against Pinochet and other military officers continued. The political initiatives aimed at "solving" the human rights problem outside the courts had been overtaken by developments in the courts themselves. What we may tentatively conclude, then, is that progress in retributive justice for past human rights violations during this crucial early post-transition period came about in spite of, rather than because of, executive policy preferences. The Supreme Court, long known as conservative and Pinochet-friendly, could no longer be trusted to protect the former dictator's interests. This trend continued throughout the presidential terms of Lagos and Bachelet. In essence, the human rights issue was transferred from the political realm to the courts during 1998–2001 and has remained there since. If the onset of post-transitional justice and subsequent legal developments have been court driven rather than policy driven, then what accounts for these changes?

## The Three Preconditions for Military Trials

Before turning to changes in judicial behavior, let us first examine three preconditions for judicial activism in cases of past human rights violations:

a reduction in military threat, a persistent demand for justice, and a sufficient basis for prosecution of past human rights violations.

*Reduction in Military Threat*

At the time of transition, the balance of power clearly favored the military, with Pinochet remaining head of the armed forces until 1998. Not surprisingly, Pinochet ardently guarded the military from any judicial attack. A couple of saber-rattling episodes during the Aylwin government demonstrated that the military was still a force to be reckoned with in early years after the transition.

Although the military reacted negatively to the imprisonment of Contreras and Espinoza after their conviction in the Letelier murder case, there were no tanks in the streets during the Frei presidency. As detailed above, civil-military relations continued to improve under Lagos. The military's nonviolent reaction to Pinochet's London arrest and his return to Chile, and to subsequent court procedures against him and hundreds of other retired military, further demonstrated a willingness to stay in the barracks. The talks-not-tanks strategy was exemplified by the Mesa de Diálogo.

Rather than Lagos, it was Michelle Bachelet, appointed defense minister by Lagos in 2002, who managed to "forge a bridge between the military and political worlds" (Angell 2007, 117). The first female defense minister in Latin American and one of the few in the world, she promoted gestures of reconciliation between the military and victims of the dictatorship. These culminated in the historic 2004 declaration by General Juan Emilio Cheyre Espinoza, commander in chief of the Chilean army from 2002 to 2006, that "las violaciones a los derechos humanos nunca y para nadie, pueden tener justificación ética" (violations of human rights can never be ethically justified by anyone). He added that "never again" would the military subvert democracy in Chile.[90] This was the first official confession of military responsibility for human rights violations.

Change in military leadership has been an important factor in explaining the gradual warming of the military to democratic values. The heads of the army who succeeded Pinochet—first Ricardo Izurieta, succeeded by Juan Emilio Cheyre in 2002 and Oscar Izurieta in 2006—were more pro-democratic than their predecessor and officially favored human rights. There has been a gradual distancing over time from Pinochet and the values he promoted. Generational changes in the military and the simple passage of time, along with the fact that military dictatorships are no longer in vogue, have certainly advanced peaceful civil-military relations (see Fuentes 2006). Even so, there is still a culture of deference to military will in certain political circles in Chile. The hailing of assassinated right-wing senator Jaime Guzmán, architect of the 1980 Constitution and an ardent Pinochet supporter, by building a monument to him in late 2008

demonstrates that significant strands of the Chilean population still sympathize with the military. Yet, there is good reason to conclude that the military forces were subservient to democratic rule by the time Pinochet died in 2006.

*Demand for Justice: The Human Rights Movement*

Although Chilean investigative magistrates technically may initiate cases on their own, in practice, where gross violations of human rights are concerned, they have instead responded to efforts by private individuals to bring cases before the courts. Those bringing such cases have been mainly survivors or members of victims' families, frequently represented by a lawyer working for one of Chile's human rights organizations.

Chile had one of the strongest nongovernmental human rights networks in Latin America during the dictatorship period, well organized and with a high level of professional legal expertise. The human rights groups played a crucial part in collecting evidence of military abuses and presenting *querellas* (criminal complaints) to the courts (Frühling 1991, 1992; Orellana and Hutchison 1991). Much of the information gathered during the dictatorship period, presented first to the 1990–91 truth commission (evidence on executions and disappearances) and later to the Valech Commission (evidence on torture), was used later in court cases against the military. Although most of the cases were brought before the courts by either survivors or victims' kin, political parties (particularly the Communist Party), trade unions, and youth organizations can also be found among the *querellantes.* If not for this vibrant local NGO and social movement network, there is good reason to believe that the quest for justice would have been much less successful in Chile.

Several scholars have argued that the push for justice from 1998 onward came largely as a result of human rights organizations presenting cases to foreign courts, particularly Spanish courts, after Pinochet's arrest in London. It has been argued that the domestic justice processes in Chile (and Argentina) in large part reflect the impact of transatlantic human rights networks and human rights lawyers (Lutz and Sikkink 2001; Sikkink 1993, 2005; Sikkink and Walling 2007). Roht-Arriaza (2009a, 92) writes that "transnational civil society plays a key role in both pushing forward these transnational prosecutions and translating them into catalysts of domestic change. In the Chilean cases, human rights groups within the country were deeply involved in the preparation of the European as well as the domestic legal cases." Roht-Arriaza notes the positive contribution of exile communities to these legal processes related to Chile, as do Sznajder and Roniger (2009, 229–43).

Though legal processes in Europe and elsewhere undoubtedly strengthened the human rights movement in Chile and encouraged

activists to present cases to court, I would argue that the domestic "justice cascade" is principally due to the efforts of local actors. Chilean human rights organizations, while showing fluctuating levels of activity over time, have sustained their pressure on the courts since the early days of the dictatorship—long before transnational networks emerged as prominent actors. A sudden change in the demand chain for legal justice is thus not a plausible explanation for why trials started to materialize toward the end of the 1990s. It is therefore pertinent to shift focus to the receiving end of the complaints: if the courts had not become more receptive to human rights cases, these cases would probably have continued to stall in the courts—irrespective of the number of cases brought to court and the pressure exercised by human rights organizations and their lawyers.[91]

*Legal Basis for Judicial Action*

The main legal obstacles to prosecution of the military in Chile have been the Amnesty Law of 1978 and the 15-year statute of limitations for murder. In contrast to Argentina, which has annulled its amnesty laws granting the military impunity for gross human rights violations, Chile has retained its law (as has Uruguay). There have been several efforts at the presidential and congressional levels to have the Amnesty Law declared null and void, but important sectors of the center and right have blocked these initiatives. Although constitutional reforms in 2005 brought about important changes in the composition of the Senate by eliminating the nine designated senators (and reducing the presidential term from six to four years), this has so far not produced a political majority in favor of undoing the Amnesty Law—leading to heavy criticism by Amnesty International, among others.[92]

The national legal basis for judicial decision making in Chile has thus remained largely intact throughout the post-dictatorship years. What has changed is judges' interpretation of this amnesty law, as well as their definition of when to apply the statute of limitations to a given crime. As noted in a recent report, "although the Decree-Law [Amnesty Law] was continuously applied by the Chilean justice system, there was a significant change in the jurisprudence of the Supreme Court in 1998" due to the Poblete-Córdoba case.[93] Prior to that case, the Supreme Court had automatically applied the Amnesty Law. The Poblete-Córdoba ruling in 1998, refusing to grant amnesty in cases of detained-disappearance, thus marked a second phase in the application of the Amnesty Law. Chilean judges gradually started to bypass the law by interpreting forced disappearance as a continuing crime (*delito permanente*).

There were two separate legal arguments in their reasoning, which were applied in two phases. The first was that in a continuing crime, such as forced disappearance, the statute of limitations has not started

to run, as the crime is still being committed. If the truth about a disappearance is established and it turns out that the crime was a homicide, it is only eligible for amnesty if it was committed before 1978. In this phase, judges investigated continuing crimes but applied amnesty and/or the statute of limitations once the date of commission had been established. The second line of reasoning, adopted later, was that regardless of when a murder was committed (before or after 1978), if it qualifies as a crime against humanity it cannot be amnestied or prescribed, so the date of commission becomes irrelevant.

After Poblete-Córdoba, the doctrine of forced disappearance as a continuing crime was next applied by the Santiago Court of Appeals in the Sandoval case in 2004. This doctrine is now applied almost universally by Chilean judges in all courts. However, the legal reasons invoked for not applying the Amnesty Law to cases of detained-disappearance have varied from case to case and over time.[94] In the Sandoval case, the Santiago Court of Appeals noted the fact that Chile was both a signatory to the Rome Statute establishing the International Criminal Court and a party to the Vienna Convention on the Law of Treaties, and was therefore obliged to prevent impunity for certain crimes. In the Prats murder case, the same court in 2005 found that as Chile was a State Party to the Vienna Convention on the Law of Treaties, it had to recognize "the primacy of international law over domestic law, being unable to invoke any legitimate reason to ride roughshod over the fulfillment in good faith of the contracted obligations." The Court noted that "the non-applicability of statutory limitations to crimes against humanity is now emerging as an important norm in general international law (*ius cogens*)."[95] In other cases, the fact that Chile has been since 1994 a signatory to the International Convention for the Protection of All Persons from Enforced Disappearance has encouraged Chilean judges to invoke the principle of chain of command when establishing responsibility for crimes.

With some variations, then, international human rights law has been applied much more systematically in recent years. In a way, it is surprising that it has taken so long for Chilean judges to invoke international law, given that the Supreme Court of Chile has stated that international law takes precedence over domestic law. According to the Inter-American Court of Human Rights, "with regard to the ranking of international law, a significant action occurred in 1989 with the constitutional amendment of article 5 of the Constitution; this established that the fundamental rights are not only indicated and recognized in the Constitution itself, but also by international human rights treaties. No provision in domestic legislation may have pre-eminence or in any way obstruct real and effective compliance with the decisions of the Inter-American Court."[96]

The jurisprudence handed down by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights

has also had significant impact, in particular in rulings where Chile is a party as well as rulings that these bodies have issued against Chile.[97]

Under the presidency of Bachelet important strides were made in Chile's compliance with international human rights law. Particularly important was Chile's ratification of the Rome Statute of the International Criminal Court in June 2009—a gesture applauded by, among others, Amnesty International, which had long urged the Chilean government to take this step (Amnesty International 2009).

In sum, more frequent references to international human rights conventions, treaties, and regional human rights jurisprudence handed down by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights suggest that Chilean judges have gradually become more aware of legally binding international obligations and more sensitive to prevailing human rights norms. What has changed, then, is not domestic law, but rather its interpretation by judges, who have expanded the scope for jurisdiction in cases of past human rights violations.

## Explaining Changes in Court Behavior

The activist behavior of judges in human rights matters since the turn of the millennium breaks not only with the judiciary's role during the dictatorship period but also with its pre-authoritarian role.[98] Prior to the coup, Chile was considered "a model of democratic governance" (Faundez 2010, 1). Its judiciary was known as independent (Faundez 2005) and indeed was considered one of the most independent judiciaries in all of Latin America.[99] The Chilean judiciary was, however, also known for its legalistic approach, its reluctance to carry out judicial review of administrative action (Couso 2004; Faundez 2010), and its general conservatism (Couso 2005; Hilbink 2007). Faundez (2010, 2) notes that in the uninterrupted democratic period from 1932 to 1974, the approach to governance "reinforced the independence of judges, but at the cost of marginalising courts and turning judges into remote figures with little understanding or interest in political issues of the day." He characterizes this period in Chilean legal history as "legality without courts." Hilbink (2007, 65) notes that during these four decades (1932–74), "the Supreme Court found a covertly activist means of imposing its traditional, conservative perspective on both case outcomes and general legal interpretation."[100] Moreover, Hilbink, in her historical analysis of Chile, demonstrates a striking continuity in judicial performance across regimes, including under the Aylwin government.

As demonstrated in this chapter, dramatic changes in judicial behavior and performance have taken place since Aylwin was in office. How, against this historical backdrop, do we explain the more activist role that Chilean

judges have played in holding the military to account for prior human rights violations since the turn of the millennium? Why have they broken with their conservative role as applicants, not interpreters, of the law? Chilean courts have made an almost 180-degree turnaround from their initial stance on past human rights crimes. After ardently refusing to deal with these matters at the time of transition—or passing cases to the military courts, where they inevitably stalled—certain judges have, over the years, become proactive, both in their interpretation of the Amnesty Law and with respect to successfully charging and incarcerating ex-military for gross human rights violations. The question is why.

An obvious response would be the simple passage of time. The Supreme Court has certainly gone through generational changes as judges who have retired or died in office have been replaced by new judges. The Supreme Court that stripped Pinochet of his immunity in 2000 was inherently different from the Court that Aylwin inherited from Pinochet in 1989. Yet, the judicial processes outlined in this chapter would most likely not have taken place—or would, at the very least, have occurred at a much slower pace—in the absence of broader institutional changes. These institutional changes widened the scope for judicial action in human rights matters. A key question is, therefore, what factors spurred changes in court behavior, specifically in the period 1998–2001? It may be useful to distinguish between changes that have affected the institutional or structural conditions for judicial decision making, on the one hand, and factors influencing the case-by-case decision making of a particular judge, on the other.

### *Judicial Reform and Structural Changes*

At the beginning of this book, judicial independence was identified as one of the necessary, though not sufficient, conditions enabling prosecution of gross human rights violations to occur in the absence of political will to prosecute. When we talk about judicial independence in the Chilean context, we must address the important question of independence from *whom*. While most scholars consider freedom from undue political pressure from the *incumbent* government to be a precondition for independent judicial behavior, and while Helmke (2002), looking at Argentina, points to strategic defection to the *next* government as a form of judicial dependence, the Chilean case demonstrates the vital importance of independence from the *previous* government. In Chile, judicial reforms intended to increase structural independence have thus been aimed at reducing dependence on the outgoing Pinochet regime.

When the Supreme Court ruled in 2006 that Pinochet was fit to stand trial, none of the judges originally on the court at the time of transition in 1989 were still there. In other words, the originally Pinochet-friendly

and loyal court had become more independent—at least from the outgoing military regime. Some of this was due to the simple passage of time and to routine resignations and deaths. However, the Supreme Court profoundly changed its character through the reform of 1998, which explicitly brought new blood to the Court. It did so by expanding the number of judges (including bringing in non-career judges) and altering appointment procedures, and, most importantly, by creating specialized chambers within the Supreme Court. One of these new chambers was the criminal bench, which dealt with human rights cases as part of its wider remit.

With respect to judicial review powers—considered important for judicial independence—the Chilean Supreme Court enjoys strong constitutional powers. However, it has historically been very reluctant to exercise this authority, including in the first decade after transition (Couso 2004). Not surprisingly, the Pinochet-friendly Supreme Court in 1990 refused to consider the Amnesty Law inapplicable—against the wishes of the Aylwin government. Only in more recent years has the Court become willing to question the constitutional aspect of the Amnesty Law. Interestingly, "the Court's excessive deference in the exercise of power to review the constitutionality of legislation contrasts sharply with its behaviour as head of the judiciary and custodian of judicial power" (Faundez 2010, 9).

Given the hierarchical system of the Chilean judiciary, the Supreme Court has wielded undue power over lower court judges, both normatively and in terms of controlling their career path (Faundez 2010; Hilbink 2007). There has thus been a historical tendency in Chile for lower court judges to defer to higher court judges in controversial cases. This was particularly important given that many of these human rights cases started at the appellate court level, mainly in the Santiago Court of Appeals (a handful of cases against Pinochet started in the Appeals Court of Valparaíso).[101] With new appointment procedures and control mechanisms introduced through senatorial approval, the Supreme Court was forced to cede some of its traditional power to other organs, resulting in less dependent appellate courts.

The appellate courts (one per district) clearly benefited from a less controlling and more liberal Supreme Court. Importantly, the Santiago Court of Appeals also went through its own structural changes. The large number of special appellate court judges (*ministros en visita*) assigned in 2001 specifically to deal with cases of the disappeared in the wake of the Mesa de Diálogo certainly advanced these cases a great deal. The infusion of new judges, then, definitely sped up the human rights cases. More cases were opened to investigation in the months following 1998 than in the preceding ten years, and many went on to reach the verdict stage. That leads us to the next question: did these new judges behave differently from

those judges already on the court—and if they did, why? Alternatively, did sitting judges alter their behavior over time?

*Judges as Actors*

Judges are key to the criminal justice system in all countries, but they are especially important in Chile. Investigating magistrates in civil law systems, like Chile's, control the gathering of evidence and instructions as to whether or not there is a basis for investigation. They also deliver the verdict and sentence. This triple role means that they control important parts of the criminal procedure that are usually left to the prosecutor in common law countries (and in civil law countries after criminal procedural reform). Chile has had a criminal procedural reform, with a change from the inquisitorial to a more adversarial system, implemented incrementally from 2002 onward and fully in 2004–5. However, cases of past human rights violations have continued under the old system, with investigating judges taking care of the first stage of the criminal procedure.

Most of the human rights cases were initially taken on by a relatively small number of judges. Although these judges were disproportionately responsible for advancing human rights cases, one may certainly argue that a broader cultural change was going on in the Chilean judiciary during this period. From being staunchly conservative, judges seem to have grown more receptive to developments taking place in the human rights field nationally, regionally, and internationally. To the best of my knowledge, no scholar has systematically compared individual judges' ideological profiles to their votes in each of the several hundred controversial human rights cases that have passed through the Chilean courts since 1998, though some work has been done on the attitudes of judges to the question of prosecution for past human rights violations (Huneeus 2009). We thus do not know whether legal advances may be attributed exclusively to the influx of new judges into the judicial system or whether there has also been ideological change among judges who have been in the court system for some time.

There is reason to believe it is a mixture of both. The fact that the Juan Alegría case, which had stalled in court for 15 years, advanced rapidly once Judge Muñoz was assigned to the case illustrates the individual power of a judge to make a case go forward—or not. Similarly, Judge Juica (who became president of the Supreme Court in 2010) made great advances in a short time in the Degollados case once he got it, as did Judge Bañados in the Letelier case. These three cases illustrate the power of the investigating magistrates.

That a judge may change his or her ideological position over time is perhaps best illustrated by the career of the Chilean judge most widely known outside the country: Juan Guzmán Tapia. Guzmán, whose judicial career began prior to the coup, started out as a conservative judge.

He was not at all a fan of human rights and had signaled sympathy for the military. The first 1998 case against Pinochet was given to him *por sorteo,* that is, it was assigned to him using a computer program that distributes court cases randomly among judges. So he had little choice in the matter. The second case against Pinochet was given to Guzmán after the judge who was first assigned the case refused to take it. After that, it became an unwritten rule that Guzmán would take on new human rights cases involving Pinochet. Judge Guzmán was then given *ministro en visita* status for Pinochet, so according to the rules of accumulation, he was assigned all cases after 1998 mentioning Pinochet. As he heard witness after witness testify to disappearances, torture, and murder, the horrors of the dictatorship apparently became clear to him.[102] Nevertheless, many human rights lawyers at the time of Pinochet's return to Chile claimed that Guzmán initially did not intend to put Pinochet on trial: he just wanted to strip him of his immunity and then apply the Amnesty Law.[103]

Guzmán's ideological journey from staunch conservative to high-profile human rights defender may be an exception. Alternatively, there may be many more judges who also changed their positions on how the courts should deal with human rights violations, as research by Huneeus (2009) suggests. To know for sure what determined a particular ruling in a particular case, one would need to examine each judge's personal motivations and actions in the various human rights cases he or she has handled. One should also keep in mind that judges in general do not choose their cases; what cases they can technically take depends on which *sala* they work in and on the *sorteo* assignment procedure, or on whether they are designated judges.

But whatever a judge's ideological complexion, we may assume that individual judicial will is restricted by complex structural, normative, and legal factors that make up the "opportunity structure" within which judges operate. Given the hierarchical structure of the Chilean judiciary, Supreme Court judges exercise at least a certain amount of indirect control over lower court judges, since judges' career advancements traditionally have required the approval of their superiors.[104] The question of whether higher court judges exert a debilitating undue influence over lower court judges has been amply discussed by other scholars and will not be debated here. An equally interesting question is to what extent the behavior of fellow judges at the same hierarchical level may influence a judge's position on a particular case. In short, what may constitute *positive* influences on judicial decision making in human rights cases? The importance of role models is worth exploring.

For the period we are examining in detail (1998–2001), it is reasonable to assume that the actions of Juan Guzmán, the principal judge in the Pinochet case, sent strong signals to other Chilean primary and

appellate court judges that human rights cases again were acceptable. It is also likely that the solid, serious, and uninterrupted judicial work of liberal/progressive judges like Cerda and Milton Juica, who had fought for human rights during the dictatorship period and continued to do so after the transition, may have had a more profound impact on their peers over time.[105] But Guzmán initially received most of the national and international press. Moreover, the fact that an initially conservative judge changed his position so dramatically may have sent a stronger message, at least to those judges who also started out skeptical about human rights, than the consistent work of the liberal judges.

Guzmán adopted the Poblete-Córdoba legal interpretation of "detained-disappearance" as a continuing crime; as such, it was not covered by the 1978 Amnesty Law and could thus be subjected to investigation.[106] This allowed Guzmán to investigate a large number of cases against Pinochet. This interpretation was very similar to that employed by Argentine judge Adolfo Bagnasco in his prosecution of the Argentine military (see Chapter 3). Another Chilean Supreme Court judge who systematically pushed for the progressive redefinition of forced disappearance as a continuing crime was Luis Correa Bulo. This innovative interpretation has been of great importance in enabling judges to bypass the 1978 Amnesty Law and investigate human rights cases. Though the military in the Mesa de Diálogo negotiated secrecy, protecting individual informants from identification in return for handing over information about the disappeared, the new legal interpretation permitted investigation until a body has been found.

It was not only Guzmán's legal ideas that influenced his fellow judges. The very fact that he successfully processed a former head of state won international and national acclaim. Media coverage and public support were extensive, and this in itself may have contributed to widening "opportunity structures" for judges.[107] Apparently, many lower and appellate court judges in Chile at the turn of the millennium wanted to be the "new Guzmán," just as many Argentine judges at the time aspired to become the "new Bagnasco." However, as more judges have gained a high profile in emblematic human rights cases, the role models provided by Guzmán and his Argentine counterpart are likely to have diminished in importance. There is even evidence that Guzmán may have lost credibility since his retirement because of certain controversial statements and actions, and many pro-prosecution judges in Chile now prefer to distance themselves from him.[108] Yet, it is undeniable that Guzmán has played an important role in bringing about the onset of transitional justice.

What factors have contributed to changing the ideas of Guzmán and other judges who are prosecuting the Chilean military? The work of European judges has been important, particularly in terms of moral

support. The previous chapter showed that the rulings of Judge Garzón in Spain had a profound impact on the way Argentine judges started to perceive their role in dealing with legacies of the past. The "Garzón effect"[109] also influenced Chilean judges, especially since Garzón was the judge who requested Pinochet's extradition to Spain and who also placed arrest orders and extradition requests on a substantial number of other Chilean retired military personnel. Though Chilean judges were conspicuously silent when Pinochet was arrested in London on Garzón's orders, there is good reason to believe that their pride was hurt. According to Eduardo Contreras, the lawyer who presented the first case against Pinochet in Chile, the prosecution of Pinochet in Spain after he was arrested in London "was crucial because it made [Chilean] judges wake up."[110] José Zalaquett, another prominent Chilean lawyer, notes that the promotion of judges no longer depends on Pinochet, so judges may use Garzón as a model: "Garzón is our model and how much of a Garzón are you?"[111] Although some Chilean judges were wary of Garzón's publicity seeking, the fact that this Spanish judge and other European judges were successfully prosecuting Chilean military in Europe no doubt both provoked and inspired Chilean judges to take action. Just as importantly, it clearly illustrated the new uses of international human rights law.

*International Human Rights Law and Jurisprudence*

Chilean judges, like their Argentine and Uruguayan counterparts, are part of a larger international context, both legally and normatively. The legal landscape in the area of international human rights has been radically reshaped since the end of the Cold War. This has encouraged European judges to start using international laws to prosecute non-nationals. For instance, Judge Garzón in Spain is said to having been inspired by Italian judges in his pursuit of Latin American military officers, including Pinochet (Sugarman 2002). The Pinochet case in turn has inspired judges in various parts of the world to hold state leaders to account for past violations. Indeed, the "Pinochet effect" on both international and national legal processes has received ample scholarly attention.[112] The fact that a number of Chilean nationals besides Pinochet were being prosecuted in British, Spanish, and Italian courts also, no doubt, forced Chilean judges to pay attention. Certainly, the human rights cases against former Latin American military in European courts (particularly in Spain, Belgium, France, Italy, and Sweden) preceded the onset of post-transitional justice in both Argentina and Chile. The ripple effect on domestic courts has been duly analyzed by scholars such as Roht-Arriaza (2005, 2009a, 2009b).

The effects of changes in international human rights law and of foreign court cases on Latin American judges are hard to trace directly and hence

"prove." There is, however, little doubt that the Pinochet case had an impact. Alan Angell correctly observes that "the rather insular Supreme Court took notice when the British Law Lords showed that a judiciary normally considered as conservative and traditional could nevertheless respond positively to accusations of human rights abuses" (2007, 153). I agree with Roht-Arriaza when she says that "it became a matter of national pride" for Chile to argue that Pinochet should face trial at home; she asserts that "judges took it as an affront that a foreign judge was leading an investigation into events that had occurred in their country" and notes that "several became much more active in investigations that had been pending for years" (2009a, 90–91). Roht-Arriaza in my opinion overstates the case when arguing that much of the judicial activity in Chile in the wake of Pinochet's arrest may be attributed to court proceedings in European courts against Pinochet and other Southern Cone military. On balance, though, I agree with her conclusion that the Pinochet case demonstrates that "transnational judicial processes based outside a country can have a profound impact on changing internal political dynamics" (Roht-Arriaza 2009a, 91). Yet, without internal changes to the Chilean judiciary, it is doubtful whether the impact would have been as profound.

Moreover, the jurisprudence and new legal norms developed through foreign court cases may have had the most direct external impact on national judicial decisions in human rights cases in Chile. The main business of judges is, after all, to apply the law. Chilean judges were reluctant to apply international human rights law prior to Pinochet's arrest, even though several international human rights treaties had been signed and ratified by the Pinochet and Aylwin governments—and, according to the Chilean constitution, international law prevails over domestic law. Since Pinochet's arrest, Chilean judges have increasingly been forced to take a stance on judgments and rulings by regional and international human rights bodies such as the Inter-American Court of Human Rights, especially in cases related to application of the Amnesty Law (see, for example, Vargas Viancos and Duce Julio 2000). This has presented them with new legal tools and created another potential source of law and legal interpretation that judges must take into account in their rulings.[113] Though lower court judges have been most active in employing international law, the new precedents have also reached the highest court. The Inter-American Court of Human Rights has also had a political impact in Chile: a judgment by the Court condemning the Amnesty Law as a violation of Chile's international obligations[114] spurred the Chilean Congress to debate "permanently annulling the law or interpreting it to not apply to crimes under international law" (Roht-Arriaza 2009a, 90).

Globally, there has been increased focus on international human rights law over the last decade, as reflected in the establishment of

the International Criminal Court, the increased adherence to international law through ratification of international conventions, and the growing tendency to invoke international law in cross-country prosecution for gross human rights violations. Since the arrest of Pinochet, the principle that nobody is above the law—not even heads of state—has become established as an international norm (Roht-Arriaza 2009b). There is growing global acceptance of the idea that some crimes are too heinous to go unpunished: they include torture, mass killings, and genocide. States that commit such crimes have become stigmatized in the eyes of the international community. Chilean judges have not been isolated from these international changes in normative ideas and human rights culture. In the heat of the legal processes against Pinochet, Zalaquett noted that "the ironic thing is that . . . all his right-wing lawyers have always refused to use international law. Now they are arguing for the most progressive interpretation of international law."[115]

*Growing Sensitivity to Public Opinion*

International court rulings and world attention to the Pinochet case not only sensitized judges and lawyers; they also increased worldwide public concern with human rights. Public opinion thus became an additional factor shaping the behavior of judges. Chilean judges, though in principle independent, are not immune to public opinion or to changing political and social attitudes. A prominent Chilean lawyer noted that all judges were very sensitive to the political climate, the political atmosphere, and the politically correct.[116] The Chilean Supreme Court was offended and publicly humiliated when the *Informe Rettig* issued by the truth commission in 1990 strongly criticized Chilean judges for having been accomplices of the military and for not fulfilling their duty to address the thousands of human rights cases that were presented to the courts during the dictatorship period. Chilean judges prior to the coup used to pride themselves on their professionalism and their reputation as not corrupt. Understandably, they would like to regain some of their former prestige and respect. Based on interviews with a large number of Chilean appellate court and Supreme Court justices, Huneeus (2009) argues that some judges may have turned into activists in human rights cases simply because of the guilt they felt for collectively failing to address human rights violations at the time they were committed.

There is evidence that public expectations of Supreme Court performance in human rights matters did not necessarily match what people would have preferred the Court to do. Public opinion polls show that

when Pinochet was returned to Chile from Britain, most Chileans did not believe that he would face trial; the majority assumed that the aging dictator would be let off on grounds of poor health.[117] Yet, when asked in a poll in July 2000 whether the Supreme Court *should* lift the congressional immunity protecting Pinochet, 52 percent of the respondents were in favor and only 35 percent were against.[118]

Though it is hard to prove, it seems likely that judges too have been alerted to the increasing concern—international and national—surrounding human rights. In sum, Chilean judges have been exposed to an array of influences that have increased their propensity to prosecute the military for gross human rights violations committed during the dictatorship period. Since the judiciary is not a monolithic structure, the personal motivations for judicial action vary from case to case and from judge to judge. The general point I want to make is that the dynamics changed with the structural reforms that altered the composition of the Supreme Court in 1998. These reforms, in conjunction with the other normative changes pointed out above, created room for varying judicial opinions and policy preferences. As a result, certain judges became willing to act in cases of past human rights violations. Indeed, one may speak of an emerging new judicial or legal culture in Chile (see also Couso 2010). Without these institutional changes, the courts' response to demands for retributive justice would likely have been much more reluctant. Had the Chilean courts not taken action to prosecute Pinochet nationally, the human rights movement would have continued its uphill battle for justice.

## Conclusions

Chilean courts, spearheaded first by the Santiago Court of Appeals and later by the Supreme Court, have become accountability agents in matters concerning past human rights abuses. This trend, which emerged and developed under the governments of Aylwin, Frei, and Lagos, matured under the fourth Concertación presidency of Bachelet.

Court-executive dynamics in Chile over these four presidential periods may be summed up as follows. The first president, Aylwin, was pro–human rights and initially favored pursuing justice through the courts, but he met with fierce opposition in the conservative, Pinochet-friendly, and Pinochet-dependent (though technically independent) Supreme Court. In addition, a large conservative opposition in the Senate effectively blocked congressional approval of judicial reform proposals. Military presence in politics during the Aylwin government also influenced the court-executive dynamics in ways that did not favor prosecution of the military. This left the Aylwin government with much less room for action

in human rights matters than presidents who took office after Pinochet stepped down as head of the armed forces.

The second president, Frei, did not care much about human rights, yet notable progress was made through the courts during his presidency. Ironically, it was Frei who managed to push through the Supreme Court reform that was a crucial factor in making the highest court in the country more autonomous in human rights matters. The third president, Lagos, claimed that he was leaving legal matters in general and the Pinochet case in particular to the courts, but he set in motion measures to prevent large-scale prosecution. By this time, though, the courts had gained their own momentum in human rights cases and were not looking to the executive for policy signals. This trend continued under Bachelet, who was friendly to the human rights cause and enthusiastic about memorial projects but perhaps less firm in matters of legal justice.

In conclusion, the impetus for retributive justice in Chile over the last two decades has shifted. Initially the quest for justice was pushed by the executive but actively hindered by the courts. Eventually, however, an increasingly independent and assertive judiciary became willing to address the human rights issue, irrespective of executive preference, at times even persisting in the face of active attempts at obstruction on the part of the executive. Part of this new sensitivity to human rights can be attributed to a gradual change in the historically conservative legal culture, with at least some judges moving in the direction of a more liberal or more activist stance (see figure 2.4 in Chapter 2).[119]

The real breakthrough in post-transitional justice in Chile came in 1998–2001. This chapter has tried to explain why. In essence, the new judges brought into the system through the Supreme Court reform and the new appellate court judges added in the wake of the Mesa de Diálogo profoundly changed the composition of the courts and hence court dynamics. In addition to the influence of new judges, there have arguably been changes in attitude among sitting judges. This is due to a combination of the larger normative effects of reforms, changes in self-perception of judges, and slow changes in legal culture, as well as the influence of role models such as Guzmán and Garzón. Though it is hard to prove, there is evidence that all judges, old and new, have been gradually forced to take into account legal developments in the Latin American region as well as in Europe. The combination of structural and individual factors at both the national and international levels thus explains the onset of post-transitional justice in Chile.

Although great strides have been made in accountability for past human rights abuses, due above all to judicial action, the process of retributive justice in Chile is still far from complete. While Chilean judges seemed prepared to push for more justice, prosecutions will continue to be limited as long as the Amnesty Law remains in force. The good news

is that the human rights matter is now so firmly located in the courts, where it belongs, that it is considered highly unlikely that the outcome of the January 2010 presidential elections will influence the course of events. Although Sebastián Piñera, who assumed the presidency in March 2010, is considered right-wing, cases of past human rights violations are expected to progress through the courts without political pressure or interference.[120] This is a scenario that was unthinkable at the time of transition.

# Chapter 5

# Uruguay: From Impunity to Trials

At the beginning of the millennium, the fieldwork for this book pursued the question of why the Uruguayan courts lagged behind their Chilean and Argentine counterparts in ensuring accountability for past human rights violations. A decade later, much has changed, and an equally interesting question arises: why did Uruguayan judges in the mid-2000s finally begin complying with international obligations to hold human rights perpetrators to account?

Uruguay is the only country in Latin America, perhaps in the world, that has two former presidents behind bars, awaiting trial for gross human rights violations.[1] However, Uruguay is also the only country in the world that has not once but twice democratically approved an amnesty law designed to shield the military from criminal prosecution for violations—in this case, the abuses that took place during the civilian-military dictatorship from 1973 to 1985. The amnesty law, known as the Ley de Caducidad, was passed in 1986, and a slim majority of Uruguayan voters declined to revoke it in a referendum in April 1989. Two decades later, on October 29, 2009, Uruguayans went to the polls once again to decide whether or not to amend the Constitution to allow revocation of the amnesty law and thus bring Uruguay in line with developments elsewhere in the region. To the surprise of many, a bare majority of the electorate again voted to keep the amnesty law in place. Hence, prosecutions for past human rights violations are more likely than ever to remain small scale.

But they have started. Under the government of Tabaré Vásquez (2005–10), at least 45 cases were exempted from the amnesty law, thus allowing prosecution for certain crimes stemming from the dictatorship period. In addition to the two former presidents, a growing number of military officials and police have been formally accused of having taken part in atrocities committed during the 1970s and 1980s. By October 2009, at least eight former soldiers and police officers had been convicted by Uruguayan courts.

This is a most unexpected turn of events. Until very recently, the story of judicial action in human rights cases in Uruguay promised to be short. After a couple of months of high judicial activity immediately after the transition to democracy in 1985, judges were virtually sidelined for the next two decades. This tale of judicial inaction is in itself worth telling as it sheds light on the factors that may determine whether or not judges take an active—or, as here, passive—stance.

This chapter focuses on how legal matters may devolve into politics where courts are not independent. In Uruguay, a political twist of the amnesty law effectively placed the courts in the pocket of the executive after the transition to democratic rule. The case thus shows that where the executive controls the courts and takes on an anti-prosecution stance, the likelihood of trials is slim—as was the case during the three first Uruguayan presidencies after the transition. Only under the two last presidencies did a more lenient executive position on human rights open the way for limited retributive justice measures. Tracing executive-judicial relationships over time leads to the conclusion that in Uruguay, perhaps more than in any other Latin American country, there was a close connection between official human rights policies and judicial (in)action—or, in later years, action—in these matters.

Tens of thousands of Uruguayans were detained, imprisoned, and tortured during the military dictatorship, earning Uruguay the dubious honor of being called a "torture chamber" by the Argentine poet Juan Gelman.[2] The practice of "disappearing" political opponents was never employed with the same fervor as in Argentina or Chile, yet almost 200 people suffered this fate. Among them were 13 Uruguayan children reported missing in Argentina at the beginning of the dictatorship. The majority of Uruguayans who disappeared are believed to have been seized outside the country's borders as part of the regional Operación Cóndor. Those who disappeared inside Uruguay, about 30, most likely died as a result of torture, not as a result of systematic "cleansing" of opponents, though this is still debated by scholars and activists.[3] Nevertheless, the disappearances were a major issue of contention between the military and civilian forces at the time of transition. Due to official politics of pardon and oblivion, it became a virtually silent issue for over a decade, except before and immediately after the referendum on the amnesty law, when there were some individual efforts at seeking justice abroad.

Although the issue of the disappeared has gained salience in Uruguay since 2000, it has persisted in the realm of politics. In spite of a couple of rather feeble attempts at raising cases in court, judges before 2005 remained on the sidelines. This is in some senses a paradox, given that the Uruguayan courts were considered relatively independent during the dictatorship that started with the military coup in 1973. Unlike their Chilean

and Argentine counterparts, judges in Uruguay never explicitly supported the military. Indeed, they prided themselves on their professionalism and their impartial stance.[4] All the military-appointed judges on the Supreme Court were sacked at the time of transition and replaced with democratically elected judges. As expected, these new judges tried to take up the human rights issue immediately after the transition. However, after executive interference with court procedures, the judges were marginalized and ceased to undertake much innovative action in human rights issues during the consolidation phase.

This chapter first seeks to explain why there was no progress in retributive justice during the first three presidencies after the transition, those of Julio María Sanguinetti (1985–90), Luis Alberto Lacalle (1990–95), and Sanguinetti again (a second term, 1995–2000). Second, it explores why President Jorge Batlle (2000–05) placed the "truth" issue on the political agenda even as judges remained sidelined in issues of retributive justice. Finally, the chapter addresses how and why judges managed to make progress in prosecuting high- and mid-level officials for past gross human rights violations during the government of Tabaré Vásquez (2005–10). The new administration of José "Pepe" Mujica, which took office in March 2010, is expected to continue the policy line of Vásquez in this field. As of late March 2010, there are already political signals that the infamous Ley de Caducidad may finally be scrapped. Hence, judges are likely to have a much more prosecution-friendly executive, and possibly also a much more favorable legal environment than in the past in which to do their jobs.

## Politics of Oblivion and Impunity

Of the three Southern Cone countries examined in this volume, Uruguay was the one that could have done the most, yet opted to do the least, in the field of human rights after the end of authoritarian rule. Unlike its neighbors, Uruguay was reluctant even to officially document the abuses committed under the civilian-military government. And rather than use legal avenues to address these violations, the new democratically elected government opted for an explicit policy of forgive and forget.

### Sanguinetti's Human Rights Policies

At the reintroduction of democracy, Uruguay had substantially better prospects of addressing past human rights violations than did Chile and Argentina at the times of their transitions. There was no formal amnesty law in place, and all judges on the Supreme Court who had served during the military period had been dismissed and replaced by professionally trained civilian judges. But the military had not been weakened by

military defeat and thus retained more power during the transition than was the case in Argentina. It is perhaps not surprising, then, that when Julio María Sanguinetti took office on March 1, 1985, after democratic elections in November 1984 ended 13 years of military rule, he made one thing clear: the human rights issue would not receive high priority.

The impetus for this stance can be found in quasi-secret negotiations between the military and three political parties—the Frente Amplio, the Partido Colorado, and the Unión Cívica—some six months earlier.[5] The agreement reached in August 1984 during the so-called Club Naval talks has never been made public, as no official records were kept of the conversations. Yet it is commonly believed that the negotiating partners agreed not to address the human rights issue through legal action. The military initially proposed a "blank cheque" for all past events of violence as well as impunity for crimes committed in peacetime. However, after much negotiation they finally agreed that "common crimes committed by military personnel in time of peace, wherever they are committed would be submitted to the ordinary justice system" (de Brito 1997, 77). Since there was no formal agreement on an amnesty law, the military technically handed over power to the democratically elected representatives without guarantees of immunity. Rather threatening speeches were made by the commander of the armed forces, Lieutenant-General Hugo Medina, right after the transition. It is believed that he and Sanguinetti reached an informal gentlemen's agreement in which Sanguinetti assured the general that his interests would be protected.

The close connections between the Sanguinetti's Colorado Party and the military made prosecution of the military improbable. According to de Brito (1997, 83), "Sanguinetti had given the military his personal commitment to 'contain' the human rights issue in exchange for a reduction in military institutional demands." Sanguinetti, called the "great architect" of the transition by a military source, had been negotiating the transition to democracy with General Medina.[6] The public seemed largely supportive of the Club Naval agreement.[7] Finally, the human rights movement was weak and fragmented and therefore had little power to pressure the political parties (de Brito 1997, 86–88).

However, Sanguinetti could not ignore the human rights issue altogether. In April 1985 the National Party, known as the Blancos, and the Frente Amplio set up two parliamentary investigating commissions to look into the fate of the disappeared as an important aspect of military repression. The Comisión Investigadora Sobre la Situación de las Personas Desaparecidas y Hechos que lo Motivaron was, as the name suggests, set up to investigate the fate of the disappeared and the reasons for their disappearance (de Brito 1997, 145–46).[8] The commission concluded on November 7, 1985, that the Uruguayan military had been

involved in the disappearances of 164 people, and it handed over its findings to the courts (Michelini 2000, n. 10).[9] A second parliamentary commission was established specifically to investigate the kidnapping and killing of two prominent politicians, Héctor Gutiérrez Ruiz and Zelmar Michelini, in Buenos Aires in May 1976. Completing its work two years later, on October 13, 1987, the Comisión Investigadora Sobre los Secuestros y Asesinatos de los Ex-Legisladores Zelmar Michelini y Héctor Gutiérrez Ruíz concluded that the military regime had been guilty of crimes against humanity, including genocide (de Brito 1997, 146). It recommended that its findings be sent to the courts, but the following month they were instead handed over to the executive branch for review. Based on the sources available, it appears that the information stalled there.

In several ways, the two Uruguayan parliamentary commissions were only half-hearted attempts at disclosing the truth. First, the lack of sufficient political support and necessary investigative powers constrained their work. Second, their mandate was restricted to investigating only the issue of the disappeared. This meant that the most widespread forms of violence and abuse in Uruguay—illegal detention, imprisonment, and torture—were not addressed at all. Third, and most importantly, the Colorados had voted down a Frente Amplio proposal in the Chamber of Deputies to give the commissions the power to oblige people to testify. The Colorados argued that granting the commissions this power would invade the jurisdiction of the judicial system. Hence, neither of the commissions succeeded in finding conclusive proof to link institutions under the military dictatorship with the crimes being investigated, and the conclusions of the reports were thus rather weak.

Their impact was also very limited, as the lack of official recognition resulted in a virtual absence of press after the commissions concluded their work. The reports published at the end of each investigation did not receive much public attention and were not publicly distributed as were their equivalents in Argentina and Chile.[10] Perhaps the most damaging contribution to discrediting the parliamentary commissions came from President Sanguinetti himself: "None of these investigations concluded by clarifying the authorship of these crimes, nor did they produce credible conclusions about them . . . there were no conclusive testimonies in any case; and the responsibilities cannot be established."[11]

To compensate for the absence of serious government-sponsored investigation, the Montevideo branch of a regional nongovernmental organization, SERPAJ (Servicio Paz y Justicia, or Service for Peace and Justice), stepped in. Under its leader Luis Pérez Aguirre, SERPAJ launched the Nunca Más (Never Again) fact-finding project in March 1986.[12] The low-profile SERPAJ team gathered data through a survey of 311 former political prisoners, from its own documentation center,

and from direct testimony. The investigation lasted three years, coinciding with the period leading up to the 1989 referendum on the amnesty law. It was a period of intense public conversation on the legacy of the past, and the Nunca Más project contributed to that debate.

Nonetheless, the launching of the final *Nunca Más* report on March 9, 1989, lacked official backing and was overshadowed by the referendum itself, which took place only a month later (SERPAJ 1989). As a result, the report never gained national attention and did not provoke the same public debate about human rights as did similar reports issued elsewhere in the Southern Cone. In Buenos Aires, an investigative report, also called *Nunca Más,* was released in 1984 with presidential backing and extensive media coverage. It "exploded like a bomb in the midst of the public sphere," becoming a bestseller in Argentina (Roniger and Sznajder 1999, 62–63), and it made "an extremely important contribution in the battle against impunity" (Michelini 2000, 5). Likewise, the Chilean equivalent, released in Santiago in 1991 by President Aylwin, had a profound impact on Chilean society and the public debate over human rights violations. The Chilean report's greatest achievements were "the official recognition of the truth of repression and the concomitant rejection of the military's ideological justification" (de Brito 1997, 211). By contrast, the release of SERPAJ's *Nunca Más* report in Montevideo in 1989 remained a rather anonymous affair.

Nevertheless, for all their limitations, the efforts of the three fact-finding or truth commissions in Uruguay had an important cumulative effect: they encouraged the families of the disappeared to bring their complaints to court.

## Military and Executive Meddling in Judicial Affairs

The first human rights cases were brought to court by victims and their families in April 1985, right after the transition. A flood of criminal complaints against the military for past human rights violations followed, clogging the courts through the end of 1986 (Garro 1993, 11, n. 24). Many first instance judges started to investigate the matter of the disappeared after the first parliamentary commission presented its findings in November 1985 and handed evidence over to the courts. But the civilian judges did not get far in their work, as they soon faced threats and interruptions from several quarters—first from the military courts, and later from the president and his government.[13]

Even before the first parliamentary commission had concluded its work, the Supreme Military Tribunal had interposed a jurisdictional claim against the civilian courts. Interestingly, the courts initially refused to comply and continued their investigations, though the tribunal held up

judicial action for months. Finally, at the end of August 1985, a civilian court called for the arrest of three military officers accused of human rights violations. One of them was José Nino Gavazzo, an infamous torturer.[14] Even more worrisome than the Supreme Military Tribunal's interference was the government's subsequent reaction to this essentially judicial dispute over jurisdiction in human rights cases. Spearheaded by President Sanguinetti, the government openly supported the jurisdiction of the military courts. Next, the government tried to postpone the arbitration of the conflict by supporting the continued presence of two military-appointed judges on the Supreme Court.[15] It did so by vetoing the opposition's majority vote against the continued service of these two judges in May 1985, and it applauded the confirmation of the same judges when the Senate formally approved them in November by a two-thirds majority vote.

In reaction to official politics, two opposition leaders, Senator Hugo Batalla and Senator Alberto Zumarán, presented a bill that tried to limit the scope of prosecution of the military and thus make at least limited justice politically feasible. But the government strongly opposed the bill and it never made it to Parliament. The government's strong position in favor of the military courts created deep divisions within the Blancos. Lengthy debates ensued, both among the Blancos and between all the political parties. No agreement was reached as what to do about the human rights problem. Importantly, "the President consistently opposed proposals for limited justice, insisting that he would not 'negotiate with or make scapegoats of a few names' " (de Brito 1997, 133). Sanguinetti's supporters also did their best to interfere with ongoing court cases. For example, in April 1986 the Ministry of Defense sent secret information compiled by one of the parliamentary human rights investigating commissions to the military instead of to the ordinary courts.

In spite of repeated governmental interference in judicial matters, the civilian courts continued their work. By June 1986, civilian judges were examining over 40 disputed cases involving 180 military and police officers. When the Supreme Court finally arbitrated in favor of the civilian justice system, Sanguinetti accused the Court of partiality and claimed that it was not in a position to arbitrate on the issue of human rights violations (de Brito 1997, 134). To get his point across even more strongly, Sanguinetti in October 1986 refused to comply with Argentine requests to extradite a number of military officers who had engaged in repressive activities in Buenos Aires. In sum, the Uruguayan president's position on the issue of justice was clear: he wanted no prosecution of the military and he was prepared to go to great lengths to prevent judges from dealing with cases of human rights violations. Sanguinetti's final solution to the problem was to close the matter politically.

## The Ley De Caducidad: A Political Solution

After lengthy debates and various political proposals on how to deal with the issue of justice and impunity, the Colorado Party presented a proposal to Parliament in August 1986, advocating an amnesty for military and police officers directly or indirectly involved in the "war against subversion" between January 1, 1972, and March 1, 1985. The amnesty was to cover authors, coauthors, accomplices, and persons covering up the crimes. The Colorado proposal also recommended closing all cases currently in the courts.[16] Sanguinetti pressed the proposal to his chest, claiming that there was no evidence linking the armed forces to human rights violations and that whatever "excesses" had taken place were justified by the need to combat subversion. But the following month, the opposition in the Senate rejected the bill by 16 votes out of 29. Sanguinetti and his supporters had been narrowly defeated in the first political round.

In October, 19 generals warned that the lack of amnesty legislation involved "serious risks" for the democratic system (Roniger and Sznajder 1999, 82). The political parties were again forced to grapple with the issue. The Blancos favored a partial amnesty. The Colorado Party, headed by Sanguinetti, maintained its demand for a wider amnesty such as the one outlined in their August 1986 proposal. The Frente Amplio (Broad Front), a left-wing coalition, wanted prosecution of the military and rejected any compromise. Finally, the military made it clear that they would refuse to obey any judicial subpoena.

After new rounds of negotiations, on December 22, 1986, Sanguinetti with parliamentary approval finally passed the Ley de Caducidad de la Pretensión Punitiva del Estado.[17] Known as the Ley de Caducidad (or, in English, as the Expiry Law), it shielded the military and police forces from legal prosecution for human rights violations committed prior to March 1, 1985. Article 1 stated that

> as a consequence of the logic of the events stemming from the agreement between the political parties and the Armed Forces signed in August 1984, and in order to complete the transition to full constitutional order, the State relinquishes the exercise of penal actions with respect to crimes committed until March 1, 1985, by military and police officials whether for political reasons or in fulfilment of their functions and in obeying orders from superiors during the de facto period.[18]

The judges who had started working on the disappearance cases were thus forced by law to drop them—a clear example of executive interference in legal proceedings. There are striking parallels between Uruguay's Ley de Caducidad and Argentina's Ley de Punto Final and Ley de Obediencia

Debida. All three laws had one objective: to provide the military with impunity. And in all three cases the laws were introduced in the wake of judicial action, after judges had decided to investigate cases of human rights abuses at the request of victims and their representatives. The executives in all three countries argued strongly that such investigations would goad the military into action, endangering the fragile post-transition democracy. Not willing to risk military opposition (and, in the worst-case scenario, a coup), President Alfonsín in Argentina and President Sanguinetti in Uruguay both decided to issue amnesty laws to avoid unnecessary provocation.[19]

The Uruguayan Ley de Caducidad was in effect an amnesty law, though it was not called by that name. But it had one important clause that opened up the possibility of further investigations into the fate of the 164 disappeared and of the children of disappeared parents. Article 4 provides:

> Beyond what the previous articles say, and without affecting them, the judge in charge of the case will send to the Executive the testimonies of the denunciations that have been presented until the enactment of the law in question, regarding people who—seemingly—have been detained during military or police operations and also regarding missing people and children who—seemingly—have been kidnapped in similar circumstances. The Executive will immediately order the investigation of these events, in order to clarify them. Within 120 days of the judicial communication of the denunciation, the Executive will inform those who made the denunciation about the outcome of the investigation and will give them access to the information gathered.[20]

At first glance, article 4 of the Ley de Caducidad seems to be of a rather redeeming character. It allows for continuing the quest for truth, though it precludes legal action.[21] However, a closer reading reveals that this was actually another shrewd political move, as the article transfers responsibility for investigating disappearances from the courts to the *executive*. It follows logically that where the executive has no interest or will to investigate these matters, the cases will stall in the presidential office. Even where judges are willing to investigate cases of the disappeared, the responsibility for investigation lies with the executive, legally and politically. Article 4 would be used as a pretext for inaction in the field of human rights for many years to come.

## The 1989 Referendum

Sanguinetti's Ley de Caducidad caused a stir. The human rights community was appalled at the law and its negative consequences for the pursuit of legal justice. An organization called Comisión Nacional

Pro-Referéndum (National Pro-Referendum Committee), formed in response to the Ley de Caducidad, launched a public campaign to have the law repealed through a popular referendum. According to Uruguay's 1967 Constitution, a referendum on legal decisions can be held at the request of 25 percent of the electorate. Following massive mobilizations, the commission gathered the 600,000 signatures necessary for a popular consultation. Half of the signatures were gathered in the first three months by the Mothers and Relatives of Disappeared Persons (Madres y Familiares de Uruguayos Detenidos Desaparecidos, typically referred to as Familiares).[22] By the end of the year, after months of door-to-door campaigning, the Pro-Referendum Committee presented a total of 634,792 signatures to the Electoral Court—well over the number required for a referendum.[23]

After much wrangling, the vote was finally held on April 16, 1989. The two sides were represented by yellow and green banners: the yellow vote (*el voto amarillo*) wanted the law to remain in force, while the green vote (*el voto verde*) wanted it repealed. Both camps held their positions for a number of diverse and partly contradictory reasons. Rather unexpectedly, the *voto amarillo* received 56.7 percent against the *voto verde*'s 43.3 percent. The amnesty law drew stronger support in the countryside than in the capital, where 56.6 percent of Montevideans voted for repeal (Roniger and Sznajder 1999, 88).

This is, to my knowledge, the only case in world history in which the people of a democratic country have ratified a law granting the military impunity through a referendum. Given that human rights supporters initiated the referendum, it was a devastating blow that they lost it. There has been much speculation as to why the pro-amnesty vote triumphed. Some scholars, especially those on the left, claim that Uruguayans voted for it out of fear of military retaliation; according to this argument, people voted against their real political preference and the outcome of the referendum thus did not reflect the true popular will. The discourse of President Sanguinetti and the military provides some support for the fear thesis. For instance, Sanguinetti stated that "this signature [on the referendum petition] is for rancour and revenge. We send out a warning to all citizens, to all those who in good faith may feel tempted to do so, that what they will be doing is simply taking the country back to a period it has already overcome" (de Brito 1997, 148–49). The military, too, launched an aggressive campaign against the referendum, and the president never penalized repeated violations of article 77 of the Constitution concerning the exercise of suffrage. General Medina, when asked how the military would react should the amnesty law be defeated, responded with vague threats ("time will tell"... "difficult to know"). Just before the referendum, Medina warned that the vote would "provoke very bitter and unfortunate moments" and a "strong confrontation" (de Brito

1997, 149). In sum, the signals sent by the political establishment and the military were not subtle.

Other scholars are not persuaded by the fear thesis. The vote in the referendum was secret, and nobody's name could be tracked down by the military or security forces. These observers argue that the majority of Uruguayans simply wished to put the past behind them and look to the future.[24] Since no systematic academic work has been done on the political, cultural, or psychological motivations driving the outcome of the referendum, nothing conclusive can be said about why the people approved the law.[25]

What is clear is that the issue of legal prosecution of the military had turned into a political issue. More importantly, the people had democratically given Sanguinetti's policy of impunity a seal of approval. This was to have profound consequences for those who had supported the idea of a referendum and lost the vote. The Frente Amplio and some of the Blancos deeply regretted having, in essence, chosen a route that had led to popular sanctioning of the law, making it politically extremely difficult to repeal or annul the law in the future. The referendum was thus a letdown to the human rights community and its supporters. Moreover, it presented a serious legal obstacle to prosecution. Importantly, the Supreme Court had found the amnesty constitutional in 1988,[26] signaling that the Uruguayan judiciary was split on the issue of human rights violations. Prior to the passing of the Ley de Caducidad, civilian court judges had shown an impressive will to pursue human rights cases in spite of opposition from both the military courts and the executive. The amnesty law changed this. It forced judges to drop the several hundred cases that were under investigation and precluded any future legal prosecution of the military; moreover, article 4 stated that any investigation into the matter of the disappeared was to rest with the executive, not the judiciary. Technically, this should not have prevented judges from pushing for justice. But in practice, the 1989 referendum seemed to put a lid on most human rights activities.

With domestic avenues for recourse apparently closed off, a few months after the referendum the Institute for Legal and Social Studies of Uruguay (Instituto de Estudios Legales y Sociales del Uruguay, IELSUR), with support from Americas Watch, started bringing cases to the Inter-American Commission on Human Rights and to the UN Human Rights Committee. They argued that the Ley de Caducidad was in violation of the American Convention on Human Rights, which Uruguay had ratified in 1985.[27] The IACHR, in a historic decision in 1992, concluded that the Ley de Caducidad was in contradiction with two international human rights treaties. It recommended that the Uruguayan state pay compensation to the victims, but it did not ask the Uruguayan government to repeal the law. The IACHR decision was the first time *any*

intergovernmental body had directly addressed the question of the compatibility of an amnesty measure with a state's obligations under a human rights treaty. Yet the decision had little impact in Uruguay (Mallinder 2009b, 59). With respect to national legal processes, the president had had his way. The families of the disappeared and human rights activists were discouraged, judges were marginalized, and the military and its supporters were content.

The referendum has frequently been cited as the main reason for the 15 years of virtual silence on the human rights issue that followed. Roniger and Sznajder, writing at the end of the 1990s, claimed that "the results of the referendum were widely interpreted as signalling the end of the debate and the definite closure of the issue" (1999, 54). De Brito went farther, stating, "thus ended Uruguay's attempt to come to terms with the legacy of state repression . . . In Sanguinetti's words, the amnesty was the price to pay for democracy" (1997, 151).[28] With the benefit of hindsight, these conclusions can be seen as overly pessimistic. The 1989 referendum was not the end of the story, though it certainly did mark the beginning of many years of silence.

## WHERE JUDGES FEAR TO TREAD

The rest of Sanguinetti's first term saw the domestic human rights community, and as a consequence, the judges as well, paralyzed by inertia. This situation persisted through the succeeding government of Luis Alberto Lacalle of the Blancos (1990–95), when "the topic of the disappeared remain[ed] at an impasse" (Equipo Nizkor 1997, my translation).

### Post-referendum Blues

Interestingly, very few scholars who write on the human rights issue mention Lacalle's presidency.[29] Lacalle made no effort to raise the human rights matter in public debate or counteract the effects of the referendum in any way. With judges having been forced into inactivity by Sanguinetti, it is perhaps not surprising that there was no progress on human rights cases during Lacalle's term in office.

After the referendum, "human rights demands . . . almost disappeared from the political platforms of the major parties and their internal sectors (*lemas*)" (Roniger and Sznajder 1999, 126).[30] Only Rafael Michelini's Nuevo Espacio (New Sector Coalition) and small sectors of the left kept pushing to find out what had happened to the disappeared. The referendum "was widely accepted and served, in following years, as a basis for the political leaders' repeated claims that the debate had been definitively closed . . . . This closure projected the legacy of human rights violations

into the realm of oblivion and memory" (Roniger and Sznajder 1999, 208). Human rights groups were disgusted and discouraged by the results of the referendum, and their level of activity fell remarkably. One of the most active groups had been the one representing family members of the disappeared, the Madres y Familiares de Uruguayos Detenidos Desaparecidos.[31] Though the Familiares continued to meet three times a week, as they had done throughout the dictatorship, they lost hope and faith after the referendum.[32] No new cases of human rights abuse stemming from the dictatorship period were brought to court domestically in the period from the referendum until 1996. Consequently, judges remained passive.[33]

National newspapers were conspicuously silent on the subject of the disappeared. Establishment newspapers such as *El País, El Observador,* and *La Búsqueda* rarely or never published anything that had to do with human rights—perhaps not surprisingly, since *El País* had expressed support for the military during the dictatorship period.[34] Only a national left-wing daily, *La República,* and a left-wing weekly, *Brecha,* covered human rights regularly.

The military too kept quiet; they had little to complain about. In fact, Sanguinetti had solved the Uruguayan military's problem before it even became a problem.[35] The military remained doubly protected by an internally imposed wall of silence and an outer wall of silence provided by the political elite. The judges did not challenge either. However, in 1995 important events in Argentina broke the silence there, and this had important spillover effects across the Río de la Plata.

## Military Confessions

Soon after Sanguinetti was inaugurated as president for the second time in 1995, events took a new turn.[36] Various military officers in the three Southern Cone countries made unexpected confessions, acknowledging their participation in the torture, killing, and disappearance of thousands of people. In Argentina, the 1995 confessions of Captain Scilingo, followed by those of the commander in chief of the army, General Balza, opened up a new public debate on the human rights issue (CELS 1996). The impact of the Argentine military confessions on neighboring countries was direct and noticeable. Since the majority of Uruguayans who disappeared during the military dictatorship were last seen in Buenos Aires or in the provinces of Argentina, Scilingo's and Balza's confessions naturally had repercussions in Uruguay.

Up to that point, "the Uruguayan military [had] preserved a high measure of internal cohesion around the defence of the thesis of having saved the country from communism and anarchy" (Roniger and Sznajder 1999, 119). In May 1996, however, there was a fissure in this

wall of silence with the declarations of retired Uruguayan navy captain Jorge Néstor Tróccoli. According to Roniger and Sznajder, he publicly recognized that "although he had not participated in the worst acts of torture and assassination, he had fought a war in which the armed forces 'treated their enemies inhumanely' " (1999, 120). Tróccoli (1996) stated, "I assume responsibility for having combated the guerrilla band with all the forces and resources at my disposition. I assume responsibility for having done things which I am not proud of now, nor was I proud of then . . . . I assume responsibility for having been submerged in violence."[37] Tróccoli was, naturally, harshly criticized by the navy. This was the first time a Uruguayan citizen directly involved in the repression had publicly admitted guilt.

## The March of Silence, May 1996

Encouraged by the military confessions, social democratic senator Rafael Michelini, in a joint effort with Familiares, HIJOS, SERPAJ, and other human rights and social movement organizations, organized a March of Silence on May 20, 1996. The march was held to honor the twentieth anniversary of the deaths of four people: Michelini's father, Zelmar Michelini, a Colorado senator and later a founder of the Frente Amplio; Héctor Gutiérrez Ruiz, speaker of the Chamber of Deputies; and Rosario Barredo and William Whitelaw, members of the guerrilla group Movimiento de Liberación Nacional, also known as the Tupamaros. All had been assassinated in 1976. In the "March for the Truth, Memory, and Never Again" (*marcha por la verdad*), between 30,000 and 50,000 people filed through the streets of Montevideo in silent protest against the government for not investigating the fate of the disappeared. The protest sent a message that the human rights movement might have been weakened, but it was not entirely demobilized. The march was accompanied by an act of homage in the Uruguayan Parliament in memory of the murdered parliamentarians. However, the homage reflected a compromise between the major political parties: by prior agreement, the armed forces' involvement in the killings of Michelini and Gutiérrez was not mentioned.[38] The time for an open public debate on military responsibility for human rights violations was not yet at hand.

The Colorado Party's negative attitude toward human rights was further illustrated when Rafael Michelini, shortly after the March of Silence, demanded that Parliament establish a truth commission to look into the deaths of Michelini, Gutiérrez, Barredo, and Whitelaw. This proposal was not well received by either the government or the armed forces high command. Although no commission was established at this point, Michelini's two initiatives were to have important repercussions. The May 20 march became an annual event in Uruguay, drawing thousands of people each

year and demonstrating that the issue of the disappeared continued to be of widespread concern. Though Sanguinetti shelved the idea of a truth commission, his successor, Jorge Batlle, would pick up the issue several years later.

Not having achieved what he wanted through the executive route, Michelini tried next to have the problem of the disappeared solved through the courts.

## First Attempt at a Legal Solution: Caso Zanahoria

On March 19, 1997, Senator Rafael Michelini presented to court a case regarding over 150 persons who had disappeared during the dictatorship. It was believed that they died in military custody under torture and later were secretly transferred and buried in military camps. Michelini claimed that he had received secret information from a retired general and various soldiers regarding the clandestine burial of the bodies of some of the disappeared who had died in actions of state repression. This information was consistent with information given by another military officer to the newspaper *Posdata* in February 1995 regarding people who had died during sessions of interrogation and torture and who had been buried in an upright position in military garrisons (Equipo Nizkor 1997). Because the victims were buried standing upright and a tree was planted on each of the graves in order to hide the bodies, the incident came to be known as Operación Zanahoria (Operation Carrot).

A first instance judge in the Criminal Court of Montevideo, Alberto Reyes, was convinced by the information presented by Michelini and decided to take the case. Reyes started an investigation to determine when the alleged criminal acts had taken place as a first step in deciding on appropriate judicial action. Since the denouncement did not specify an exact date that the bodies had been removed from the military garrison and secretly buried, the judge needed to establish these facts before he could determine whether or not the Ley de Caducidad was applicable. On April 15, 1997, Reyes ordered an investigation into the fate of more than 150 "detained disappeared." He stated that the aim of the investigation was only to determine the existence of the clandestine cemetery, exhume the bodies, and return them to their families—not to instigate punitive action against the perpetrators. He mentioned that Uruguay had recently ratified the Inter-American Convention on Forced Disappearance of Persons. However, although the Ley de Caducidad precluded any form of punitive action against the military, the investigation into the fate of the disappeared proved difficult to carry out for various reasons (Ferro Clérico 1998).

First, Reyes's investigation was complicated by the explicit opposition of Lieutenant-General Raúl Mermot, commander-general of the

armed forces, who issued an order of noncompliance to his subordinates. More specifically, Mermot refused judges entry into the military headquarters where the disappeared supposedly had been buried. Second, in response to an appeal from the public prosecutor, Ana Maria Merello, the Montevideo Court of Appeals reexamined the case. On June 13, 1997, the appellate court overturned Reyes's ruling ordering the investigation. The court ruled that it was not relevant to discuss whether or not Ley No. 15.840 offered an amnesty. Moreover, the appellate court discarded Reyes's intention to clarify the *indefinición temporal* that came out of the complaint, stating that it was the responsibility of the executive to order such investigations (Ferro Clérico 1998, 18).[39]

Complying with the Montevideo Court of Appeals ruling, on August 6, 1997, Reyes forwarded the case to President Sanguinetti. According to article 4 of the Ley de Caducidad, the executive was obliged to order an investigation of the disappeared. A few days later the government informed Reyes that the acts of disappearance denounced by Senator Michelini were covered by article 1 of the Ley de Caducidad, as immunity was granted for crimes committed by state officials for political reasons during the de facto period.[40] Consequentially, the government ordered that the case be closed and the facts archived. But the rebuff did not stop there: Reyes also lost his position as a judge. He was transferred to a civilian court (*juzgado letrado en lo civil*). This was widely understood to be an explicit sanction.[41]

Operación Zanahoria was the first case in which the judicial apparatus in Uruguay, in accordance with article 4, presented evidence to the executive so that the latter could determine whether or not a particular crime was covered by article 1 of the Ley de Caducidad. The executive's response was a severe blow to human rights activists. But the case had even broader implications. First, the appellate court's unwillingness to uphold Reyes's decision to investigate the matter suggests that there was no particular will among the three judges on this court to take on the issue of the disappeared. In its statement, the appellate court postulated that dealing with the disappeared was a political, not a judicial, matter. Second, the next stage of the appeal shows how the executive actively used the Ley de Caducidad to prevent legal investigation into the alleged crimes. In short, the executive had designed a law that permitted it to control or overrule the courts in these matters, thus reducing judicial independence to a farce. Finally, the removal of Reyes from his position bluntly suggests that Uruguayan judges who tried to do anything outside the politically acceptable in human rights cases risked severe sanctions.

There was one redeeming aspect of the failed Reyes case: several well-known jurists in Uruguay, such as Adolfo Gelsi Bidart and Horacio Cassinelli Muñoz, publicly voiced unease and displeasure at the executive's power over the start and end of the seemingly closed circle defining

procedures for cases regarding the disappeared. Even the then president of the Supreme Court, Milton Cairoli, maintained that the judiciary should be allowed to investigate these matters. However, the Supreme Court refrained from taking any explicit action on the issue (Ferro Clérico 1998, 19, n. 27). As a consequence, Reyes was the first to go. Four more years passed before another judge ventured into similar business, with similar results. In the meantime, demands for truth and justice were increasing in Uruguay as the human rights movement grew weary of negative responses from the government and judicial inaction. Yet, for now, the military could feel quite safe from prosecution, secure in the knowledge that they had presidential backing and that any judge who tried to contradict official policy would not last very long in his or her post.

## Sanguinetti's Indifference to Demands for Truth and Justice

President Sanguinetti's negative response to Michelini and Judge Reyes in the Caso Zanahoria falls neatly in line with the president's consistent position on the human rights issue: that it was best forgotten. In many ways, Sanguinetti seemed impervious both to national demands for justice and to international criticism of the failure to respond to these demands. After the first March of Silence in 1996, civil society activity on human rights issues picked up markedly. The executive and his government were forced to respond to mounting demands for truth and, to a lesser extent, for justice. There were at least seven major cases or situations in which the president was requested to act regarding the disappeared, and in which he gave a negative response.

In April 1997, about a year after Sanguinetti had turned down Senator Rafael Michelini's request for a truth commission, the bishop of San José, Monseñor Pablo Galimberti, publicly offered to act as a mediator in an effort to clarify the fate of the disappeared. An Episcopal conference was held in which the details of the bishop's proposal were discussed. Several high-profile politicians declared their support for Galimberti's proposal, including Hugo Batalla, then vice president of the Republic; Tabaré Vásquez, president of Encuentro Progresista, who would be elected president of the country in 2004; and General Líber Seregni, the Frente Amplio leader. But the proposal went nowhere.

Another initiative came on April 16, 1997, originating with about 30 family members of the disappeared and gaining support from prominent political, cultural, academic, and religious figures as well as a number of journalists. Referring to articles 30 and 318 of the Constitution, the family members demanded "an investigation to clarify the destiny" of their disappeared kin, as well as their final resting place. They further demanded that responsibility for the investigation be given to a "trustworthy, independent and impartial" organ. One of their spokespersons, human

rights lawyer Javier Miranda, himself the son of a disappeared parent, argued that "the detention-disappearance of a person leaves his or her loved ones in a state of permanent anxiety and uncertainty" (Equipo Nizkor 1997, my translation). The appeal particularly highlighted the plight of disappeared children. Miranda, who authored the document, also asserted that Uruguay's ratification of the Inter-American Convention on Forced Disappearance of Persons provided the government and other political sectors with an opportunity to demonstrate political will by putting words into action. Sanguinetti turned down the proposal, arguing that the events in question were covered by the Ley de Caducidad.

A third proposal came from Mauricio Rosencof, a historic leader of the Tupamaros and later a cultural figure, who had spent 13 years in jail under horrible conditions during the dictatorship. He suggested that some kind of dialogue be formally established between the military and the former "combatants." At the outset, Rosencof did not intend this dialogue to revolve around any specific topic. The aim was to get a conversation going and then see where it would take them. Rosencof believed that at least some members of the military might be willing to sit down and talk—in particular, young officers who never had taken part in the repression but who still carried the burden of collective blame on their shoulders. Also, he hoped that some older officers who had been involved in the repression might want to relieve their conscience and help right a wrong by giving vital information to the families of the disappeared. The declarations of Tróccoli suggested that some military might be willing to engage. The government was receptive to Rosencof's proposal at the outset, though it was not prepared to sit down at any table for Chilean-style negotiations with the military.[42]

In May 1998, the General Assembly deputy for the Frente Amplio, Víctor Semproni, suggested an agreement whereby the state would investigate the fate of the disappeared and the armed forces would admit responsibility for their crimes. Semproni promised anonymity to anyone who would give information that might contribute to revealing what had happened to the disappeared. He said the Church would guard the information, and he emphasized that once the task was completed, the issue would be closed forever. The proposal remained just that: a proposal. However, some of these ideas were later incorporated in the work of the Comisión para la Paz, the peace commission established by the next president.

There were also international requests for information regarding alleged human rights violators. On July 16, 1998, the year after Caso Zanahoria was closed and Reyes had been transferred from his position as a judge, another Uruguayan judge, Rolando Vomero, was asked by Judge Baltasar Garzón in Spain for information regarding the disappearance of Spanish citizens during the dirty war in Argentina.[43] Garzón's request

came in the wake of Captain Scilingo's declarations and had to do with bodies that had appeared on the Uruguayan coast between March 24, 1976, and December 1983. The corpses were disfigured, some had been mutilated, and all were hard to identify because they had been in water for so long. News reports during the dictatorship had tried to write the corpses off as drowned Korean seamen, but it was later acknowledged that the remains were those of people who had disappeared in Argentina.[44] According to Vomero's ruling, "all these acts should be transferred to the executive power, in order to decide whether or not they are encompassed by article 1 of the mentioned law [Ley de Caducidad]."[45]

It is hard to tell whether or not Vomero's ruling was influenced by the fate of Reyes. What is clear is that the case was handed over to the executive and no information was given to Judge Garzón in Spain. Case closed. This, in practice, meant extending the effects of the Uruguayan impunity law to the Argentine military (Ferro Clérico 1998). In short, both the judge and the executive considered article 1 of the Ley de Caducidad to cover all crimes that had to do with the disappeared, regardless of who had committed the crimes and where.

## Three Emblematic "Truth" Cases

*The Gelman Case*

The next request for truth that involved both national and international actors was the so-called Caso Gelman, arguably one of the most emblematic human rights cases stemming from the dictatorship period in Uruguay.[46] The case stemmed from a request by well-known Argentine poet Juan Gelman for help in searching for his disappeared grandchild. Perhaps more clearly than in any other case, Sanguinetti's dismissive reaction demonstrates a president deaf to popular demands in his own country and out of sync with world developments in the human rights field.

Juan Gelman's son Marcelo and his daughter-in-law María Claudia García Irureta Goyena were kidnapped in Buenos Aires in July 1976. María Claudia was later confirmed to have been transported by Uruguayan military officers to their headquarters in Montevideo. In November 1976, she reportedly gave birth to a baby girl in the military hospital before she disappeared, never to be seen again. Juan Gelman mounted a tireless search for the child and finally thought that he had located her in Uruguay in 1999. He petitioned President Sanguinetti and his secretary Elías Bluth for information that would allow him to establish the identity of his grandchild, who by then would have been a young woman of 24. Sanguinetti repeatedly refused, and he publicly pronounced the infamous words, "en Uruguay nunca hubo casos de niños secuestrados como en Argentina"—in Uruguay there were never disappeared children as in Argentina (SERPAJ 2000, 65).

After months of presidential inaction, Gelman sent Sanguinetti an open letter in which he formally asked the president to investigate the matter. A worldwide campaign then began in support of Gelman, as journalists, artists, poets, and writers from all over the world signed on to a petition to Sanguinetti. The 115 writers who signed the petition included several Nobel Laureates in Literature—Mario Vargas Llosa, Arthur Miller, and Nadine Gordimer—and Nobel Peace Prize winner Luis Pérez Esquivel. Ignoring these prominent international voices, Sanguinetti firmly maintained his position, asserting that "nobody has the miraculous capacity of giving the answer to the author as long as there is no new evidence and the events took place in Argentina and were carried out by Argentines."[47] His words rang hollow only four months later when Jorge Batlle came to power.

*The Simón Riquelo Case*

The second high-profile request for truth concerned a kidnapped Uruguayan child, Simón Riquelo Méndez (Amnesty International 2007b). The case started in Argentina, but Simón Riquelo's mother repeatedly sought court solutions in Uruguay too. The disappearance of Simón Riquelo was typical of many of the crimes that took place under Operación Cóndor and exemplifies some of the legal issues involved where more than one government was responsible for repression. As in the Gelman case, Sanguinetti rebuffed all requests for cooperation.

Simón was just 20 days old when he was kidnapped from his mother, Sara Méndez, as she was arrested in their Buenos Aires home in July 1976. A Uruguayan student activist, Méndez had been forced to flee Uruguay the year after the coup. After her son was kidnapped she spent some time at a clandestine detention center in Buenos Aires before she was illegally transported back to Uruguay with a group of prisoners.[48] When Sara Méndez recovered her freedom in May 1981, she started searching for her child in close collaboration with the Grandmothers of the Plaza de Mayo, the Argentine human rights organization devoted to the recovery of disappeared children.

Her case went through many legal twists and turns in both Argentina and Uruguay. Sara Méndez first testified against her kidnappers in Argentina, including Major José Nino Gavazzo of the Uruguayan security forces, before the National Commission on the Disappearance of Persons (Comisión Nacional sobre la Desaparación de Personas, CONADEP). In 1985 she participated in a public trial against the Argentine military junta in Buenos Aires. On September 12, 1986, Judge Néstor Blondi, an Argentine federal criminal judge in First Instance Court 3 in Buenos Aires, issued a preventive detention order against Gavazzo and others for the repeated illegal deprivation of freedom in 23 cases; among them was that of Sara Méndez and her son Simón. Gavazzo was detained in

September 1986. Because three of the victims in this case remained disappeared, the judge required the extradition of the alleged perpetrators by the Uruguayan authorities. Sanguinetti did not respond. In 1989, President Menem of Argentina pardoned the suspects, including Gavazzo, whose extradition request and sentences in absentia were still pending in the Argentine justice system.[49]

Toward the end of 1989, President Sanguinetti declared that the crimes denounced by Sara Méndez were covered by the Uruguayan amnesty law, and, furthermore, since the alleged crimes had been committed in Argentina, they were outside the jurisdiction of the Uruguayan criminal justice system. Sanguinetti also pointed out that Menem had pardoned the suspects the same year. The case was declared closed in 1990 when the Argentine judge in charge ruled that Sara Méndez's kidnapping in Buenos Aires was covered by the Argentine amnesty law. In the meantime, Méndez had identified a child in Montevideo she thought might be her son and had requested DNA tests. In a separate legal proceeding, a Uruguayan judge ruled that there was not enough evidence to put the child through a DNA test and closed this case too. In May 1990 Méndez opened a new case in the Family Court in Montevideo (Tribunal de Apelaciones de Familia), demanding new DNA tests. This case also was closed five years later when acting judge Dra. Diver Rial of the Family Court ruled that there was no proof that Simón and the child located in Uruguay were the same person.[50] The Supreme Court dismissed Sara Méndez's final appeal in early 1998.

Undaunted, Sara Méndez then tried the legal route in Europe, contacting a number of parliamentarians and human rights organizations and presenting evidence to Judge Garzón in Spain. It is unclear what the outcome of this petition was; the case would not be solved until later.

*The Elena Quinteros Case*

The third emblematic human rights case was that of Elena Quinteros. The 26-year-old schoolteacher was abducted from the Venezuelan embassy in Montevideo in 1976 and then disappeared. Her mother, María del Carmen Almeida de Quinteros (also called Tota Quinteros), immediately presented various complaints, but the Uruguayan authorities systematically denied having arrested her daughter. While in exile in Sweden, Tota Quinteros presented a complaint to the Inter-American Commission on Human Rights, but she withdrew it in 1980. She also complained to the UN Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, arguing that all domestic remedies had been exhausted, and that case was heard in 1983. The UN Human Rights Committee requested information from the Uruguayan state, which replied that the (military) government had been searching for

Quinteros's daughter and that they had nothing to do with her disappearance. The committee concluded that "responsibility for the disappearance of Elena Quinteros falls on the authorities of Uruguay and that, consequently, the Government of Uruguay should take immediate and effective steps: (a) to establish what has happened to Elena Quinteros since 28 June 1976, and secure her release; (b) to bring to justice any persons found to be responsible for her disappearance and ill-treatment; (c) to pay compensation for the wrongs suffered; and (d) to ensure that similar violations do not occur in the future."[51] Not giving up, Quinteros appealed in 1987 to President Sanguinetti to help her find her daughter. The president responded that an investigation was precluded by the Ley de Caducidad.

At the end of the millennium there were rumors in the Uruguayan press that an ex-soldier, Sergio Pintero, in December 1999 had volunteered to the Supreme Court that he knew that Elena Quinteros had been detained, how she had disappeared, and where she had been buried. Pintero supposedly also said that Elena Quinteros had died in childbirth, but none of this had been verified. The Supreme Court apparently sent the new information to President Sanguinetti, who, according to article 4 of Ley de Caducidad, was obliged to investigate the case. The executive again responded in the negative, arguing that the crime was covered by the Ley de Caducidad. None of the information that Pintero provided to the Supreme Court was given to the mother of Elena Quinteros.

Pained by the disturbing information leaking out to the press, Tota Quinteros, by then elderly, sought the help of labor lawyer Pablo Chargoñia. Chargoñia was associated with the PIT-CNT (Plenario Intersindical de Trabajadores-Convención Nacional de Trabajadores), the largest labor union in Uruguay, founded in 1964 but forbidden to operate during the dictatorship period. PIT-CNT has had a prominent role in the quest for justice in Uruguay; the union's lawyers have taken several of the more important human rights cases to court, including the first court case regarding the disappearance of Elena Quinteros.

Chargoñia decided to present a *recurso de amparo* to the first instance civilian court of Montevideo.[52] He noted in his communication to the judge that it would not be easy to establish the facts in this case. The Supreme Court had received the testimony and sent a copy of the statement to the executive. However, since no official copy of Pintero's statements was available, Chargoñia said, he and his client were unable to determine exactly when the ex-soldier had given the information to the Supreme Court. Notwithstanding these complicating factors, Judge Estela Jubette decided to hear the case on February 17, 2000, under the assumption that new evidence in the case would allow a follow-up investigation. In her opinion, there were legal grounds for a *recurso de amparo*.[53] Jubette demanded that the Supreme Court send over the information

about Pintero. Her ruling was issued after Sanguinetti left power (this will be explored in more detail below).

These three cases suggest that Sanguinetti did what he could to stall any initiative that tried to resolve the problem of the disappeared by clarifying the truth surrounding the crimes. Result: no truth and no trials.

## TOWARD TRIALS

There was a noticeable positive shift in the human rights discourse when Jorge Batlle assumed the presidency in March 2000. Yet, although Batlle demonstrated interest during his term in finding the truth about the disappeared, he continued Sanguinetti's policy of keeping the issue in the political sphere and out of the hands of judges. Result: truth but no trials. The Elena Quinteros case, though, under the next presidency of Vásquez was to turn into a battle for justice, not merely truth.

### Batlle's Battle for Change

Sanguinetti handed over the presidential sash to Jorge Batlle on March 1, 2000.[54] Batlle was an old-time Colorado politician who had sought the presidency no less than four times before. Now nearly 70 years of age, he was making his fifth and final run. As a surprise to everyone, including his personal advisers and close friends, Batlle, in his inaugural speech, informed the Uruguayan people that he would make sure that peace between Uruguayans was sealed forever.[55] This was widely understood to be a poorly disguised reference to the problem of the disappeared. It was the very first time since the first referendum campaign that a Uruguayan head of government had addressed the problem of reconciliation.

Another small but significant gesture by Batlle on inauguration day helped convince a skeptical human rights community of his sincere intentions. As the parade through Montevideo passed by Parliament, the new president turned and waved to a group of representatives from the Familiares, who were standing by their headquarters only two blocks from the legislative palace to protest the new president. Used to turned political backs in the past, the family members of the disappeared were stunned: this was the first time a president had acknowledged their presence.[56] Shortly after, Batlle invited the Familiares to the presidential palace for consultations on the issue of the disappeared and possible solutions.

Batlle soon made two more important moves that were to change the official human rights discourse in the country. First, he took steps to solve the longstanding Gelman case. Second, he established a peace commission, the Comisión para la Paz, to put into action his words about national peace and reconciliation among Uruguayans.

## The Gelman and Simón Riquelo Cases Revisited

Only a week after he assumed office, the new president ordered DNA tests to be carried out on the person Juan Gelman believed to be his granddaughter. The tests were positive.[57] The identification of the kidnapped child, by then a young woman, gave a boost to other parents and grandparents who had been searching for their disappeared children or grandchildren for more than 20 years.[58]

Since Batlle had indicated that he recognized the need for the state to seek to resolve cases of forced disappearance, particularly those involving children, he was also obliged to address the case of Simón Riquelo. After a private audience with the youth who Sara Méndez suspected might be her long-lost son, Simón, Batlle convinced him to undergo DNA testing. The tests were negative. With the help of human rights organizations in Uruguay, Méndez then called upon President Batlle to use his power as commander in chief of the Uruguayan armed forces to do everything in his power to gather relevant information from the military that might clarify the whereabouts of Simón Riquelo. Nothing happened.

However, the Simón Riquelo case was to find its solution in Argentina, in connection with the reopening of a formerly closed case related to Operación Cóndor. An Argentine judge, Rodolfo Canicoba Corral, in June 2001 ordered the preventive detention of three Uruguayan army officers, José Nino Gavazzo, Manuel Cordero, and Jorge Silva, and a Uruguayan police officer, Hugo Campos Hermida, for their alleged involvement in the disappearances of over 20 Uruguayan citizens in Argentina in the 1970s, including Simón Riquelo. As mentioned, Sara Méndez had previously testified before the Argentine truth commission, CONADEP, and Canicoba cited this testimony in which Méndez identified Gavazzo and Cordero as the military officers who led the operation to arrest her. As a result, in March 2002 an Argentine judge confirmed that a young man, then age 25, who had been adopted as a baby by an Argentine family was in fact Simón, son of Sara Méndez (Amnesty International 2003, 2007b).

Although he did not manage to resolve the Simón case, at least Batlle had demonstrated political will to officially try to establish the identity of disappeared children when requested. With respect to the Gelman case, Batlle proved to the Uruguayan people that Sanguinetti had lied, and that where there is political will, the executive does indeed have the power to muster the necessary information to solve long-neglected cases of disappearance. What Sanguinetti had denied for 15 years, Batlle solved in 15 days. It was a brilliant move in terms of gaining popular support. But Batlle did not stop with finding Gelman's grandchild. He had a larger scheme, namely, to learn the fate of and restore the identity of as many as possible of the disappeared. This Batlle did by establishing

the commission that Sanguinetti four years earlier had refused even to consider.

## Comisión para la Paz

Shortly after coming to power, President Jorge Batlle, in consultation with Familiares, started discussions on the establishment of a Comisión para la Paz (peace commission). The commission was formally established by presidential Decree No. 858/2000 on August 9, 2000, 15 years after the return to democracy and 24 years after the most grave human rights violations had occurred. The preamble to the decree stated that in order to create national reconciliation and establish peace among Uruguayans, all possible measures should be taken to determine the situation of the disappeared during the civilian-military dictatorship, as it was "an ethical obligation of the State and a necessary task in order to preserve the historical memory" and make reparations possible.[59] The peace commission would function under the auspices of the president with a membership of seven notables representing various branches of politics and civil society.[60]

The Comisión para la Paz had two main objectives: to clarify the fate of all disappeared Uruguayans, whether they had vanished inside or outside the borders of Uruguay, and to find the whereabouts of the four disappeared children who had not yet been restored to their rightful families. The peace commission had no punitive powers; it was purely an investigative body. All information was to be kept confidential, according to its mandate, and no information could be used for legal purposes later. The commission was initially given a strict time limit of 120 days to complete its work (to be extended, if necessary), with its report due by the end of 2001.[61] However, its work was delayed and the final report was released only on April 10, 2003.[62]

The Comisión para la Paz, though not enjoying much confidence at the outset, soon gained a reputation for keeping its word about maintaining confidentiality. This may have encouraged the military to talk. In addition to gathering, revising, systematizing, and cross-checking the existing information supplied by SERPAJ and Familiares—who maintained the main centers of documentation on human rights abuses in the country—the peace commission also received testimonies from witnesses who either had not talked before or had new information.[63] Surprisingly, both retired and in-service military of lower and higher ranks volunteered important information about where and when people had been detained and killed. These details would later help clarify some of the cases.

Important information also reached the commission from both Chile and Argentina, clarifying the fate of several of the Uruguayan disappeared. For instance, in March 2001 information from a Uruguayan military official helped establish the identities of seven people who had disappeared

in Chile during the dictatorship. Two of them were previously believed to be Uruguayan citizens, but it was later found that they had been operating with false identities. The disclosure in Argentina of facts about Operación Cóndor and its network in the Southern Cone made headline news in all major national newspapers in Uruguay. The Comisión para la Paz on April 4, 2001, informed the public that mass graves were exhumed at military headquarters in Buenos Aires and that least two of the ten bodies appeared to be those of Uruguayan citizens.[64]

In its final report released in April 2003, the Comisión para la Paz stated that the 26 Uruguayans who had disappeared inside Uruguay during the dictatorship period had died as a result of torture (Comisión para la Paz 2003). Military sources had informed the peace commission that the victims were first buried in military barracks but were exhumed in 1984. The bodies were then burned, they said, and the ashes thrown into the waters of the Río de la Plata, covering all traces of the crimes.[65] The report further stated that five Argentine nationals had been detained in Uruguay during this period and transferred to secret detention centers in Argentina. Finally, it concluded that 182 Uruguayans had been detained in Argentina during the military dictatorship; this represented an increase over the number of disappeared documented in the truth commission report issued by SERPAJ years earlier. It also provided substantial evidence for the existence and operations of Operación Cóndor. In its conclusions, the peace commission recommended that relatives of the victims of forced disappearance be financially compensated through a reparations program and that crimes such as forced disappearance and torture should be codified in Uruguay's penal code. This was done under the next government.

The peace commission's report was handed over to the Supreme Court. In response, the government adopted the commission's conclusions in Resolution 448/2003 on April 16, 2003, and also created a secretariat to continue the work of the commission (see Mallinder 2009b, 65). Furthermore, the government promised to pay reparations to families of victims who died in detention under military rule as well as to the victims of guerrilla violence. Ley de Reparacion Integral No. 18.596 was approved on September 18, 2009, and a Special Reparations Committee met in March 2010 to discuss implementation of the reparations.[66]

In spite of high hopes for prosecution, no trials were held immediately after the release of the report in 2003. The peace commission's most important achievement was, no doubt, placing the disappeared on the political agenda by reopening the public debate about the right to truth. The Comisión para la Paz addressed the truth issue, not the issue of justice. Batlle was the first executive in Uruguayan post-coup history to take article 4 of the Ley de Caducidad seriously, both by establishing the peace commission and by ordering investigation into the cases

of the disappeared when claims for truth were brought to court. Even the president's most ardent critics within the PIT-CNT agreed that Batlle deserved credit for this.[67] However, Batlle made clear from the beginning that it was an investigation into the facts and nothing more.

Skeptics questioned whether Batlle *really* wanted to find out the truth about the disappeared. Voices on the left claimed that even the much-praised Comisión para la Paz was just for show. If the president had been serious about wanting to clarify the fate of the disappeared, they argued, he would have given the commission a much stronger mandate. The PIT-CNT raised two main criticisms. First, the peace commission had no coercive powers: it could not require the military to give information, and it stated in its preamble that it would only take the "necessary steps" to solve the problem of the disappeared. Second, the commission ignored international law. Instead of taking the "necessary steps," observed the PIT-CNT, the commission should have complied with national and international law and exhaustively investigated the final resting place of the disappeared and the circumstances surrounding the disappearances. The gravest omission relates to the Inter-American Convention on Forced Disappearance of Persons, ratified by Uruguay in 1995 in Ley No. 16.724. The convention obliges the state to investigate and to criminally sanction those responsible. Moreover, the convention defines disappearance as a continuing crime (*delito continuado*) that continues for as long as the fate of the victim is unknown. This means that one may question the criminal responsibility of the kidnappers even without reference to the Ley de Caducidad.

In spite of these weaknesses, the disclosure of the truth sparked a new debate over what to do with the guilty. Before the Comisión para la Paz was established in August 2000, there had been very few vocal demands for justice in Uruguay. Only one case demanding the investigation of the disappeared, Caso Zanahoria, had sought a legal solution. As noted above, the judge in the case, Reyes, was forced to drop the case and lost his position as a result. Returning to Caso Elena Quinteros, whose legal twists and turns unfolded as the peace commission started its work, we shall see how this case started off as a quest for truth but ended up becoming the first case in Uruguay demanding retributive justice through the courts.

## The Continuation of Caso Elena Quinteros

When Judge Jubette issued her ruling on May 10, 2000, after three months of investigation, she strongly criticized former president Sanguinetti for his inaction in the matter. The judge referred to his neglect of both national and international law, which obliges the executive to act. The ruling concluded that the Ministry of National Defense "should fulfill Article 4 of Law 16.724 and order the start of administrative

research aiming at clarifying the circumstances in which the teacher Elena Quinteros disappeared and where she is now."[68] In demanding this, the judge invoked the Uruguayan Constitution (articles 7, 29, and 72) and referred to Uruguay's obligations under international law (the American Convention on Human Rights and the International Covenant on Civil and Political Rights).

The day after Jubette issued the verdict, she was contacted by Gonzalo Fernández (then involved in the Comisión para la Paz discussions, and later a member of the commission). On behalf of President Batlle, who had recently taken office, Fernández requested that the human rights committee of the PIT-CNT and Jubette drop the case and leave it to the peace commission to investigate the fate of Elena Quinteros. The peace commission was still at a formative stage, and Fernández argued that a legal solution would send the wrong signal to the military and might thus damage the political process set in motion to extract information from the military about the disappeared (PIT-CNT 2000, 6).[69] Refusing to give in to blatant political pressure, Jubette refused to drop the case. The executive then ordered an appeal. Surprisingly, after carefully examining the facts of the case, the Montevideo Court of Appeals upheld Jubette's verdict on May 31, 2000. The court further agreed with Jubette that article 4 of the Ley de Caducidad and the various international human rights treaties signed by the Uruguayan state obliged the executive to investigate the matter.[70]

Jubette could certainly have foreseen that the state would appeal the case, but she could not have counted on the support of the appellate court. According to Javier Miranda, a prominent human rights lawyer, Jubette took on the Elena Quinteros case "against all odds."[71] Nobody expected that a judge would agree to hear the case, not even Chargoñia, the lawyer who presented the case on behalf of Tota Quinteros.[72] The judge herself said that she was moved by the fact that a mother had been looking for her child for more than 20 years. She felt a strong moral and ethical obligation toward Tota Quinteros, and given the emergence of new information after Sergio Pintero's confession, Jubette said, she felt compelled to take the case.[73]

Jubette was keenly aware of the risk she was running. Judge Reyes's fate was fresh in her memory. She anticipated trouble, and rightly so. President Batlle brought pressure to have her drop the case once she issued her May 2000 ruling, and when she refused to comply, the president pressured the Supreme Court to have her sanctioned. The Supreme Court, surprisingly, refused to oust her from her position, but it made clear that it was not happy with her ruling. Jubette also faced pressure and noncooperation from her colleagues. The combined political and legal pressures caused a great deal of stress for the judge and forced her to take a lengthy sick leave. She was out of her office for over six months and was thus absent

when the appellate court issued its verdict in support of her. Jubette knew that she was jeopardizing her career, which had been marked by rapid promotions up to then, but said she had to follow her conscience.

Judge Jubette faced scorn and threats for her decision to apply the rule of law. Some claimed that she did not follow legal rules. Prominent lawyers, including Miranda, argued that the 30-day limit for *recursos de amparo* had been exceeded, and therefore she should have refused the case on technical grounds.[74] Others argued that she was meddling in what was essentially a political, not a judicial, matter.[75] However, she won support and admiration too. Pablo Chargoñia lauded her for being the first Uruguayan judge to explicitly apply international law in her ruling. The fact that a unanimous appellate court upheld her decision illustrated that she was legally on track. Moreover, Jubette had supporters further up in the judicial system. Former Supreme Court judge Jacinta Balbela called Jubette "a brilliant strong young woman" and expressed hope that there would be more judges who, like her, dared interpret the law correctly.[76] Even the military gave Jubette an unintended compliment when, referring to the Chilean judge who opened hundreds of cases against Pinochet and the Chilean military, they questioned whether Jubette thought she was "a new Guzmán."[77]

One court case hardly makes a judge into a Guzmán. But Jubette was undoubtedly a pioneer in her bold interpretation and application of the law. She responded, as was her duty, to a civilian's appeal for the right to know the truth about her disappeared daughter. The Elena Quinteros case could easily have been a noncase. If Tota Quinteros had not persisted after having repeatedly received a negative response, including from the president himself, and if she had not taken her case to court one final time, it would never have become a watershed in Uruguayan legal history. Likewise, if the case had landed on the desk of another judge, or if Jubette had done what everybody expected her to do—namely, dismiss the case on the grounds that it did not have legal merit or that it was the executive's responsibility to investigate—the case would probably have been stranded. Instead, it made it through both a first instance and a second instance court.

This was a small but significant advance in terms of bringing judges back as actors in the quest for truth and justice in Uruguay. A lower court judge invoking international human rights legislation had for the first time in Uruguay been supported by the appellate court. Further advances in this particular case seemed unlikely at the time, though. The protagonist on the accusing side, Tota Quinteros, died in January 2000—before she heard Jubette's verdict. It was now up to the executive to investigate the daughter's disappearance. If the executive refused to comply with the orders from Jubette and the appellate court, there was little more that judges could do.

As a surprise to all, in April 2002 first instance judge María del Rosario Berro formally charged the former minister of foreign affairs, Juan Carlos Blanco, with the unlawful kidnapping and disappearance of Elena Quinteros Almeida. This was the first time a prosecutor had asked for prosecution in a case of human rights violations stemming from the dictatorship period. To get around the Ley de Caducidad, the judge argued that Blanco was a civilian and was therefore not covered by the amnesty law, which grants impunity only to military and police. Moreover, the judge ruled that disappearance is a continuing crime and can therefore be investigated. Blanco was arrested in 2002—the first time anyone had been detained in Uruguay for human rights violations committed during military rule (Amnesty International 2003). This clearly disturbed the government. It responded to the detention in April 2003 by attempting to extend the 1986 Ley de Caducidad to cover not only police and military personnel but also civilians. Furthermore, the judge in charge of the case apparently was told to stop investigating the possibility that bodies of the disappeared had been buried in military compounds.[78] This caused Amnesty International (2004) to express "serious concerns that the government was interfering with the judiciary."

Although it started as a quest for "truth," the Elena Quinteros case gradually developed into the first court case for retributive justice in Uruguay. It started toward the end of Batlle's presidency but advanced in earnest under the next president. Before going into the details of legal developments since the turn of the millennium and the closely related questions of why post-transitional justice in Uruguay was delayed, let us examine the reasons why changes started under the presidency of Batlle.

## Batlle's Motivations for Taking on the Human Rights Issue

Why did Jorge Batlle decide to place the human rights issue on his political agenda when he became president in March 2000? There are three possible explanations.

First, some argued that Batlle launched the issue for personal reasons. He had always been considered liberal in political as well as in economic matters—unusual for a member of the conservative Colorado Party. According to historian Oscar Destouet, Batlle always maintained that "I am not a neoliberal. I am an old liberal."[79] So it is plausible that he believed in human rights and wanted to right the wrongs of 15 years of official oblivion and impunity. Batlle certainly succeeded in convincing the human rights community that he was sincere. The public was awed at how the new president, only a few days after taking office, managed to restore the identity of Gelman's grandchild and clarify the identity of the child that Sara Méndez thought was her son. The core group of the Familiares,

initially skeptical, gave him their confidence and pledged their full support to the work of the Comisión para la Paz.[80] SERPAJ, although somewhat more reluctant, agreed to cooperate and provided the necessary information to the peace commission (SERPAJ 2000, 105–9). The commission members thought the president was an honest man with a deeply held ethical commitment to human rights.[81] The press, too, praised him at the first president in Uruguayan post-coup history to address the violations of the past. In short, according to his supporters, Batlle raised the issue of the disappeared because he was convinced that it was the morally correct thing to do.

A more pragmatic view is that Batlle acted for self-serving political reasons. His intervention to resolve the Gelman case and establish the Comisión para la Paz carried low political cost and promised high gains in terms of popularity. By successfully ordering the military to give up information in the Gelman case, Batlle gave the lie to Sanguinetti's constant refrain that nothing could be done. Eduardo Pirotto, a representative of Familiares, called this a "very strong blow against Sanguinetti."[82] So was Batlle's decision to set up a truth commission, which Sanguinetti had refused to do. Many thought that Batlle was getting back at Sanguinetti for squeezing him out of the electoral campaign in 1985. Though Sanguinetti and Batlle are both Colorados, they belong to different party factions. The political as well as personal rivalry between them runs deep. "They hate each other," confided one informant, who chose to remain anonymous. Another person, who also asked not to be named, thought that Batlle and Sanguinetti were fighting out "brutal political and personal rivalries." At a broader political level, taking on the issue of the detained, which according to historian Alberto Marchesi has been a "central issue for the left," was a way of building closer relations with the Frente Amplio.[83]

A third possible explanation is that Batlle simply did what he had to do. National and international pressure was mounting, and the issue of the disappeared could no longer be ignored. European judges were prosecuting Latin American generals, and Operación Cóndor was again on the regional political agenda. The legal processes underway in neighboring Chile and Argentina put Uruguay to shame for its lack of progress on human rights. Following this line of reasoning, Batlle did what any other president in his shoes would have done. It was widely believed that if Tabaré Vásquez had won the presidential campaign in 1999, as he very nearly did, he too would have created a truth commission. According to Alberto Marchesi, Vásquez would have had to take up the issue because the Frente Amplio had promised to address article 4 and "close the chapter."[84] Parliamentarian Felipe Michelini, Rafael's brother, suggested that the more interesting question was whether or not Vásquez would have pursued a more aggressive policy than Batlle. He noted that

Vásquez did not talk about human rights during his electoral campaign in 1994. The issue was more salient in the 1999 elections, but still not a principal concern.[85] Since Vásquez did indeed win the presidential elections in 2005, we know that this speculation proved correct: Vásquez followed a much more aggressive human rights policy.

Whether one buys the first or the second or the third explanation, or a combination of the three, one essential question remains. Why was no justice actually achieved during Batlle's term in office?

## TRUTH BUT NO JUSTICE

How one evaluates Jorge Batlle's achievements in the human rights field depends on whether one considers a glass to be half-empty or half-full. Although Batlle's official efforts to establish the truth about the disappeared marked a positive change from Sanguinetti's policy of negation, oblivion, and open protection of military interests, military impunity continued under Batlle.

### Executive Preference

In essence, Batlle went for (partial) truth rather than justice. The mandate given to the Comisión para la Paz was weak, as noted. Batlle made no attempt whatsoever to address the validity (in relation to international human rights treaties) of the infamous Ley de Caducidad. By contrast, he used this law to avoid prosecuting the military for human rights violations. In one notable case, Batlle, invoking the Ley de Caducidad, refused to give information to Argentine authorities when his cooperation was requested in order to put on trial the kidnappers of Simón Riquelo. Batlle was generally skeptical of extradition requests. For instance, in 2001 an Argentine judge twice requested the Uruguayan government to extradite former officers of the Uruguayan armed forces and police for their alleged involvement in the disappearance of Uruguayan nationals in Argentina and in Operación Cóndor activities carried out by military governments in Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay. The Uruguayan authorities on both occasions refused to detain any of the officers (Amnesty International 2002).

### Preconditions for Trials

Since Batlle did not favor a legal solution to the problem of the disappeared, and since the Ley de Caducidad required the active support of the executive for investigations to start, the end result was truth—but no trials. A question is why Uruguayan judges failed to pick up on the two

legal arguments embraced by judges in Chile and Argentina in order to get around various types of existing amnesty laws (see chapters 3 and 4). These arguments were that enforced disappearance is (a) an international crime that cannot be exempted from domestic amnesty laws, and (b) a continuing crime that should not be subject to statutes of limitation. In Uruguay, no judge had officially interpreted enforced disappearance as a continuing crime and used this as an argument for not applying the Ley de Caducidad. Only Judge Jubette had the courage to invoke international law, in the court case regarding the disappearance of Elena Quinteros, but as noted, she did so in order to achieve truth for the victim's family, not to bring the perpetrators to justice. Hence, she too declined to invoke the legal interpretation of the term "disappeared" as a continuing crime.

To recap, successfully staging trials of Uruguayan military figures would have required, at a minimum, four prerequisites: (a) civil society makes claims for justice, (b) independent judges respond to these claims, (c) the military opts to give information and does not attempt to obstruct justice, and (d) the executive respects the judges' decisions and complies with their orders (in cases that involve application of article 4 of the Ley de Caducidad). Alternatively, in the case of executive noncompliance with article 4, judges could get around the amnesty law by declaring it unconstitutional. The Uruguayan Supreme Court has the power to review the constitutionality of laws, but it had so far chosen not to use its powers.[86] Before turning to an analysis of the potential factors explaining judicial behavior in these cases, a couple of comments on the necessary preconditions for trials are warranted.

*Inexistence of Military Threat*

Military threat seems not to have been a factor obstructing justice during the Batlle presidency. Military presence in Uruguayan politics had gradually diminished since the time of transition, when the main motivation for passing the Ley de Caducidad was to avoid provoking the military by prosecuting them for past abuses. Democracy had to be preserved at all costs.[87] Less than five years after the transition, the majority of Uruguayans approved the law in a referendum, some perhaps partly out of fear rather than conviction. A decade later, the military was no longer considered much of a threat to democracy in Uruguay. Cracks in the military wall of silence in 1996 have widened and deepened since then. Whereas the whole military as an institution previously refused to give information to the courts, a small number of military personnel of various ranks volunteered sensitive information to the Comisión para la Paz.

Why did they choose to talk? One possible answer is that the Uruguayan military had been inspired by the truth and justice processes in neighboring countries, where the military had either chosen to talk (as

in Chile) or had been ordered to talk (as in Argentina; see Chapter 3). From this perspective, the possibility of entering into a dialogue with civilians appeared as a new option. A second, purely psychological, explanation is that many military had been troubled for years by memories of participating in or witnessing torture and murder, and they finally had an opportunity to cleanse their conscience and help the families find out what happened. Uruguay is a small country with a small population, and victims and perpetrators were quite likely to encounter each other in the street.

A third possible explanation is that very few military participated directly in the deaths—the cases that were the focus of public and legal debate—and there was a sense of injustice at being collectively blamed for the misdeeds of a few. Fewer than 40 people actually disappeared within Uruguay's borders. Consequently, only a limited number of military could have taken part directly in those deaths. Many higher-ranking officers who had served at the height of the repression, more than 25 years earlier, were either dead or had retired; very few were left in active service. It is therefore reasonable to assume that some military men felt that they had been unjustly blamed for events that they either took no part in or had no control over. However, the fact remains that torture and detention were so widely practiced that many more military must have been involved in repression than those who were publicly blamed for the disappearances.

It is safe to say that civilian forces were in command in Uruguay by the turn of the millennium. Among Uruguay's neighbors, the Chilean military has not used force in recent years, not even when their leader Pinochet was imprisoned. Nor has the historically rebellious Argentine military taken up arms when faced with legal prosecution since the mid-1990s, although the military and their supporters have continued to engage in uprisings and occasional human rights violations (see Chapter 3). Uruguayan governments therefore seem to have little to fear should they support legal prosecution against the military in the future.[88] Preserving immunity in order to preserve democracy is an argument that no longer holds. Yet, for all the objective possibilities of undertaking prosecutions of the military, Batlle did not respond favorably to demands for legal justice.

*Demands for Truth and Justice*

Although Uruguayan judges can, in theory, open investigations in criminal cases, they generally rely on citizens to bring cases before them. Demands for truth and justice have fluctuated substantially over time in Uruguay. A large number of such cases were brought before the courts right after the transition to democratic rule, but pressure on the national courts diminished substantially after the Ley de Caducidad was passed. When pressure on the courts started to pick up again after the first

March for Silence, it was limited to demands for truth. Only since the first criminal court case was raised against Blanco in 2002 have there been demands for retributive justice, principally from left-wing sectors spearheaded by the PIT-CNT. This contrasts with events in Chile and Argentina, where hundreds of cases have flooded the courts in the period of post-transitional justice.

Several factors may explain why relatively few individuals and their families have brought criminal cases to court in Uruguay. One obvious reason is that the courts seemed impervious to demands for justice after the Ley de Caducidad was passed. As previously noted, activists within the human rights community were discouraged by the endorsement of the Ley de Caducidad in the referendum and the seemingly widespread acceptance among Uruguayans that the problem of the disappeared was political rather than judicial in nature. Second, the number of disappeared is comparatively low in Uruguay, so only a limited number of complaints could be made for this particular crime. Although thousands of complaints could have been made for torture and illegal detention, there seems to have been little pressure in Uruguay for justice in torture cases—probably because this crime was legally excluded from prosecution by the Ley de Caducidad.

A third reason that merits some discussion is that the human rights community in Uruguay has always been much smaller and less well organized than those in Argentina and Chile. During the dictatorship, the repression brought to bear against the formation of opposition groups, including total government control of the media until 1980, hindered the development of a strong local human rights movement. No autonomous institutions like the Catholic Church offered protection to opposition groups (as the Church did in Chile, though not in Argentina), and little international attention was paid to Uruguay (de Brito 1997, 86–88).

Indeed, opposition to the atrocities committed by the authoritarian regime was first voiced by Uruguayans in exile. A large proportion of the Uruguayan population, possibly as much as 10 percent, went into forced or voluntary exile, thus reducing the number of victims directly affected by the repression who might have later pressed for justice in domestic courts. Importantly, the political exiles of Uruguay differed from Chilean exiles: though the former "sustained their previously revolutionary positions and rhetoric in terms of class struggle . . . they did not believe in the 'humanitarian lamentations' and purely informative activities of the human rights groups and organisations" (Sznajder and Roniger 2009, 247).[89]

Uruguay's long democratic history may also have played a role here. The long-standing dominance of civil society by politicians is peculiar to Uruguay, exemplified through the close links between the Frente

Amplio and the human rights movement via the Michelinis. Much of the quest for both truth and justice has taken place through the labor union PIT-CNT, which is a distinctive feature of the human rights movement in Uruguay. Finally, Uruguayan NGOs had fewer and weaker links to transnational human rights networks than did similar organizations in Chile and Argentina, which made them less receptive to, and less able to take advantage of, what Sikkink (2005) calls "international opportunity structures."[90]

Nevertheless, it would be farfetched to argue that the lack of justice in Uruguay was principally due to a lack of demand for justice. The more interesting question is why the courts and judges responded as they did to the limited public demands for justice.

## Obstacles to Retributive Justice

According to recent research, Uruguay has a high degree of respect for human rights and a working rule of law.[91] Some scholars consider Uruguayan courts to be "far more independent in practice than nearly all of their counterparts in Latin America" (Brinks 2008, 196). Indeed, the Uruguayan courts have been ranked among the most independent in the region, together with those of Costa Rica and Chile (Brinks 2005, 596; Staats, Bowler, and Hiskey 2005, table 3).

Yet Uruguay scores low on formal judicial independence, according to the constitutional guarantees for judicial independence outlined in Chapter 2.[92] Little was done during the first 30 years of democratic rule to address the problem of gross human rights violations. As discussed above, judges have been obliged by law to play second fiddle in human rights cases, as the Ley de Caducidad states that responsibility for investigations into disappearances rests with the executive (article 4) and that no prosecution of the military may take place (article 1). In the rare cases where judges tried to challenge these institutional constraints, they encountered pressure from the executive to drop cases, or from prosecutors who appealed cases and then had them transferred to the orbit of the executive. One of the arguments I want to set forth here is that a chief reason why judges were not more proactive in the quest for retributive justice was precisely their lack of independence. Part of the explanation lies in the institutional setup of the Uruguayan justice system.

Before diving into the analysis, let us briefly review the division of labor in criminal justice cases. According to the Uruguayan code of criminal procedure, the prosecutorial function is split between the judge and the prosecutor, forcing the two to work closely together.[93] The responsibility for investigation rests with ordinary criminal courts (*juzgados de primera instancia en lo penal*). Prosecutors, who operate within these courts, are responsible for deciding whether or not the state will accuse

the suspect(s). If the prosecutor requests a dismissal of the case during the early stages, or refuses to forward a request for charges after completing the investigation, the judge has to dismiss the case. Once the prosecutor has decided on the charge, the judge cannot modify it or impose a more severe sentence. However, the judge is responsible for gathering the evidence and building the factual record in the case. For this, he or she relies on the police. Hence, it is up to the judge to decide on the type and amount of detailed evidence needed to press a charge—and up to the police to put forward the requested evidence. According to the code of criminal procedure, the judge is responsible for both the investigation and the final decision in the case; this is considered "the hallmark of the inquisitorial model" (Brinks 2008, 182). Tracing the different steps in a criminal case makes clear that there are many potential institutional bottlenecks that may hinder trials of the military.

First, prosecutors are part of the executive branch (named by the executive with the advice and consent of the Senate) and enjoy the same kind of tenure protection as judges. It follows that if the government does not want investigation into cases of human rights abuse (as was the case under the three post-transition governments preceding Batlle, as well as that of Batlle), nothing much happens. According to Brinks, "tenure protection gives them considerable individual freedom of action, but career incentives make them susceptible to internal control" (2008, 194). At the top of the system one finds the *procurador general,* a political appointee selected freely by the executive with senatorial confirmation. The result of this system, according to Brinks, is "a prosecutorial corps with job security, but with considerable incentive to respond to their politically appointed top leadership" (2008, 194).

Second, even if the prosecutor investigates a case and orders the military to testify, the military can refuse. According to Uruguayan law, all citizens (not only the military) are protected from forced testimony.[94] As long as the military refused to give evidence, the absence of evidence made it virtually impossible to solve the cases in which the military had the final proof. Progress was made under the Batlle government when the Comisión para la Paz managed to get the military to talk with guarantees of confidentiality. According to a member of the peace commission, Luis Pérez Aguirre, now deceased, the commission was in possession of 90 percent of the information needed to solve the cases of disappearances. The remaining 10 percent was in the hands of the military (SERPAJ 2000, 85). Although evidence was given on the understanding that it would not be used in trials, a separate problem was that there was not yet sufficient evidence to start a trial process.

Third, although the Comisión para la Paz successfully managed to get some of the military to talk and hence had evidence about who had committed some of the crimes, it was widely assumed that the Ley

de Caducidad precluded prosecution because it guaranteed the military impunity for crimes committed during the period of military-civilian rule. However, Uruguayan judges and lawyers who were more in line with progressive judges and lawyers in neighboring countries claimed that technically it was possible to prosecute the military for human right violations if "detention-disappearance" was defined as a continuing crime.[95] Other human rights violations, such as torture or murder, would still be subject to statutes of limitation.

Courageous and independent judges could indeed have ruled that the Ley de Caducidad does not cover detention-disappearance because it is a continuing or permanent crime, and they could have invoked international law to instigate prosecution. In theory, even if the prosecutor appealed a first court ruling advocating prosecution, an independent appellate court could uphold it if there were sufficient evidence. And if a criminal case were to be appealed further, a just Supreme Court could uphold the decision to prosecute if there were enough evidence and if international law were applied. Yet a serious problem mars this best-case scenario: even if judges did invoke international law and successfully condemned military officers guilty of human rights violations, it would be on a case-by-case basis with no general applicability. Unlike the U.S. or British common law system, a ruling in a civil law system like that of Uruguay does not automatically establish precedence for ensuing cases. This means that lower court judges do not need to take heed of a Supreme Court judgment in a particular case.[96] In sum, there were numerous constraints to judicial action on cases of the disappeared.

## Institutional Obstacles to the Exercise of Judicial Independence

Executive dominance certainly offers a partial explanation as to why judges during this period seldom used an innovative interpretation of the law to get around the Ley de Caducidad. Historically, the Uruguayan judiciary has been dependent on the executive through the prosecutor's office. But the judiciary also depends on the executive for funding and resources, as it does not control its own budget. There are no constitutional guarantees for the size of the budget, making the judiciary dependent on the executive and legislature for funding. The budget is small compared with judicial budgets in neighboring countries and there is not much judges can do to increase it, even though Uruguay has one of the highest per capita number of judges in the world. Lack of financial independence was frequently cited as impeding the independent work of judges.[97]

No judicial appointment system in the world is totally free of political influence, but some systems are thought to favor judicial independence

more than others: life tenure for Supreme Court justices, appointment by independent judicial organs, and so forth. The Uruguayan judicial appointment system falls into a category of its own. Unlike Supreme Court judges in Chile or Argentina, who are directly appointed by the executive, Uruguayan judges on the highest court are appointed by Parliament (the General Assembly) by a two-thirds vote for ten-year terms—the shortest term for Supreme Court justices in all of Latin America.[98] The term may be renewed after five years out of office. This might suggest that Supreme Court judges would enjoy a fair degree of structural independence from the executive but that there would be incentives to please those in Parliament to secure reappointment.

Before Vásquez came to power, there was a long-standing tradition of the Colorados and Blancos dividing up the new judgeships between them. Since neither of these two dominant political parties enjoyed a two-thirds majority in Parliament after 1942, each party had veto power over the other party's judicial candidates. However, until the 1994 elections, the Blancos and Colorados jointly controlled at least two-thirds of the vote in Parliament. The solution chosen by the parties was therefore to alternate in appointing judges to the vacancies that arose. Given the small Supreme Court of only five members and the short ten-year tenure, one of the two political parties on average would appoint a new Supreme Court justice every two years.

According to Brinks's favorable reading of the system, this unwritten agreement to alternate resulted in both parties primarily naming "qualified and independent candidates who might produce legal continuity, a neutral forum, and a more stable and independent institution," with the result that "the Supreme Court is strongly believed to be free from partisan political meddling in the outcomes of cases" (Brinks 2008, 197). A less positive interpretation would be that since neither Blancos nor Colorados officially favored prosecution, it is likely that politically appointed Supreme Court judges would not favor it either. It is also likely that both Blancos and Colorados as a general rule would go for noncontroversial, conservative judges rather than liberal judges who would be more likely to challenge government policies in general. Hence, because the appointment system was tied so closely to consensus policies in the legislature, the Supreme Court was not very likely to challenge the executive on important controversial matters—and thus lacked both de jure and actual independence.

In addition to the lack of both constitutional and actual structural independence at the highest level of the judiciary, the institutional setup further compromised the independence of lower court judges, resulting in a pervasive lack of internal independence throughout the system. The Uruguayan judiciary is strongly hierarchical and has been characterized as a "generally conservative judiciary that is cautious, resistant to change,

and very orthodox in its interpretations of the laws" (Brinks 2008, 199). The Supreme Court is responsible for the hiring, firing, and discipline of lower-level judges. First instance judges must therefore please both their superiors at the appellate court level and also the Supreme Court. Judges far out of line with their superiors may risk sanctions in the form of transfers or nonpromotions (Reyes, who took on Caso Zanahoria, serves as an example). Though judges themselves invariably claim that they are independent, it was a common belief among lawyers and legal experts during the Batlle presidency that this was not really the case. According to Javier Miranda, "the judicial power [in Uruguay] has always been unimportant . . . a power lacking political weight."[99] Eduardo Pirotto called the judicial branch the "Cinderella of the country"—poorly clad and poorly funded, marginalized, and treated with little respect.[100] In fact, even some liberal judges agreed that there was a lack of judicial independence in Uruguay.[101]

After the transition, there were some feeble attempts at reforming the Uruguayan judicial system to make judges more independent and more efficient, but reform efforts quickly stalled. For instance, discussions about creating a separate *consejo de la magistratura* to take over some of the administrative responsibilities of judges, including appointment procedures, have so far not culminated in concrete law proposals. Since the judicial council in operation during military rule in the 1970s is associated with the dictatorship period, the notion of creating a similar organ has not won enthusiastic support in democratic times, neither among parliamentarians nor among judges. There was also a law proposal in 1997 to revise the criminal procedural code, but since politicians from both leading parties as well as the Supreme Court were skeptical of the proposal, it became a dead letter. Uruguayan judicial institutions remain unreformed.

## Noninstitutional Factors Conditioning Judicial Behavior

Since judicial behavior is conditioned by institutional factors but not determined by them alone, it is useful to look at other factors that may influence the way judges perceive themselves and their role in society, particularly with respect to human rights. The onset of post-transitional justice in Chile and Argentina took place in a context of rapidly changing regional and international human rights law and jurisprudence (see chapters 3 and 4). To what extent were Uruguayan judges influenced by the rulings of the Inter-American Court of Human Rights, the legal processes in neighboring Chile and Argentina, and the legal wrangling in Europe concerning Latin American military officers? The simple answer is: not much. Uruguayan judges were much slower to respond to these regional and international changes than were Chilean and Argentine

judges. As Chargoñia argued in 2000, "the winds of international justice and punishment of the guilty have not reached Uruguay" (PIT-CNT 2000, 6, my translation).

There are several plausible explanations. The first is closely linked to the institutional framework outlined above. Human rights attorneys in Uruguay have lamented, according to Brinks, that the characteristics of the judiciary (appointment procedures, career incentives, and so on) "make it difficult to prevail on claims that rest on such innovative notions as the domestic applicability of international human rights law or new interpretations of existing laws. These are indeed serious obstacles to the prosecution of the human rights violations of the previous regime, which are not only difficult to frame within the ordinary penal code, but which are further protected by an amnesty law" (2008, 199).

Second, there were fewer disappeared in Uruguay than elsewhere. Only around 200 were officially recorded, the vast majority of whom disappeared in Argentina; this compared with almost 9,000 disappearances in Argentina documented by CONADEP (12,000 by the government's estimate) and almost 3,000 in Chile. Because of the pattern of repression, very few Uruguayans were prosecuted in foreign courts, so Uruguayan judges were not forced to respond to Judge Garzón in Spain or to requests from other European judges for information or cooperation, as their Argentine or Chilean counterparts have had to do (the Elena Quinteros case is a notable exception).

Third, as a result of the above and because Uruguayan civil society has relatively few international connections, Uruguay hardly attracted any international press on human rights issues. This in turn meant that Uruguayan judges were initially much less exposed to international public opinion and pressure. Moreover, they did not have to "compete" with judges in European countries in terms of prosecuting their own people.

A fourth and very important related factor is that Uruguayan judges were not exposed to international human rights legislation in the same direct way that Argentine or Chilean judges were during the period examined. In Argentina all international human rights treaties and pacts (including the Inter-American Convention on Human Rights) became part of the Argentine Constitution after the constitutional reform of 1994. In Chile, judges were forced to deal with Pinochet after he was sent back from London, and they also had to take into account European judges in this case and in many other cases involving Chilean nationals. In Uruguay, by contrast, there was no tradition of applying international human rights law, in spite of ratification of decrees and covenants. According to Judge Jubette, Uruguay has international obligations, such as the Inter-American human rights conventions, that it never applied.[102] The conservative nature of judges and the civil law tradition in combination prevented progressive decisions, like that of Jubette, from having

a binding effect on future judgments. Arguably, therefore, it would take more time for new interpretations of law to sink in. This became evident in the following years, when different pieces of international human rights law were adopted by the Uruguayan government—a point we shall return to in the next section.

Technically, international law has the same standing as national law in Uruguay, but in practice judges tended to invoke national law only. This had more to do with tradition than anything else. Unlike Chile and Argentina, where there had been major shifts in Supreme Court structure and composition due to judicial reforms, the Uruguayan court system remained largely unaltered after the transition to democracy, except for generational changes (Skaar 2003). These obviously were not enough to bring about noticeable shifts in the judicial culture, though younger judges (like Jubette) have shown a willingness to challenge the system. It was commonly held that young judges tended to be more liberal than their superiors and more open to using international law in their evaluation of cases, because of their different training and exposure. Since younger judges are dependent on their superiors and are molded as they advance through the system, it follows that structural changes affecting the top echelons of the judiciary can bring about quicker changes in judicial culture and practice than can be achieved through generational change.

On a more positive note, there were some indications that shifts were slowly taking place within the judicial system during Batlle's presidency. In February 2001 the then president of the Supreme Court, Cairoli, allegedly reported to the press that detention-disappearance may be considered a permanent crime. However, he did not go so far as to say that the Ley de Caducidad was not applicable, which would be the logical conclusion of this line of reasoning. If the Supreme Court indeed was in the process of changing its position on the matter, this could have had important signal effects later. But the Supreme Court's official position was that of silently supporting the Ley de Caducidad.

Given the obvious lack of executive interest in legally solving the problem of the disappeared, combined with the apparent lack of judicial activism and innovative interpretation of the law, the chances of witnessing a parade of military men being brought to court seemed slim halfway through the first decade of the new millennium. While the number of trials of former military officials was growing exponentially in Chile and Argentina, at the turn of the century Uruguayans considered it highly unlikely that a similar development would ever take place in Uruguay. The PIT-CNT claimed that Batlle had located the issue of the disappeared "in the purely political orbit," thus "robbing it of its judicial character, in order to not punish the guilty and to prevent the winds of justice blowing in from Spain, Mexico, Chile, or Argentina from ruffling the hair

of the Uruguayan torturers" (PIT-CNT 2000, 4, my translation). This prediction was proved wrong when Vásquez assumed power in 2005.

## Delayed Onset of Post-transitional Justice

Tabaré Vásquez of the Frente Amplio, Batlle's running mate in the 2000 elections and a member of the Comisión para la Paz, won the 2004 elections with just over half the vote. Even as president-elect, before he took office in March 2005, he made clear that he intended to address the issue of retributive justice.[103] Progress under his government turned out to be nothing short of impressive. During the first four years of his term, he accomplished much more in this field than had his four predecessors combined, in spite of the fact that the Ley de Caducidad remained in force throughout this period. By the end of 2007, Vásquez's administration had exempted 47 cases from the impunity guaranteed by the law (Amnesty International 2008). How was this possible?

### New Momentum in the Quest for Retributive Justice

One reason Vásquez could address violations of the past with such vigor was that his government in 2005 reinterpreted the scope of the Ley de Caducidad as "limited to human rights violations committed under the military government after the June 1973 Coup" (Amnesty International 2006). This interpretation opened up the possibility of legal action against some 600 active and former members of the armed forces in connection with crimes committed *before* the coup. Vásquez's government also excluded from the Ley de Caducidad "cases that took place in Argentina, allegedly with the co-operation of the Uruguayan and Argentinean armed forces" (Amnesty International 2006). In addition to making it legally possible to look into the role of the military *cúpula* in the repression, the government's moves allowed criminal charges to be raised against a number of other retired lower-ranking military officials and former police. This clearly demonstrates that where there is executive will, progress in retributive justice can be made, even if domestic legislation at the outset precludes prosecution. Since many of these cases are, as of 2010, at an early stage in the penal courts, only a handful of the most emblematic cases will be discussed here to give a flavor of the latest developments in retributive justice in Uruguay.

#### *Going for the Top Echelons*

The most spectacular achievements in retributive justice have been the arrest and trials of two former presidents and one former minister. Starting in November 2006, the 11th Penal Judge in Montevideo ordered the

detention and trial of former president Juan María Bordaberry (1972–76) and the former minister of foreign affairs, Juan Carlos Blanco, on charges of crimes against humanity.[104] The families of legislators Zelmar Michelini (represented by Hebe Martínez Burle) and Héctor Gutiérrez Ruiz are plaintiffs in the case against Bordaberry. Bordaberry and Blanco were jointly charged with the murders of Michelini, Ruiz, and two members of the Tupamaro guerrilla group, Rosario Barredo and William Whitelaw, in Argentina in 1976. The decision was appealed (Amnesty International 2007a). In September 2007 the appellate court confirmed the trial and detention of Bordaberry as coauthor of ten homicides (Amnesty International 2008), and he was sentenced to three years in jail in January 2010.

A year after Bordaberry was detained, the courts again took aim at former top leadership. Uruguayan judge Luis Charles in December 2007 arrested and charged General Gregorio Alvarez, the former de facto president and leader of the military dictatorship in Uruguay (1981–85), as coauthor of the enforced disappearances of more than 30 people. On October 22, 2009, Judge Charles found Alvarez, age 83, guilty of the deaths of 37 people who disappeared during the dictatorship, as well as several additional human rights violations, while he was commander in chief of the army. He was sentenced to 25 years in prison. During the same session, a former navy captain, Juan Carlos Larcebau, was sentenced to 20 years in prison for 29 cases of aggravated homicide.[105] This was the second time in Latin American history that a former dictator had been put on trial, convicted, and sentenced to prison. The verdict against Peru's Fujimori fell in April of the same year.

*Other Court Cases*

In addition to the more spectacular cases above, from 2005 onward a number of less politicized and less publicized cases trickled into Uruguayan courts. The precondition for all the cases was that the executive had to order an exception to the Ley de Caducidad before investigations could take place. In line with Vásquez's decision on which cases fell outside the scope of the amnesty law, many of the crimes under investigation had taken place outside Uruguay as part of the regional Operación Cóndor scheme. For instance, in September 2006, a penal judge in Montevideo found six military officers and two former police officers guilty of organized crime and of kidnapping Uruguayan members of the opposition group Party for People's Victory (Partido por la Victoria del Pueblo, PVP) in Argentina in 1976 as part of Operación Condor (Amnesty International 2007a). In June the following year Vásquez excluded 17 cases previously covered by the amnesty law, including at least five transfers of detainees from Argentina to Uruguay between February

and August 1978. In September he also excluded the kidnapping of two Uruguayans in Paraguay in 1977. The decision paved the way for judicial investigations into these cases (Amnesty International 2008).

*Extradition Cases in which Uruguay has been Involved*

As in previous years, neighboring countries continued to demand extradition of Uruguayan citizens to stand trial in cases stemming from Uruguay's participation in Operación Cóndor. Compared with his predecessors, Vásquez was much more receptive to these requests. He was also ready to ask for extradition himself, as in the case of former colonel (and Uruguayan citizen) Juan Manuel Cordero, whose involvement in human rights violations during the military government included the murders of Zelmar Michelini and Héctor Gutiérrez Ruiz. Cordero was wanted by both the Uruguayan and the Argentine governments for involvement in Operación Cóndor activities and had fled to Brazil, where he sought refuge from prosecution. He was extradited from Brazil to Argentina in January 2010.

*Other Government Actions in the Human Rights Field*

Alongside criminal investigations into past human rights violations, the report of the Comisión para la Paz paved the way for progress in terms of both learning the fate of the disappeared and providing reparations to the families of the victims. In November 2005, the first remains of communists who had been kidnapped, tortured, and murdered by the military dictatorship were found. Two years later, in July 2007, excavations in the Tablada military compound were started (by the Humanities Faculty Anthropology team from the Universidad de la República), in an effort to locate the remains of more detainees. In September the same year new exhumations began on military premises in search of the remains of Elena Quinteros (Amnesty International 2008). Upon recommendation from the peace commission, torture was codified in Ley No. 18.026 of October 4, 2006. Furthermore, provision of reparations to relatives of victims of human rights violations during the military government was codified in two laws: Ley No. 18.033 of October 3, 2006, and Ley No. 18.596 of October 13, 2009. Their implementation was still being debated in early 2010. A reparations commission was established in November 2009 and implemented toward the end of January 2010.[106]

## Explanations for the Delayed Onset of Post-transitional Justice

There are at least two ways to interpret this new scenario. One is that the trials are due exclusively to Vásquez's pro-prosecution policies, and

that judges have responded favorably to these policies since dependent judges do what they are expected to do. A more nuanced interpretation is that the onset of post-transitional justice (here, trials) is due to a combination of factors. These include (a) an executive pushing for trials, thus signaling that it is politically acceptable to address the issue of military accountability for human rights violations, even though a significant part of the population opposes prosecution, as reflected in the 2009 referendum; (b) more vocal demands for justice from the human rights sector, reflected in a larger number of cases being brought to court; (c) a judiciary more receptive to individual complaints; and (d) a military subservient to civilian rule. The question is, are judges just playing along with executive policy preferences, as they have in the past? Or are judges playing an autonomous role in advancing the quest for justice?

Vásquez's personal commitment has indisputably aided the rapid progress in retributive justice since 2005. Yet it is important to note that he was also mandated by the Frente Amplio Parliament prior to his candidacy and campaign, consistent with a long-standing tradition of the left to address human rights questions. So the reinvigoration of the human rights movement was arguably also a factor in bringing more cases to court. Given the fact that it coincided with a profound change in official human rights policy, it is hard to decipher what has motivated judicial activism in human rights cases. Apart from the inspiration provided by the executive, there is reason to believe that changes have also been taking place within the judiciary itself, particularly within the Supreme Court. Already, during the Batlle presidency, the high court had on a couple of occasions carefully signaled that it was not totally happy with the status quo. For instance, when President Batlle had tried to pressure the Supreme Court to have Judge Jubette sanctioned after her 2000 ruling in the Elena Quinteros case, the Court refused to oust her from her position.

Because of the particular institutional setup of the Uruguayan Supreme Court, all of the judges have been replaced since the end of the dictatorship. Recall that the five-member court, on average, receives one new member every two years, because of the short ten-year term for justices. Recall also that the Colorados and Blancos lost their two-thirds majority in the 1994 elections and failed to reach an agreement with the Frente Amplio on alternate appointments (Brinks 2008, 196–97). With Vásquez coming to power in 2005, the Frente controlled just over half of the seats in both houses of Parliament. This suggests that the Frente Amplio has had a fair say in who gets to sit on the Supreme Court in the vacancies opened after 2005. Since they need either Blancos or Colorado parliamentarians to go along with their proposed judge in order to get the two-thirds majority, the Frente Amplio cannot handpick their preferred

candidates. Brinks (2008, 197) makes the point that new justices continue to be conservative since lack of political consensus among the three main parties in Parliament "forces" them to appoint the most senior appellate court judge when a vacancy opens on the Supreme Court.

Nevertheless, there have been some important human rights court decisions in recent years that signal change in the legal consensus. Even if it is true that senior, and thus presumably conservative, appellate court judges have been appointed, we would expect at least the two newest justices on the Supreme Court to have been appointed in a political climate more favorable to human rights trials. In 2000 Uruguay ratified the Rome Statute establishing the International Criminal Court, and in 2003 a proposal was forwarded to Parliament to incorporate the Rome Statute into Uruguayan domestic law. This signaled political will to do away with the deficiency in the Uruguayan legal code with respect to the issue of torture. On October 31, 2006, Uruguay became the first country in Latin America to fully incorporate the Rome Statute into domestic law; the legislation provided for both complementarity and cooperation with the International Criminal Court.[107] This is very important progress, since torture was one of the most widespread crimes during the dictatorship. Moreover, the Frente Amplio–led Parliament, in response to a civil society initiative launched in September 2007, proposed to annul the Ley de Caducidad and called for a referendum in 2009, signaling that it was time to politically reconsider the immunity issue.

It is not unlikely that the Supreme Court has picked up on these political signals. Although it is hard to prove, given the absence of interview and personal data on the new Supreme Court justices, it is not far-fetched to assume that there might have been a cultural (as well as generational) change in the echelons of the judicial hierarchy, which might have had a positive trickle-down effect in the system. To (very) tentatively conclude: even in the absence of judicial reform, changes have slowly taken place in the Uruguayan judiciary. This is primarily due to generational succession, but the pace of change has been accelerated by the term limits for Supreme Court justices. It is perhaps ironic that this appointment system seems to reinforce rather than counteract the politics of the forces in power, at least in the context of human rights: the effect is doubly negative when the executive is against prosecution and positive when the executive favors it.

## The Supreme Court Ruling: Amnesty Law Unconstitutional

The most spectacular—but perhaps not totally unexpected—legal development in the human rights field came in October 2009, when the Supreme Court ruling in the Sabalsagaray case unanimously declared

the Ley de Caducidad unconstitutional.[108] The case concerned a young female communist and social activist opposed to the military government, Nibia Sabalsagaray, who died in a military barracks outside Montevideo in 1974, allegedly from the effects of torture. The victim's sister, Blanca Sabalsagaray, appealed in 2004 to the government for redress, but President Tabaré Vásquez decided the following year that the law provided immunity. Three years later, criminal prosecutor Mirtha Guianze filed a new constitutional challenge, arguing that the amnesty law was unconstitutional and could not be applied to the Sabalsagaray case. In its October 2009 ruling in favor of the prosecutor, the Supreme Court stated that (a) the Ley de Caducidad violates the independence of the three branches of government and cannot be interpreted as an amnesty law because it was not approved according to constitutional procedures, which demand a special majority vote in Parliament, and (b) the law violates international obligations to protect the rights of citizens. Prosecutor Guianze praised the unanimous ruling for showing that Uruguay now has "a totally independent Supreme Court" and said it reflected "a very solid, forceful position from the Court."[109]

However innovative, in accordance with the civil law tradition, the Supreme Court ruling in the Sabalsagaray case applies only to this particular case. Nevertheless, there is widespread consensus in the legal community in Uruguay (and outside) that it will set a precedent for future rulings in similar cases. The ruling is considered to be "a critical blow to the amnesty law," and in the opinion of the family's attorney, Juan Errandonea, it "rings the death knell for the statute of limitations."[110] The Supreme Court issued its ruling only a couple of days before the Uruguayan population went to the polls to vote on the fate of the Ley de Caducidad, and the decision is all the more important in view of the negative outcome of the referendum.

## The Ley de Caducidad Revisited

As we have seen, the main legal and political obstacle to prosecution of the military in Uruguayan courts throughout the post-dictatorship period has been the Ley de Caducidad. Although the law was criticized repeatedly and extensively over the years for being out of tune with international law and for violating Uruguay's international obligations, there were no real political efforts to have it revoked until February 2008, when the two chambers of Uruguay's Parliament (where the Vásquez government had a clear majority) said they favored declaring the 1986 bill unconstitutional. A public campaign for a second referendum had started in 2006, pushed by civil society sectors that wanted to have the law revoked (Mallinder 2009b, 68). The effort drew support from elements

of the Frente Amplio, though not the top leadership. Vásquez, for his part, had originally refused to annul the law, and the Frente Amplio was generally opposed to the referendum. They particularly did not want to hold it at the same time as the presidential elections scheduled for October 2009.

Nevertheless, a referendum was held in connection with the general elections on October 20, 2009, to decide whether or not to scrap the Ley de Caducidad.[111] Although public opinion polls showed that support for annulment of the law had fallen by 6 percentage points, from 48 percent in May 2008 to 42 percent in September 2009, great hopes were pinned on the outcome of the referendum.[112] The presidential candidate from the Frente Amplio, José "Pepe" Mujica, was considered substantially more popular than his rivals—Juan Bordaberry, son of former Uruguayan dictator Juan María Bordaberry, and Luis Alberto Lacalle, who was president from 1995 to 2000. Mujica, a former Tupamaro guerrilla leader, had promised to follow the direction of his predecessor, Vásquez, on the human rights question. But he seemed likely to go further: Vásquez, though willing to reinterpret the law, had initially been unwilling to annul it, whereas Mujica explicitly opposed the amnesty law. Also, many people believed that the Supreme Court ruling in the Sabalsagaray case only days before would swing votes in favor of overturning the amnesty law.[113] All this gave room for realistic hope.

Mujica indeed won the election with 52.4 percent over Luis Alberto Lacalle's 43.5 percent. It therefore came as a great surprise that the referendum results did not fall in line: a little under 53 percent voted against repealing the amnesty law, while 47 percent voted in favor.[114] Without the simple majority vote needed to overturn the statute, the amnesty law remains in place. If the voters had decided to annul the law, the statute of limitations defense would also have disappeared, exposing many other figures from the military dictatorship to prosecution. This would have made it possible to reopen dozens of cases that have so far been excluded from investigation by the amnesty law. As it is, other roads must be found to make progress in holding the perpetrators of past human rights violations to account in Uruguay.

## CONCLUSIONS

The turbulent transitional justice record of Uruguay provides a perfect test case for examining three central hypotheses presented in the introductory chapter of this book. That is, trials *will not* occur if the executive does not want trials and the judiciary is dependent. Trials *may* occur if the executive wants them, especially if the judiciary is dependent (in which case the executive orders trials and the judges comply with their orders).

Finally, trials *will* occur if the judiciary is truly independent and there is a legal basis for prosecution, regardless of the policy preference of the government.

The analysis has shown that next to no progress was made in the quest for retributive justice during the period 1985–2000, under the first three presidencies after transition to democratic rule, chiefly because the executive manipulated or controlled the legal process through the Ley de Caducidad and judges were not independent or bold enough to protest. Also, the population voted to uphold the amnesty law, which may indicate that Uruguayans did not think that there was any political gain in revisiting it.

The first shift in post-transitional justice occurred under the presidency of Batlle (2000–5) due to Batlle's personal and political commitment to learning the fate of the disappeared. But progress during his presidency was limited to finding out the truth through the work of the Comisión para la Paz and the three truth-finding cases of Gelman, Simón Riquelo, and Elena Quinteros. Impunity for gross human rights violations remained. Judges started to challenge the Ley de Caducidad during this period, but they met with resistance or sanctions, or their cases were transferred to the military courts. I have attributed the failure of judges to reclaim their rightful position and bring about post-transitional justice partly to an institutional system that encouraged deference to the executive and the Parliament. In addition, the absence of structural changes to the judicial apparatus allowed the judiciary to retain its conservative attitude toward human rights matters, which resulted in a very slow and cautioned individual reaction to international legal developments in this field.

The real breakthrough in post-transitional justice came only when Vásquez assumed the presidency in 2005. The question is whether recent court performance in human rights cases is simply a display of judicial deference to the executive's preferred policy—as in the past—or whether the increased propensity for judges to prosecute former human rights perpetrators is a result of independent judicial action. Since the recent activism of Uruguayan courts under Vásquez coincides with a public push by the executive for prosecutions, it is hard to decipher cause and effect without in-depth analysis and interviews of appointees to the judicial sector. That will be another project.

A tentative conclusion would be that there has been a positive interaction between official executive policy, the revitalized push for justice from civil society, and the receptiveness of the justice apparatus. With the Ley de Caducidad still in force, the initiative to continue these efforts will rest on the shoulders of strong judges like Alberto Reyes and Estela Jubette and brave prosecutors like Mirtha Guianze. However, while judges who choose to take a more innovative route than their counterparts previously

tended to meet with skepticism and even sanctions, they may now expect backing from the Supreme Court. That is an improvement over previous years. Furthermore, with the incoming government of Mujica, a former Tupamaro leader who suffered lengthy imprisonment and torture during the dictatorship period, we may expect executive support for a continued quest for justice.

# Chapter 6

# The Independence of Judges and Post-transitional Justice

Since the start of the new millennium, Argentina and Chile have led the way as Latin American protagonists of post-transitional justice. Uruguay has followed suit, albeit slowly and on a much smaller scale than its neighbors. These three Southern Cone countries, along with Bolivia, Brazil, and Paraguay, have joined forces to hunt down retired military officials suspected of having committed gross human rights violations under Operación Cóndor. Where there previously was a network of repression, there is now a network of courts and governments cooperating to clean up the murky past.

This book has tried to explain why courts in some Latin American countries and not others have managed to prosecute their military officials in recent years for gross human rights violations committed during authoritarian rule. Domestic institutional factors have been the focus of analysis. Specifically, the book has examined whether reforms undertaken in the 1990s to increase the independence, power, and autonomy of the judiciaries effectively provided judges with more room for independent action in human rights cases.

A broad overview of all Latin American countries with a violent past, undertaken at the beginning of the new millennium, suggested a definite correlation between steps to formally augment judicial independence and prosecution of the military for past gross human rights violations. Not all countries that had undertaken judicial reform proceeded to prosecute their militaries, but all the countries that *did* prosecute had undertaken extensive judicial reforms. No Latin American country where reforms were absent or minimal had started prosecutions by 2000. The comparative empirical analysis of Argentina, Chile, and Uruguay has further underlined the importance of increases in judicial independence as a factor in the early onset of post-transitional justice and the subsequent exponential growth in trials.

## COMMONALITIES ACROSS THE COUNTRY CASES

Before the military of any country can be prosecuted successfully, three preconditions must be met: the military must not present a credible threat to the democratic order, cases of human rights violations must be brought to court, and there must be a sufficient legal basis for prosecution. In Argentina, Chile, and Uruguay, the first two conditions were met by the mid-1990s. The third one, which principally has to do with amnesty laws, requires more discussion.

It is clear that the military presence in politics in all three countries has diminished over time. After repeatedly rebelling against prosecutions at the end of the 1980s, the Argentine military gradually yielded to civilian control. The Chilean military wielded substantial influence over policy making and decisions, particularly with respect to human rights, until Pinochet stepped down as the head of the armed forces in 1998; it has been safely back in the barracks since then. Similarly, although there has historically been a close connection between the Uruguayan military and the Colorado Party, Uruguay's military has for all practical purposes been subjected to civilian rule.

Courts in the three countries have received systematic and more or less continuous claims for truth and justice from victims, victims' families, and the human rights movements, from the beginning of the dictatorship period until the present. Though the pressure on the courts has waxed and waned, it has never stopped completely. The human rights movements in Argentina and Chile are particularly strong, but in all three countries, activists and lawyers have worked together to maintain momentum and push for cases against the military to be resolved through the courts.

This domestic pressure for truth and justice has, of course, been exerted on the governments as well as the courts. Except for the initially human rights–friendly presidents who took office in Argentina and Chile right after the transition to democratic rule, executives in all three countries responded negatively to these pressures for many years—including during 1995–2000, a period that saw the onset of post-transitional justice in Argentina and Chile. The two Menem governments and the government of de la Rúa in Argentina and the two Sanguinetti governments in Uruguay stand out as being particularly nonreceptive to domestic demands for truth and justice. Similarly, governments in all three countries have as a general rule been hostile to external demands for justice, such as requests from foreign courts, especially European courts, to turn over nationals to stand trial.

Where the executive does not control the courts, it has sought to restrict the scope of judicial action on past human rights violations by issuing amnesty laws. The Chilean government under Aylwin inherited a self-amnesty law proclaimed by the military, and Uruguay's Sanguinetti

crafted an amnesty law in collaboration with the military before the transition to democracy took place. Argentina opened up for limited prosecutions immediately after the transition, but Alfonsín too soon tried to curb judicial action through amnesty laws when the prosecutions happened on a larger scale than anticipated.

Although amnesty laws are not direct attacks on judicial independence, they serve as legal ways of bringing court activity on human rights into line with official anti-prosecutorial policies. Whether we consider them as legal obstacles to judicial action or as direct infringements on judicial freedom and review powers, the amnesty laws certainly offer a potent explanation for judicial *inaction*. Most notably, the Ley de Caducidad in Uruguay has impeded judicial advancements in the human rights field, particularly because the law directly involves the executive in deciding whether or not a particular case may be investigated. This has blurred the line between politics and judicial affairs. The fact that the amnesty law has been democratically approved by majority vote in two referendums has, no doubt, complicated the situation in Uruguay and delayed the onset of post-transitional justice.

Given the absence of a political climate favorable to prosecutions, and given the presence of powerful legal obstacles to prosecution, why have some judges in some courts chosen to defy these obstacles and push ahead to hold the military accountable for past human rights violations?

## Does Judicial Independence Matter?

One of the main postulates in this book has been that independent judges are more likely to prosecute the military for past human rights violations than those who are not independent. If this holds up to empirical scrutiny, we should observe more trials in periods when the judiciary is more independent. With less partial appointment procedures, greater review powers, and more financial independence, the institutional space for individual judicial decision making should be broadened. Judges who favor prosecuting the military (for ideological, ethical, or other reasons) should thus have more freedom to act in accordance with their convictions when formal guarantees of judicial independence are in place. This in turn should have a positive impact on judicial decision making in the human rights field. Yet, I have cautioned that a constitutional guarantee of judicial independence constitutes the *minimal* requirement for—rather than a real guarantee of—independent judicial action. Constitutional guarantees matter in practice only when they are respected and implemented, that is, when judges may operate free from undue external or internal pressure.

Table 6.1 sketches the conditions under which trials have occurred (or not) under the 16 governments that have held office in Argentina (A), Chile (C), and Uruguay (U) since the demise of military rule. Each

**Table 6.1 Trials in Argentina, Chile, and Uruguay**

| | | JUDGES | | | |
|---|---|---|---|---|---|
| | | Not independent | | Independent | |
| | | Liberal/ activist | Other | Liberal/ activist | Other |
| EXECUTIVE | **Favors trials** | | | | |
| | Alfonsín (A 83)[a] | | | trials | |
| | N. Kirchner (A 03) | | | trials | (slow trials)[b] |
| | C. Kirchner (A 07) | | | trials | (slow trials) |
| | Aylwin (C 89) | | | | (few trials)[c] |
| | Bachelet (C 06) | | | trials | |
| | Vásquez (U 05) | trials | | | |
| | **Opposes trials** | | | | |
| | Alfonsín (A 83) | | | trials | |
| | Menem I (A 89) | | | | |
| | Menem II (A 94) | | | trials | |
| | de la Rúa (A 00) | | | trials | |
| | Duhalde (A 02) | | | trials | |
| | Frei (C 94) | | | trials | |
| | Lagos (C 00) | | | trials | |
| | Sanguinetti I (U 85) | | | | |
| | Lacalle (U 90) | | | | |
| | Sanguinetti II (U 95) | | | | |
| | Batlle (U 00) | (trials)[d] | | | |

*Source*: Author's analysis.

[a] The Alfonsín government appears twice in the table because the government changed its policy position. At the outset it wanted (limited) prosecutions, but it later attempted to severely restrict prosecutions once they occurred on a larger scale than anticipated.

[b] "Slow trials" indicates that trials under certain judges proceeded much more slowly than anticipated, with the judiciary accused by the government of deliberately dragging its feet. This was the case under both Kirchner governments, even though other trials proceeded normally under liberal/activist judges during the same period.

[c] Only one trial was held under the Aylwin government. This was the Letelier-Moffitt case pushed hard by both the Chilean and U.S. governments and taken on only reluctantly by a Pinochet-friendly Supreme Court.

[d] Trials started under the Batlle government, but their purpose was truth finding and not prosecution.

government's first year in office is indicated by two numbers (83 = 1983, 00 = 2000, etc.). "Trials" means that trials occurred. A blank space either means that no trials occurred or, alternatively, that the circumstances corresponding to that table cell did not exist (this will be further clarified in table 6.2). The information in the top row of table 6.1, for example, would be read as follows: "Trials occurred under the government of Alfonsín, who assumed the presidency of Argentina in 1983, when the

judiciary was formally independent and had at least some judges on the bench who were liberal or activist or both."

Some caveats are in order. First, judges' independence in the table refers to the overall degree of *formal* judicial independence of the courts, as stated in the countries' constitutions. For the sake of simplicity, independence is presented as a dichotomous variable. Next, to capture the dominant policy trend under each government, the policy preference of the executive has been simplified as "favors trials" and "opposes trials." Third, judges are divided into two groups for convenience: those who are liberal and/or activist and those who are neither (and thus fall into the category "other"; see figure 2.4 in Chapter 2). The underlying assumption is that judges who are liberal/ activist will be more likely to be human rights–friendly than those who are conservative and/or believe in practicing restraint. Fourth, both the executive and the judiciary are presented as monolithic actors.

As table 6.1 demonstrates, trials are much more likely to occur where the judiciary is (formally) independent than where it is not. Indeed, there is only one government under which a nonindependent judiciary has held trials against the military: that of Vásquez. But Vásquez's official policy was to favor trials and refrain from applying article 4 of the Ley de Caducidad, an approach that opened the legal space for judicial action. Not unexpectedly, the table suggests that trials are likely to occur where the executive favors prosecutions, the judiciary is independent, and there are liberal/activist judges on the bench. The most interesting finding, however, is that *trials may be held even if the executive does not favor prosecution*—as happened under the four Argentine governments of Menem II, Alfonsín, de la Rúa, and Duhalde, and the two Chilean governments of Frei and Lagos.

Table 6.2 presents the empirical material in a slightly different way. Expectations according to the theoretical arguments spelled out in Chapter 2, table 2.1, are shown as "trials" or "no trials." Each of the governments is listed according to the prevailing executive policy preferences and degree of judicial independence plus judicial preference. The governments that were in office at the onset of post-transitional justice are shown in bold.

Four broad "lessons learned" can be drawn from table 6.2.

*Lesson 1: When the judiciary lacks independence, no trials will occur unless the executive favors trials.*

In line with expectations, no trials were held under the first Menem government and at the beginning of his second government in Argentina or under the two Sanguinetti governments and the Batlle government in Uruguay. In all five cases the executive was explicitly opposed to trials,

and the judiciaries, which for all practical purposes lacked independence, endorsed official policies.[1] The empirical analysis has provided ample support for the assumption that in situations where judicial independence is lacking—that is, where a close connection exists between the executive and the courts, especially the Supreme Court—*and* the executive explicitly does not favor prosecutions, judges will be reluctant to pursue an aggressive prosecution agenda. This may be for either of two reasons. First, judges may simply share the ideology of the executive who appointed them and therefore not favor prosecution for past wrongs. This was clearly the case of the Menem-packed Supreme Court in Argentina. Alternatively, judges may fear jeopardizing their positions, promotions, and career opportunities if they choose to push a human rights agenda not palatable to the executive that controls their career path. Furthermore, in hierarchically organized judicial systems, Supreme Court judges may in practice wield a great deal of power over lower court judges by controlling their salaries and promotions. In sum, it is relatively straightforward to attribute judicial inaction in human rights cases to conformity with official executive strategies of nonprosecution.

Investigating judges Jubette and Reyes, under the Batlle government in Uruguay, attempted to dig into cases of disappearances, with truth finding and not prosecution of the military as an aim. Both were sanctioned by the executive and by higher-level judges, showing what can happen to judges who stick their necks out. It is perhaps not surprising, then, that such displays of individual judicial activism have remained, for the time being, isolated incidents.

When a more prosecution-friendly executive, that of Vásquez, came to power in Uruguay, prosecutions began against former high-level officials, although the judiciary remained unreformed and hence lacked formal judicial independence. Executive endorsement provided space for judicial action and some liberal/activist judges made use of it, no longer fearing sanctions.

*Lesson 2: Trials will occur in situations where the executive favors trials and an independent judiciary favors trials.*

Also in line with expectations, the table shows that trials are likely to be held when the executive favors trials and the judiciary is considered relatively independent, as long as there are individual liberal/activist judges who also favor trials. This was the case at the beginning of the Alfonsín government in Argentina and under the Bachelet government in Chile. When executive policy preferences and judicial preferences coincide, it is hard to attribute the occurrence of trials to one or the other. Most likely, coinciding preferences have a synergistic effect, but further empirical analysis is needed to confirm that.

**Table 6.2 Executive policy position, judicial preferences, and formal judicial independence**

| | | JUDGES | | | |
|---|---|---|---|---|---|
| | | Not independent | | Independent | |
| | | Liberal/activist | Other | Liberal/activist | Other |
| EXECUTIVE | Favors trials | TRIALS<br>Vásquez (U) | TRIALS | TRIALS<br>Alfonsín (A)<br>Bachelet (C) | **NO/SLOW TRIALS**<br>Aylwin (C)<br>N. Kirchner (A)<br>C. Kirchner (A) |
| | Opposes trials | NO TRIALS<br>Lacalle (U)<br>Batlle (U) | NO TRIALS<br>Menem I (A)<br>Menem II (A)<br>Sanguinetti I (U)<br>Sanguinetti II (U) | **TRIALS**<br>**Alfonsín** (A)<br>**Menem II** (A)<br>**de la Rúa** (A)<br>**Duhalde** (A)<br>**Frei** (C)<br>**Lagos** (C) | NO TRIALS |

*Source*: Author's analysis.
*Note*: Two governments appear twice in the table because of changes over time. The Alfonsín government changed its policy position, and under the second Menem government the degree of formal judicial independence changed after judicial reforms had been enacted.

*Lesson 3: Trials may be slowed down or reduced in number if the judiciary is independent but does not favor prosecution—even if the executive is in favor of trials.*

This situation occurred under three governments, those of Aylwin in Chile and the two Kirchners in Argentina. These experiences show that an independent judiciary cannot be expected to automatically favor large-scale trials. There are two issues here: the meaning of "independence" and the policy preferences/personal orientations of judges. The first issue is particularly tricky in the Chilean case, as it raises the question of independence *from whom*. The Supreme Court inherited by Aylwin, packed with Pinochet appointees, was Pinochet-friendly and thus independent of the new democratic government. The judges fiercely expressed their independence by opposing prosecution of the military and any attempts at judicial reform. De facto and de jure judicial independence from the incumbent government is hence no guarantee that trials will occur. It is the combination of formal judicial independence *and* judicial preferences for prosecution that makes judges prone to prosecute.

In the Argentine case, two very prosecution-friendly presidents in a row have, with legislative backing, made political moves to advance prosecutions more rapidly and on a more extensive scale than the judiciary has been able or willing to handle. The result has been unexpectedly slow trials that have produced few convictions during the Kirchner presidencies.

*Lesson 4: Trials may occur when the judiciary is independent, even if the executive does not favor trials.*

The most interesting and important lesson to be drawn from our empirical analysis is that trials may occur even when the executive is passively or explicitly opposed to prosecution. This is precisely the situation that prevailed at the onset of post-transitional justice in Argentina (under the second Menem government and the de la Rúa government and Duhalde) and Chile (under the governments of Frei and Lagos).[2] This requires further explanation.

## ACCOUNTING FOR THE ONSET OF POST-TRANSITIONAL JUSTICE

When the executive has sent a political message to the judiciary that says "do not prosecute," judges at times have done so anyway. This book has sought to identify the factors and causal mechanisms that have enabled certain judges to ignore executive preferences and press ahead with

prosecutions. We may distinguish between two broad types of situations in which this has happened.

First, some judges who issued decisions counter to official policy came under undue pressure from the executive or from their superiors within the judicial system. They lost their jobs, were transferred, or were denied promotions. The disciplinary actions against judges Cerda in Chile and Jubette and Reyes in Uruguay serve as examples. These judges' bold but isolated attempts to push for truth or justice did not immediately lead to broad changes or spur large-scale trials, mainly because they took place in the context of an unreformed judiciary and an unreformed legal framework.

Second, some judges have mounted pioneering judicial efforts that have resulted in criminal trials and convictions. It is these initiatives that led to the onset of post-transitional justice in Argentina and Chile. Apart from Argentina under the Alfonsín government, which is not the focus of this analysis, we find five empirical situations in which governments opposed, or at best were indifferent to, widespread prosecutions while individual judges pushed them, resulting in trials and convictions: Argentina under the second Menem government and the de la Rúa and Duhalde governments, and Chile under the Frei and Lagos governments.

By defying executive policy preferences and issuing courageous rulings not sanctioned by the executive or by superior judges, judges broke new ground. The innovative rulings of judges Bagnasco, Cavallo, and Corral in Argentina and Cerda, Guzmán, and Correa Bulo in Chile, among others, introduced new ways of interpreting existing laws and of applying international law that were soon followed by fellow judges. Novel interpretations of forced disappearance as a continuing crime and child kidnapping as a crime against humanity gradually evolved into uncontroversial interpretations and applications of law. They started in the lower-level courts, principally the Santiago Court of Appeals and the Buenos Aires Federal Appeals Court, but were eventually upheld by the Supreme Courts in both countries. My argument has been that the new institutional and legal framework facilitated the dissemination of these new ideas and interpretations so that they did not remain isolated incidents of judicial activism.

Although judicial reforms were multifaceted in both Chile and Argentina, some reforms had more influence on human rights matters than others. The single most important institutional change preceding the onset of post-transitional justice in Chile was the Supreme Court reform of 1998, which brought more liberal-minded justices to the Court and created a special chamber for criminal cases. In Argentina, the constitutional reform of 1994 granted constitutional status to international human rights law; this broadened the scope for judicial review, which proved decisive. By contrast, the absence of judicial reform in Uruguay

made the judiciary slower to respond favorably to demands for truth and justice. Here executive support helped judges overcome legal obstacles in the form of domestic amnesty laws and set in motion post-transitional justice.

The Argentine case highlights the complex nature of judicial activism. Menem's moves to pack the Supreme Court in 1990 and staff the rest of the enlarged judiciary with his cronies initially diminished the overall level of de facto judicial independence. Nonetheless, not all judges were sympathetic to Menem and his policies. Toward the end of Menem's second government, some judges, primarily in the federal courts, started diverging from formal human rights policies, taking steps to hold the military to account. They actively broadened their basis for legal action by reinterpreting national amnesty laws and invoking international law as superseding national amnesty laws. This display of judicial activism was made possible by the incorporation of international human rights treaties into the 1994 Constitution, which broadened the scope for judicial review in human rights cases.

However, an important finding of the empirical analysis is that judicial reform that increases de jure judicial independence does not guarantee greater de facto judicial independence. When judges have displayed judicial independence, the explanation for this may involve factors beyond mere institutional guarantees. In Argentina, one plausible scenario is that liberal/activist judges existed in the judicial system all along and only became able and willing to display their true preferences when the opportunity structure was altered, in this case by constitutional reform. Another plausible explanation is that judges and courts changed their dominant legal culture, ideology, and self-perception over time and became more liberal and human rights–friendly. The little evidence that we can gather from the empirical analysis of Argentina suggests that both explanations may have been true to some extent.

One factor that seems to matter for the presence or absence of trials in Argentina, Chile, and Uruguay is the composition of the Supreme Court. Here the ideological orientation of judges certainly plays a role. This was most notable in the Alfonsín and Menem courts in Argentina, but also in Chile after the Supreme Court reform. A constraining factor in all three countries is domestic legislation, notably the amnesty laws, which have hampered or precluded prosecution. This has been most detrimental in Uruguay, where the amnesty law was explicitly tied to executive action, and inaction on the part of the executive enforced the intent of the amnesty law. When the executive finally relaxed the application of the amnesty law, post-transitional trials started.

Another important finding across all three cases is that lower-level judges were the first to use innovative interpretations of the domestic

amnesty laws and the first to refer to international treaties in their rulings. This raises the issue of geographic jurisdiction: it mattered where the crimes were committed, under whose jurisdiction they fell, and in which courts the different cases started. As the empirical analysis demonstrated, the Santiago Court of Appeals and the Buenos Aires Federal Appeals Court have played a notable protagonist role. It also mattered which judges sat on which courts. Although the empirical analysis did not examine the personal motivations of individual judges, anecdotal evidence suggests that judicial role models may have been an important factor in the early phase of post-transitional justice. When certain judges issued bold judgments that received a flurry of media attention, their fellow judges took notice. Once the Supreme Courts followed—much later—by upholding these liberal rulings, they left lower court judges with less freedom to choose whether or not to hear cases of past human rights violations. New jurisprudential standards were set and institutionalized. Once that happened, there was no way back: progress in post-transitional justice would continue, though Argentina raises the issue of *slow* progress.

Is there enough empirical evidence to say that judicial independence is a necessary, though not sufficient, condition for trials to take place? The overall conclusion of this book is that for trials of the military to happen, there must be at least some judges in some courts who are willing to hear the cases brought before them *and* who are willing to work around legal obstacles through innovative interpretation and application of domestic and international law. The analysis has strongly suggested that this is more likely in situations where the judiciary enjoys formal judicial independence, since this potentially widens the scope for judicial action. However, judges must have freedom from undue pressure if they are to exercise their constitutional guarantees of judicial independence. Once these conditions are in place, the motivation and ideological conviction of the individual judge becomes important.

The inclination to pursue or not pursue human rights cases thus reflects an array of different factors at different levels: the judge's background (such as training and social class), her view on the role of law and courts in society, and her direct exposure and receptiveness to regional and international legal and jurisprudential developments in human rights cases, to mention but a few. At a broader contextual level, the judge's receptiveness to and sympathy with the surrounding, nonquantifiable norm shift that has slowly taken place in Latin America and the world may also carry weight. Indeed, as noted in resent research, "ideas about law are undergoing dramatic change in Latin America" (Huneeus, Couso, and Sieder 2010). These regional and international shifts, I conclude, have contributed to a favorable environment in which post-transitional justice has become possible.

## Some Final Reflections on Post-transitional Justice

It may be tempting to see the increased propensity of Latin American courts to prosecute perpetrators of gross human rights violations in the broader context of increased court activity in the human rights field generally over the past 10–15 years. Partly because of the strengthened position of Latin American courts after the wave of judicial reforms, Latin American judges have become more concerned with rights matters broadly speaking. Judges in Costa Rica and Colombia, among other countries, have turned into proponents of health rights, HIV/AIDS rights, and minority rights (Espinoza 2005; Wilson 2009; Wilson and Rodríguez Cordero 2006). This trend, referred to as the judicialization of politics, concerns matters that traditionally should belong to the sphere of politics but which, for complicated reasons, have been catapulted into the courts (Sieder, Schjolden, and Angell 2005, 7).[3] This has happened principally because citizens have become more active in presenting cases to the courts, though judges too have become activists in the way they rule in rights matters. A similar pattern may be discerned in post-transitional justice situations. Civil society has brought cases to court, where lawyers and prosecutors have pushed legal arguments rooted in international law, conventions, and jurisprudence, such as the right to truth, the right to identity, and disappearance as a continuing crime not eligible for amnesty. This is turn has contributed to a more activist judicial interpretation of amnesty laws.

Yet, I would argue, there is one important point that distinguishes the prosecutions in question from judicial activism in general: the state's guarantee to its citizens to abstain from torture, extrajudicial killings, and forced disappearance—and in extreme cases, genocide and ethnic cleansing—belongs to the sphere of the judiciary. In contrast to, for instance, health rights, which a well-functioning health system and health ministry could largely take care of, the practice of using state agents such as the military to kill, maim, and torture citizens gives rise to grave criminal offenses that the judiciary *should* respond to, since courts are the guarantors of the rule of law. Yet, historically speaking, human rights violations were long considered a political rather than a judicial matter, to be resolved by the executive rather than by the courts. Courts have, at best, been invited by the executive to handle specific matters identified by the executive a priori. Now that Latin American courts are showing an increased tendency to prosecute the military for past violations, this trend should not be interpreted as a judicialization of politics but rather as a concerted effort to return human rights violations to the place where they rightfully belong: the courts. One may thus speak of a *rejudicialization of judicial matters*. Holding citizens (including state officials, such as

the military) accountable for human rights violations should be the work of judges, not of politicians. As we have seen, at least some judges in some countries have become increasingly able and willing to take on this task.

Many Latin American scholars have expressed concern about the sorry state of the region's judiciaries. The effects of the judicial reforms carried out in the 1990s have, no doubt, been mixed (Calleros 2009; Domingo and Sieder 2001; Hammergren 2007; Ungar 2002). At the turn of the millennium, many scholars expressed misgivings about the prospects for democratic consolidation given the general failure of judicial reforms to make courts more independent, efficient, and accessible. A plausible worse-case scenario at the time, based on the reform experiences of a number of Latin American countries, envisioned "executives unchecked by counterbalancing institutions, societies unable to contain rising violence and crime, and a public increasingly willing to rely on mob justice rather than the courts—in short, a far less civil civil society" (Prillaman 2000, 9).

A decade later, there seems to be far more reason for optimism regarding the state of the courts as well as the state of democratic consolidation. Though some societies continue to experience high levels of violence—such as Brazil, Colombia, Guatemala, and Mexico—there are positive signs of democratic consolidation elsewhere. With the exception of Honduras, countries in the region have enjoyed decades of uninterrupted democratic rule, which is no mean feat in a Latin American historical perspective. While there is great variation from country to country, judiciaries in general have become more active agents of accountability and better protectors of human rights. Most notably, a shift of norms is apparent in many judiciaries. In a recent study by regional legal experts, Couso (2010, 158) notes that the "new constitutional orthodoxy, in which the human rights provisions of the Constitution—and even international human rights law—can be invoked to void legislation by judges empowered with the power of judicial review, represents a crucial cultural factor encouraging the judicialization of Latin American politics." The same could be said with respect to the *rejudicialization of judicial matters.*

In Argentina, Chile, and Uruguay the courts seem to have gradually carved out a role for themselves as protectors of the rule of law. Pushing ahead with prosecutions, individual judges have dared stand up against executive policy preferences and in some cases have even defied direct pressure. Accountability for past abuses has been placed firmly on the regional agenda, with Chile and Argentina the undisputed pioneers. The winds of justice, which Pablo Chargoñia lamented had not yet reached Uruguay in 2000, now have reached that country and are blowing north. Peru has successfully prosecuted and imprisoned its former president for gross human rights violations. Brazil has called for an official truth

commission more than four decades after atrocities were committed under military rule.

Courts in the countries formerly involved in Operación Cóndor repression are now aiding each other in bringing implicated military officials to court. In 2001 Argentina's Jorge Rafael Videla became the first former Latin American dictator to be indicted for Operación Cóndor crimes. The first trials reached the oral stage in 2010, implicating high-level officials from Argentina, Chile, Uruguay, and other countries involved in the network of repression. As the saying goes, "la justicia tarda, pero llega" (justice takes time, but it arrives eventually).

The constitutional reforms undertaken in the 1990s laid the groundwork for strengthening the courts in other Latin American countries. The extent to which these constitutional guarantees of judicial independence will translate into independent judicial action on human rights remains to be seen. My bet is that we may expect the winds of justice to blow further north, beyond Peru. The regional and international climate has never been more supportive of retributive justice than it is now. But ultimately, it is the responsibility of the individual judge to use these new opportunity structures and legal tools to hold the military accountable for past atrocities.

# Appendix 1

# Interviews

## Argentina

1. Mabel Gutiérrez, president, Familiares de Desaparecidos y Detenidos por Razones Politicos, Buenos Aires, August 1, 2000.
2. Roberto Saba, professor of law, Universidad de Palermo, Buenos Aires, August 3, 2000.
3. Christian Courtis, professor of law, Universidad de Buenos Aires, and clerk for Judge Maier of Buenos Aires Supreme Court, Buenos Aires, August 4, 2000.
4. Alberto P. Pedroncini, human rights lawyer, Buenos Aires, August 8, 2000.

## Chile

1. Eduardo Contreras, private human rights lawyer, Santiago, May 25, 2000.
2. José Zalaquett, private lawyer, member of Mesa de Diálogo, former member of the Rettig Commission, and professor of law, Santiago, June 7, 2000.
3. Víctor Espinoza, executive general, Corporación de Promoción y Defensa de los Derechos del Pueblo (CODEPU), Santiago, June 9, 2000.
4. Verónica Reyna, president, Fundación de Ayuda Social de las Iglesias Cristianas (FASIC), Santiago, June 15, 2000.

## Uruguay

1. Raúl Zibechi, journalist with *Brecha*, Montevideo, March 26, 2001.
2. Alberto Marchesi, historian, Centro de Estudios Interdisciplinarios Latinoamericanos (CEIL), Montevideo, March 27, 2001.
3. Oscar Destouet, history professor and informal adviser to Comisión para la Paz, Madres y Familiares de Uruguayos Detenidos Desaparecidos, Montevideo, March 28, 2001.
4. Felipe Michelini, member of Congress and professor of human rights, Universidad de la República, Montevideo, August 17, 2000, and March 29, 2001.

5. Gonzalo Fernández, legal adviser to Tabaré Vásquez (president of Frente Amplio) and member of Comisión para la Paz, Montevideo, March 30, 2001.
6. Eduardo Pirotto, Madres y Familiares de Uruguayos Detenidos Desaparecidos, coordinating work with Comisión para la Paz, Montevideo, April 2–3, 2001.
7. Javier Miranda, human rights lawyer, Madres y Familiares de Uruguayos Detenidos Desaparecidos, informal adviser to Comisión para la Paz, Montevideo, April 3 and 5, 2001.
8. Jacinta Balbela, former Supreme Court judge, Montevideo, April 6, 2001.
9. Luis Torello, former Supreme Court judge, Montevideo, April 9, 2001.
10. Pablo Chargoñia, Plenario Intersindical de Trabajadores-Convención Nacional de Trabajadores (PIT-CNT), Montevideo, April 9, 2001.
11. José Claudio Williman, coauthor of the Ley de Caducidad and member of Comisión para la Paz, Montevideo, April 10, 2001.
12. Gabriela Fried, then doctoral candidate in sociology at University of California, Los Angeles (assisted in Montevideo).

# Appendix 2

# Constitutional Reforms Affecting Judicial Independence

**Constitutional Reforms Affecting Judicial Independence**

| Country and date of constitution | Amendments affecting judicial independence | Variable 1: Changes in appointment procedures | Variable 2: Length of tenure for Supreme Court justices | Variable 3: Judicial councils | Variable 4: Constitutional courts and tribunals | Variable 5: Financial independence | Other | Overall rating of constitutional reform efforts (0–5 scale) |
|---|---|---|---|---|---|---|---|---|
| Argentina 1994 | 1996 | Senatorial approval by 2/3 vote of Supreme Court justices | Life in theory, but not in practice (no change) | Consejo de la Magistratura (Art. 114), operational February 1999 | Establishment of Jurado de Enjuciamiento | Salaries of Supreme Court and lower court judges determined by law (Art. 110, no change) | Public Ministry declared independent organ (Art. 120) | Major reforms: 4 |
| Bolivia 1967 | Law of Reform of the Political Constitution of the State, Law No. 1585, August 12, 1994 | Creation of independent council in charge of judicial appoint-ments. (FHS98) | Term of ten years cannot be extended, but justices may be reelected ten years after end of term (no change) | Council of Judicature (Art. 116, Art. 122) | Constitutional Tribunal, chosen by Congress (Art. 119) | Judiciary guaranteed 3% of state budget (Art. 116, VIII) (JCS99) | | Major reforms: 4 |
| Brazil 1988 | Constitutional amendments nos. 21 and 22, 1998 | Supreme Court justices must be approved by | Life tenure (no change) | | Limits jurisdiction of Supreme Federal | | Serious attempt at reforming bureaucracy | Minimal reforms: 1. Court has acted quite |

| Country | Amendments | Var. 1 cont. | Var. 2 cont. | Var. 3 cont. | Var. 4 cont. | Var. 5 cont. | Other | Rating |
|---|---|---|---|---|---|---|---|---|
| Brazil 1988 cont. | | Senate (no change) | | | Tribunal to decrease caseload (Amend. 22) | | through Amend. No. 19 of June 4, 1998, which strengthened efficiency of court system in general | independently in practice |
| Chile 1980 | Three constitutional amendments, 1997 (Act No. 19.519, Act No. 19.526, and Act No. 19.541). Supreme Court reform bill approved by Congress, 1999 | President appoints Supreme Court justices, but they now need confirmation by 2/3 vote of Senate. Number of justices increased from 17 to 21. (Both Law No. 19.541, Art. 75) | Life tenure (no change). President can no longer authorize transfer of justices; only Supreme Court can (Law. No. 19.541, Art. 77) | Consejo Nacional de la Justicia has been proposed, but no consensus to implement it yet. (MD96, 21) | Constitutional Court already existed under 1980 Constitution (Art. 81). Judicial review powers already quite broad (Chap. VII) | | Public Ministry declared autonomous organ (Art. 80) | Major reforms: 4 |

(Continued)

| Country and date of constitution | Amendments affecting judicial independence | Variable 1: Changes in appointment procedures | Variable 2: Length of tenure for Supreme Court justices | Variable 3: Judicial councils | Variable 4: Constitutional courts and tribunals | Variable 5: Financial independence | Other | Overall rating of constitutional reform efforts (0–5 scale) |
|---|---|---|---|---|---|---|---|---|
| Colombia July 1991 (1886 Constitution amended 1957, revised 1991) | Reforms, 1997 | Supreme Court justices appointed by "the appropriate body" from lists drawn up by the Superior Council of the Judicature | Judges of Constitutional Court, Supreme Court of Justice, and Council of State are elected for eight-year term, no reelection | Superior Council of the Judicature (Consejo Superior de la Judicatura) (Art. 254) | Constitutional Court (Art. 239) | | Radical reform of judiciary's organization under 1991 constitutional reform (FSG98) | Major reforms: 4 |
| Costa Rica November 8, 1949 | Several amendments, 1954, 1993 | Elected by the Legislative Assembly (amendment Law 1749, June 8, 1954) | Eight years. Justices are regarded as reelected for like periods unless Legislative Assembly decides | | Supreme Court has power to rule on the constitutionality of laws (no change) | Judiciary guaranteed 6% of state budget. (JCS99) | After a year in office judges cannot be removed (1993 amendment). (JCS99) | Minimal reforms: 1. Judiciary already classified as independent |

| Country | Amendments | Var. 1 cont. | Var. 2 cont. | Var. 3 cont. | Var. 4 cont. | Var. 5 cont. | Other | Rating |
|---|---|---|---|---|---|---|---|---|
| Costa Rica cont. | | | otherwise by 2/3 vote of entire membership | | | | | |
| Dominican Republic 1966 | Constitutional amendment, November 1995 | Elected by National Congress of Magistrature, previously by Senate (Art. 64). Number of Supreme Court justices increased from nine to eleven | No change. Not specified in constitution | National Judicial Council | | | Supreme Court justices may introduce legislation | Some reforms: 2 |
| Ecuador 1978 | Amendments, 1986, 1993, 1996, 1997 (reforms approved by referendum) | Power to appoint judges transferred from legislature to Supreme Court in 1997, with Congress having a final | Six years with possibility of reappoint-ment (Art. 202) | National Council of the Judicature (Art. 199) | | Judiciary guaranteed 2.5% of state budget. (JCS99) | | Substantial reforms: 3 |

(Continued)

| Country and date of constitution | Amendments affecting judicial independence | Variable 1: Changes in appointment procedures | Variable 2: Length of tenure for Supreme Court justices | Variable 3: Judicial councils | Variable 4: Constitutional courts and tribunals | Variable 5: Financial independence | Other | Overall rating of constitutional reform efforts (0–5 scale) |
|---|---|---|---|---|---|---|---|---|
| Ecuador 1978 cont. | | chance to choose that 31-member body based upon recommendations by a special selection commission. (FHS98) | | | | | | |
| El Salvador December 15, 1983 | Decree No. 860, April 29, 1994. Additional amendments adopted in 1996 | Supreme Court elected by the Legislative Assembly (Art. 186). May be removed by same, 2/3 vote of selected deputies | Nine years; can be reelected and 1/3 of the justices are replaced every three years (Art. 186) | National Council of the Judicature, listed as an independent institution (Art. 187) | Constitutional Division (Art. 174) | Judicial organ allocated 6% of current income of state budget (Art. 172) | Independence of Supreme Court stated (Art. 172) | Substantial reforms: 3 |

| Country | Amendments | Var. 1 cont. | Var. 2 cont. | Var. 3 cont. | Var. 4 cont. | Var. 5 cont. | Other | Rating |
|---|---|---|---|---|---|---|---|---|
| El Salvador December 15, 1983 cont. | | needed. Legislature names more politically representative 15-member Supreme Court, which controls the entire Salvadoran judiciary (reform 1996). (FHS98) | | | | | | |
| Guatemala May 31, 1985 | Reforms of Legislative Accord No. 18–93, November 17, 1993 (Arts. 213–15, 217, 222). Approved by referendum October 1993; became law January 30, 1994. (BM98) | Number of magistrates of Supreme Court increased from nine to thirteen (Art. 213) and selected by Congress. Limitations imposed on the | Term of Supreme Court magistrates reduced from six to five years (Art. 215). Supreme Court magistrates elected by Congress of | Postulation Commission (Art. 215) | Constitutional Court headed by Supreme Court president. Increased review powers of Supreme Court. (BM98) | Judiciary allocated no less than 2% of the Budget of Ordinary Revenues of states (Art. 213) | Increased transparency (Art. 213). Functional independence of Supreme Court guaranteed (Art. 205, no change) | Substantial reforms: 3 |

(Continued)

| Country and date of constitution | Amendments affecting judicial independence | Variable 1: Changes in appointment procedures | Variable 2: Length of tenure for Supreme Court justices | Variable 3: Judicial councils | Variable 4: Constitutional courts and tribunals | Variable 5: Financial independence | Other | Overall rating of constitutional reform efforts (0–5 scale) |
|---|---|---|---|---|---|---|---|---|
| Guatemala May 31, 1985 cont. | | appointive powers of both president and Congress. (BM98) | the Republic from list of 26 candidates proposed by a postulation commission. Must have 2/3 senatorial approval | | | | | |
| Honduras January 1982 | No amendments regarding judicial power | Nine principal Supreme Court magistrates and seven alternates (Art. 303) | Elected by National Congress for four years; may be reelected (Arts. 304 and 305) | | | Judicial power guaranteed annual appropriation of not less than 3% of Budget of Net Income of the Republic (Art. 306) | Independence guaranteed (Art. 309) | No reforms: 0. But formal independence already substantial |

| Country | Amendments | Var. 1 cont. | Var. 2 cont. | Var. 3 cont. | Var. 4 cont. | Var. 5 cont. | Other | Rating |
|---|---|---|---|---|---|---|---|---|
| Mexico 1917 | Since 1988, 20 amendments, including major overhaul of judicial system December 31, 1994. Some articles already amended in 1992 and 1993 | Eleven Supreme Court ministers appointed by president with approval by Senate, 2/3 vote required (Art. 96). Can be removed from office by president with Senate's approval | Supreme Court justices named for 15 years and cannot be renamed (Art. 94). President of Supreme Court elected for four years and can be reelected (Art. 97) | Council of the Federal Judicature (Art. 100) | Electoral Tribunal is highest jurisdictional authority (Art. 99). Supreme Court rules on constitutionality of matters and has some review powers (Art. 105) | Salaries of Supreme Court ministers and others guaranteed (Art. 94) | Transparency guaranteed (Art. 94) | Major reforms: 4 |
| Nicaragua November 19, 1986 | Law No. 192, July 4, 1995, major reform affecting 65 of the 202 articles of the Constitution. Articles 159, 161–64 affecting judiciary | Supreme Court consists of 12 magistrates elected by National Assembly (Art. 163). Supreme Court elects its own | Supreme Court justices elected for seven years and appellate judges for five years | | | Judiciary guaranteed 4% of General Budget of the Republic (Art. 159) | Supreme Court justices guaranteed immunity (Art. 162) and independence (Art. 165, no change) | Some reforms: 2 |

(Continued)

| Country and date of constitution | Amendments affecting judicial independence | Variable 1: Changes in appointment procedures | Variable 2: Length of tenure for Supreme Court justices | Variable 3: Judicial councils | Variable 4: Constitutional courts and tribunals | Variable 5: Financial independence | Other | Overall rating of constitutional reform efforts (0–5 scale) |
|---|---|---|---|---|---|---|---|---|
| Nicaragua November 19, 1986 cont. | | president by majority vote for one-year term with possibility of reelection (Art. 163) | | | | | | |
| Panama October 11, 1972 | Constitutional Act of April 24, 1983, Legislative Act No. 1 of 1993, and Legislative Act No. 2 of 1994. Did not affect judiciary | Supreme Court justices appointed with agreement of the Cabinet Council, subject to approval by the legislative branch. Every two years, two justices shall be appointed (Art. 200, no change) | Appointed for 10-year term with no renewal (Art. 200, no change) | | | Judiciary guaranteed 2% of state budget (unclear when). (JCS99) | Judicial system was supposedly revamped in 1990. (FHS98) Not reflected in constitution | No reforms: 0, possibly 1 |

| Country | Amendments | Var. 1 cont. | Var. 2 cont. | Var. 3 cont. | Var. 4 cont. | Var. 5 cont. | Other | Rating |
|---|---|---|---|---|---|---|---|---|
| Paraguay June 20, 1992 (old Constitution 1967) | Reforms part of new constitution | Supreme Court justices nominated by Council of Magistrates and appointed by Senate with concurrence of the executive branch (Art. 264) | Nine Supreme Court members appointed for five-year terms. When confirmed for a second term, may continue until retirement age. Irremovable except through impeachment (Art. 252) | Council of Magistrates (Art. 262) | Supreme Court seems to have been given broad review powers (Art. 258). Also a separate Constitutional Chamber exists (Art. 260) | Judiciary guaranteed no less than 3% of state budget. (JCS99) | | Substantial reforms: 3 |
| Peru 1993, Fujimori (old Constitution 1979) | Major reforms of judiciary incorporated into 1993 Constitution | Supreme Court justices appointed by independent elected National Council of the Magistracy (Art. 150) | Life tenure (Art. 146, 3). But declared removable after *Fujimorazo*, April 1992. (JCS99) | National Council of the Magistracy (Arts. 150, 154) | Powers of judicial review given to Tribunal of Constitutional Guarantees in August 1996, but six of seven members of | | Supreme Court justices are guaranteed independence (Arts. 139, para. 2, and 146, para. 1). Judiciary seems to have | Major reforms: 4 |

(Continued)

| Country and date of constitution | Amendments affecting judicial independence | Variable 1: Changes in appointment procedures | Variable 2: Length of tenure for Supreme Court justices | Variable 3: Judicial councils | Variable 4: Constitutional courts and tribunals | Variable 5: Financial independence | Other | Overall rating of constitutional reform efforts (0–5 scale) |
|---|---|---|---|---|---|---|---|---|
| Peru 1993 cont. | | | | | Tribunal needed to declare a law or government action unconstitutional. (FHS98) | | been given broad powers (Art. 138). Judiciary also guaranteed remuneration (Art. 146, para. 4) | |
| Uruguay November 27, 1966 | Amended by plebiscites of November 26, 1989, November 27, 1994, and December 8, 1996. None seems to have affected judiciary | Supreme Court has five members (Art. 234), appointed by General Assembly by 2/3 vote of the full membership (Art. 236, no change) | Ten-year term, may serve another term after lapse of five years (Art. 237, no change). Forced retirement at age 70 (Art. 250, no change) | | Consejo was abandoned at transition, but Supreme Court has constitutional review powers (Art. 257) | | | No reforms: 0 |

| Country | Amendments | Var. 1 cont. | Var. 2 cont. | Var. 3 cont. | Var. 4 cont. | Var. 5 cont. | Other | Rating |
|---|---|---|---|---|---|---|---|---|
| Venezuela 1961 | No amendments | Supreme Court justices elected by the Chambers in joint session (Art. 214, no change) | Nine years, but 1/3 of the justices are replaced every three years (Art. 214, no change) | Consejo de la Judicatura (Art. 217, no change) | Supreme Court has quite broad powers (Art. 215, no change) | | Supreme Court justices guaranteed autonomy and independence (Art. 205) | No reforms: 0. But formal guarantees already substantial |

*Sources*: An English translation of the most recent constitution for each country was used to determine constitutional changes along variables 1–5. Supplemented by information from the Freedom House survey of political rights for 1998 (FHS98) and numerous secondary sources for individual countries to assess overall evaluation/extent of reform, including Dakolias 1996 (MD96); Correa Sutil 1999 (JCS99); Sáez García 1998 (FSG98); Bickford 1998 (LNB98); Banks and Muller 1998 (BM98).

*Note*: I examine the constitutions for each country and record changes in the articles that have affected judicial independence along any of the five dimensions listed in the table. I use this information, in combination with secondary sources, to rank the countries on a scale from 0 to 5.

# Notes

## Chapter 1: Retributive Justice

1. On the Pinochet case, see Roht-Arriaza (2009a). On the Fujimori case, see Gamarra (2009).
2. For details, see Roht-Arriaza (2009b). The heads of state undergoing criminal investigations for alleged human rights abuses were General Augusto Pinochet of Chile, Luis Echeverría of Mexico, Jorge Videla and María Isabel Martínez de Perón of Argentina, Alberto Fujimori of Peru, Efraín Ríos Montt and Óscar Humberto Mejía Victores of Guatemala, Gonzalo Sánchez de Lozada of Bolivia, and Juan Bordaberry of Uruguay, in addition to the earlier proceedings against General Luis García Meza of Bolivia and Alfredo Stroessner of Paraguay.
3. I first used the term "post-transitional justice" in 2002. Since then it has come into wider use among scholars working on transitional justice and is often used in a broad sense to include various types of transitional justice mechanisms, not only trials. See, for example, Aguilar (2008) and Collins (2010b).
4. The assassination of Chilean foreign minister Orlando Letelier and his assistant Ronni Moffitt in Washington, D.C., in 1976 was the only pre-1978 crime to be exempted from protection under the Chilean Amnesty Law of 1978. There was also a trial under way in Bolivia against former dictator General Luis García Meza. Tried in absentia, García Meza was found guilty of genocide by the Bolivian Supreme Court in April 1993 and sentenced to 30 years in prison. In 1995 he was extradited to Bolivia from Brazil (see Roht-Arriaza 2009b, 51–52). Initiatives were also taken to hold lower-ranking military accountable after the last Bolivian dictatorship ended in 1982. García Meza was convicted of serious human rights violations together with 52 of 55 accused collaborators (USIP 2009).
5. I borrow Kathryn Sikkink's (2005) concept of "opportunity structure," which she employs to analyze the widening space for human rights activism in Latin America. The concept, originating in social movements theory, may be useful for analyzing other actors too, including courts.
6. These, along with some other serious international crimes, constitute breaches of the Convention on the Prevention and Punishment of

the Crime of Genocide (1948), the International Covenant on Civil and Political Rights (1966, entered into force in 1976), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

7. The doctrine called for actions to eliminate enemies of the state, defined broadly as communists, Marxists, socialists, or any other group that might pose a threat to capitalist interests (Fagen 1992). The United States had a central role in developing and promoting this doctrine.
8. Peru and Ecuador were peripheral members of Operación Cóndor who joined later than the six core countries. For a definition of forced disappearance and a discussion of the international instruments designed to deal with this tool of repression, see Brody and González (1997). In Latin America, the term *detenidos desaparecidos*—"the detained-disappeared"—is widely used to denote victims of forced disappearance. In English, they are generally known simply as "the disappeared," and I follow that usage in this book.
9. For a discussion of the situations in Guatemala and El Salvador, see Booth, Wade, and Walker (2006), Hayner (2001), and Popkin (2000).
10. The truth commission report released in 1984, *Nunca Más,* documented 8,960 murdered or disappeared persons (CONADEP 1991). The government has recognized about 12,000 disappeared. Some human rights organizations, such as the Mothers of the Plaza de Mayo, claim that the true number is closer to 30,000. For a detailed analysis of the abuses in Argentina, see Sikkink (1993).
11. The term "transitional justice" was coined by Teitel in 1991 (Teitel 2008, 1), but the roots of the concept go back further. Another early proponent of the term is Kritz (1995). Transitional justice commonly refers to formal or informal mechanisms that governments use to address violations by past regimes falling into the categories of gross human rights violations, war crimes, or crimes against humanity. These transitional justice mechanisms include trials, truth commissions, reparations programs, the lustration processes, vetting, memorials, education programs, local justice mechanisms, and so on. For comprehensive analytical discussions of institutional solutions to human rights violations, see Gloppen (2002) and Walsh (1996).
12. Truth commissions have four main characteristics: (a) they focus on the past; (b) they investigate a pattern of abuse over a set period of time rather than a specific event; (c) they are temporary bodies, usually operating over a period of six months to two years, although there have been significant outliers; and (d) they are officially sanctioned, authorized, or empowered by the state (Hayner 2001, 14).
13. On truth commissions in Latin America and the rest of the world, see Barahona de Brito (1997) and Hayner (1994, 2001).

14. Rule of law is a widely contested concept. Thome (1998, 3) provides a useful minimal definition, and Domingo (1999, 153–54) a more extensive one. On the various meanings of the rule of law in the Latin American context, see Carothers (2001), Correa Sutil (1999), Domingo and Sieder (2001), O'Donnell (1999b), Salas (2001), Schor (2000), and Ungar (2002).
15. See, for instance, Rotberg and Thompson (2000).
16. See, for instance, Roht-Arriaza and Mariezcurrena (2006). Note that my three phases refer to different periods of judicial behavior in human rights matters (more specifically, retributive justice), not to the three main phases of transitional justice discussed by Teitel (2003).
17. These are customary legal mechanisms for protecting human rights. Via a writ of *habeas corpus* or *amparo*, "courts could enjoin certain government actions (often, but not always, privation of liberty or freedom of movement) on the basis of their violation of constitutionally guaranteed rights. Under diffuse systems of constitutional control, where any judge can accept an *amparo* or refuse to apply a law he or she finds unconstitutional, such decisions are always subject to appeal to the higher courts" (Hammergren 2007, 173).
18. See, for example, Barahona de Brito (1992), Bickford (2000), Roniger (1997), Roniger and Sznajder (1999), and Sikkink (2005).
19. Though not focusing on human rights cases, Helmke's (2005) work on Argentina offers a novel interpretation of when judges manage to secure an accountability function.
20. My working concept of judicial independence will be useful for cross-comparative purposes beyond the Latin American cases chosen for my analysis. Since systematic analysis of judicial independence in regions outside the United States and Europe is scarce, this will be a contribution to the theoretical debate on the meaning and importance of judicial independence. Moreover, by examining how a strong military presence may affect judicial independence, I hope to address an aspect of institutional limitations on judicial behavior that is not discussed in the U.S. or European literature on the judiciary (because the military in these parts of the world does not have an explicit impact on judicial independence).
21. Kapiszewski and Taylor (2008) find in their review of 90 studies of judicial politics in Latin America in 1983–2004 that the only work to draw the connection between judicial reform and the judiciary's response to legal claims for redress of gross human rights violations was my own (Skaar 2002). Other scholars have tried to measure the impact of judicial independence on other policy areas, such as the impact of judicial reform on corruption (Ríos-Figueroa 2006).
22. This challenges the more pessimistic verdicts in the judicial reform literature as articulated by, for instance, Buscaglia, Dakolias, and Ratliff

(1995), Calleros (2009), Dakolias (1995), Domingo and Sieder (2001), Frühling (1998), Hammergren (2002), Jarquín and Carrillo (1998), Popkin (2000), Prillaman (2000), and Ungar (2002).

23. See, for example, Huntington (1991) and Kritz (1995).
24. For instance, on the subject of the "justice cascade," Lutz and Sikkink emphasize "the willingness of *governments* to ensure its continuation, such as taking steps to prosecute past perpetrators when there was no immediate likelihood of their trial in a foreign court" (2001, 30, italics mine).
25. On the role of courts during the military dictatorship in Chile, see Hilbink (2007).
26. On judicial reform in the region, see Dakolias (1995, 1996), Domingo (1999), and Domingo and Sieder (2001).
27. By 2001, according to Langer (2001, 5) at least ten countries had undertaken such reforms, including Colombia (1991), Argentina (1992), Guatemala (1994), Costa Rica (1998), El Salvador (1998), Paraguay (1999), Venezuela (1999), Chile (region by region since 2000), Bolivia (2001), and Ecuador (2001). Honduras apparently implemented its criminal justice reform in 2002.
28. For a list of the countries that have increased the power and independence of their Supreme Courts through constitutional reform, see appendix 2.
29. Kapiszewski and Taylor (2008) provide a survey of this literature.
30. For an overview of earlier attempts at judicial reform in the Latin American context and why these efforts presumably failed, see Frühling (1998) and Hammergren (2007).
31. Hilbink (2007) makes a similar argument for Chile.
32. On the characteristics of the military regimes in the Southern Cone and the fear they tried to install in their populations, see Garretón (1992).
33. Chile and Argentina have also undertaken major reforms of their criminal justice systems and procedural codes (see Hammergren 2007).

## CHAPTER 2: EXPLAINING POST-TRANSITIONAL JUSTICE

1. Much of the scholarly literature on Supreme Court justices, principally in the United States, has been concerned with these types of characteristics. A prime example is Segal and Spaeth (2002).
2. For two classics in the rational choice field dealing with political actors in general, see Geddes (1994) and Tsebelis (1990).
3. For a holistic approach to judicial behavior, focusing on the demand as well as the supply chain in the judicial system, see Gargarella, Domingo, and Roux (2006), Gloppen, Gargarella, and Skaar (2004), and Gloppen et al. (2010b).

4. An important study by Brinks (2008) analyzes the continuing occurrence of police violence in post-authoritarian Argentina, Brazil, and Uruguay.
5. Ríos-Figueroa (2006) provides a thorough discussion of the concept of judicial independence. For an overview of 14 different categories of judicial independence, each containing multiple measures, that have been used in recent quantitative analyses, see Ríos-Figueroa and Staton (2009). Another distinction in recent debates is between "preference" independence and "decisional" independence (Brinks 2005).
6. Buscaglia, Dakolias, and Ratliff (1995, 7) call this "structural independence," and Fiss (1993) calls it "political insularity."
7. On independence from the other branches of government, see, for example, Becker (1999), Buscaglia, Dakolias, and Ratliff (1995, 172–76), Domingo (1999, 153–55), Fiss (1993, 55–56), Larkins (1996), and Rosenn (1987).
8. Another important factor that might usefully have been included in the analysis is the autonomy and jurisdiction of military tribunals. Keith (2002) found this to be a statistically significant measure in explaining the improvement in respect for human rights.
9. These five indicators were dominant in the judicial reform literature dealing with the concept of judicial independence during the period that will be analyzed in later sections of this chapter. They overlap with, but do not completely coincide with, the U.N. Human Rights Committee's (UNHRC) interpretation of Article 14 of the International Covenant on Civil and Political Rights, which carries great weight in international human rights work. In its comments on Article 14, which refers to a mix of de jure and de facto measures, the UNHRC notes that "the requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the *actual* independence of the judiciary from political interference by the executive branch and legislature" (UNHRC 2007, paragraph 19, italics mine). The five indicators partly overlap with and partly differ from several other attempts to capture de jure independence (Ríos-Figueroa 2006) and several of the datasets described and analyzed by Ríos-Figueroa and Staton (2009).
10. However, many legal scholars have recently argued that a maximum age for retirement may be more favorable, given that older judges enjoying life terms sometimes become incapable of administering justice because of the mental and physical limitations of old age.
11. See, for example, Dakolias (1996), Domingo (1999), Hammergren (1998), and Vaughn (1992). Some of the main problems confronting

Latin American judiciaries include political obstacles in the form of strong executives, institutional instability, and corruption, which inhibit impartial adjudication; institutional and organizational obstacles, closely connected to appointment mechanism, tenure, and budgetary provisions for the judiciary; and judicial review powers and practices, which affect the political role of the judiciary.

12. This has happened, for example, in Colombia (see Hammergren 1998).
13. Central early works on transitional justice include those by Kritz (1995), Malamud-Goti (1990), McAdams (2001), Panizza (1995), Pion-Berlin (1994), Roht-Arriaza (1995), Teitel (2000), and Walsh (1996).
14. There is an extensive literature on democratic transition and consolidation, known as the modes-of-transition literature. On Latin America, see Diamond and Plattner (1993), Garretón (1989), Huntington (1991), Karl and Schmitter (1991), and Mainwaring, O'Donnell, and Valenzuela (1992). For an account of the military's role, see Stepan (1989).
15. In my own previous study of 30 countries undergoing transition and dealing with the legacies of gross human rights violations, I concluded that the government, at best, would set up a truth commission, but more often than not it would do nothing at all. Underperformance in human rights matters was the norm rather than the exception during the early transition period (Skaar 1999).
16. Interestingly, Hunter (1998, 314) admits that the narrow focus on only two actors—civilian government and military leadership—means that her own analysis of Chile and Argentina falls short of fully explaining the human rights dynamics in these two cases.
17. Many scholars have focused on judicial reform and its driving forces, including Biebesheimer (2001), Buscaglia, Dakolias, and Ratliff (1995), Correa Sutil (1999), Dakolias (1995), Domingo and Sieder (2001), Finkel (1999, 2004), Hammergren (1998), Jarquín and Carillo (1998), Sarles (2001), Skaar (2002), and Vaughn (1992).
18. On democratic consolidation, see Becker (1999), Boeninger (1997), Bratton and van de Walle (1997), Diamond (1999), Diamond et al. (1997), Frankel (1993), Linz and Stepan (1996), Mainwaring, O'Donnell, and Valenzuela (1992), Panizza (1995), Schor (2000), Stotzky (1993), and J. S. Valenzuela (1992). On the accountability function of courts, see Gloppen et al. (2010b), Gloppen, Gargarella, and Skaar (2004), Mainwaring and Welna (2003), O'Donnell (1999a, 1999b), Plattner (1999), and Schedler, Diamond, and Plattner (1999).
19. See Schedler, Diamond, and Plattner (1999), Gloppen, Gargarella, and Skaar (2004), and Gloppen et al. (2010b).
20. See Biebesheimer (2001), Brinks (2008), Correa Sutil (1999), Domingo and Sieder (2001), Méndez, O'Donnell, and Pinheiro

(1999), Prillaman (2000), Ríos-Figueroa and Staton (2009), and Walker (2007). In spite of this general consensus, a recent article poses the question as to whether judicial independence indeed is a prerequisite for the rule of law (Helmke and Rosenbluth 2009).

21. See, for example, Buscaglia, Dakolias, and Ratliff (1995), Calleros (2009), Dakolias (1995), Domingo and Sieder (2001), Frühling (1998), Hammergren (2002), Jarquín and Carillo (1998), Popkin (2000), Prillaman (2000), and Ungar (2002). Rios-Figueroa's (2006) comparative analysis of the impact of judicial independence on corruption in a selection of Latin American countries is a notable exception.
22. Keith notes that she has found "only one empirical study that systematically examines the impact of constitutional provisions for judicial independence on human rights behavior across numerous countries." Using a constructed index of nine attributes of judicial independence, a 1996 study by Blasi and Cingranelli found, in Keith's words, that "constitutional provisions for these attributes were associated with both actual judicial independence and, in turn, protection against political torture, imprisonment, and disappearances" (Keith 2002, 196).
23. Judges in countries like Costa Rica and Colombia have turned into proponents of health rights, HIV/AIDS rights, and minority rights (Espinoza 2005; Wilson 2009; Wilson and Rodríguez Cordero 2006). The judicialization of politics is a worldwide rather than specifically Latin American trend; see Landfried (1994), Moustafa (2003), Sunkin (1994), and Vallinder (1994). For an early comparative analysis of how the scope of individual rights has expanded across the globe, see Epp (1998).
24. I thank Jeff Staton for pointing this out to me (personal communication, September 4, 2009).
25. For a classical discussion of the veto players argument, see Tsebelis (1990).
26. Brinks (2005) distinguishes between "preference" independence and "decisional" independence, which reflects thinking along roughly the same lines.
27. I thank Terje Einarsen, judge, Gulating Appellate Court, Bergen, Norway, for pointing out these main distinctions or dichotomies to me (personal communication, January 3, 2010).
28. A statute of limitations in common law systems defines the maximum time after an event that legal proceedings based on that event may be initiated. In civil law systems, such provisions are often known collectively as "periods of prescription." This means that in civil law countries the public prosecutor in criminal cases must prosecute within a given time limit. The time limit varies from country to country and increases with the seriousness of the alleged crime. In most jurisdictions, murder, the most serious crime, has an indefinite

statute of limitations. According to customary law, genocide, crimes against humanity, and war crimes are usually not subject to statute of limitations, nor to prescription.

29. Some may object to the fact that the prosecutor is left out the equation. Prosecutors can certainly play an important, even crucial, part in criminal cases in some countries. However, since the countries examined in this book belong to the civil law tradition, investigating judges have traditionally had the major role in gathering evidence in a case and deciding whether or not the case should be heard on the merits of evidence. Prosecutors, where they exist, have played a marginal role, even after the enactment of judicial reform. There have been important changes to the inquisitorial system since criminal procedures have been reformed in many countries to adhere more closely to the common law model, where the prosecutor is independent of the judiciary (Hammergren 2007, 26–41). There are currently many different models and divisions of labor in different Latin American countries. This will be discussed on a country-by-country basis in the empirical chapters.
30. This raises the important issue of standing, that is, the question of who can initiate court cases (individuals, collectives, the police, prosecutors, etc.). This will be dealt with in more detail in later chapters.
31. This is in line with the writings of Epp (1998).
32. Here the number of trials is used as a proxy for court assertiveness in the prosecution of human rights crimes. A possible objection is that this measure does not distinguish between the courts in Country A, which prosecute hundreds of low-level military personnel but fail to go after the top generals, and those in Country B, which go for the top generals only and let the rest off the hook. Whether courts that punish the "small fry" are more or less assertive with respect to human rights than courts that go for the "big fish" is an open call. I thank Bruce Wilson for pointing this out to me (personal communication, January 28, 2010).
33. Indeed, except for the coup in Honduras in 2009, the region has been free of coup attempts throughout the first decade of the new millennium.
34. Popkin (2000) provides an analysis of the judicial reform process in El Salvador.
35. Peru in the last few years has made spectacular legal progress in terms of holding former state officials to account. Former president Fujimori's trial, which produced a conviction in April 2009, is but one of several court cases dealing with violations from past regimes. Recent legal developments in Peru have been discussed in detail by other authors (Collins 2010b; Lutz and Reiger 2009) and will not be addressed here. It is my hunch that some of the judicial reforms carried out in the 1990s may finally be having an impact in

Peru, along with important changes in the regional and international contexts.

36. For a comparative analysis of amnesties in the region, see Mallinder (2008).

## Chapter 3: Argentina

1. The dictatorship continued under four different generals: Jorge Videla, Roberto Eduardo Viola, Leopoldo Galtieri, and Reynaldo Bignone. For a comprehensive account of human rights violations during the Dirty War, see Guest (1990) and Rozitchner (1985). For an analysis of the military, see Acuña and Smulovitz (2001).
2. On the role of the Argentine judiciary during military rule, see Helmke (2005, 68–75) and Osiel (1995).
3. All other judges had to swear an oath of loyalty to the military government but were allowed to keep their posts (Helmke 2005, 66). Over 70 percent of all federal judges kept their posts under the military government (Smulovitz 1995).
4. These policies have been extensively covered by other authors, such as Acuña and Smulovitz (2001), Nino (1996), Pion-Berlin (1994), and Roniger and Sznajder (1999).
5. Several scholars have grappled with this political-ethical dilemma. See, for example, Acuña and Smulovitz (2001), Malamud-Goti (1991), Nino (1991), J. S. Valenzuela (1992), and Zalaquett (1991, 1992).
6. See Alfonsín's address to the Radical Party on July 31, 1983, in *Keesing's Record of World Events* (1983, 32554). On Alfonsín's electoral promises and his struggles to design a human rights policy that would both fulfill his promises and keep the military at bay, see Nino (1996).
7. On the military's failed economic policy and its defeat in the Malvinas-Falklands War, see Vacs (1987). On additional measures taken by Alfonsín but not discussed here, such as modifying the military code and proposing various legal reforms, see Helmke (2005, 75–83) and Nino (1996, 69).
8. Ley No. 22.924, issued by the outgoing military government on September 22, 1983, provided amnesty for abuses committed in the battle against "domestic terrorism." It was counteracted by Ley No. 23.040 of December 27, 1983, rendering the self-amnesty law "null and void."
9. Alfonsín's five-member court was composed of Augusto César Belluscio and José Severo Caballero (both Radicales, but not Alfonsinistas); Genaro Rubén Carrió (Independent); Carlos Santiago Fayt (Socialist); and Enrique Santiago Petracchi (Peronist) (Larkins 1998, 439). Also see Helmke (2005) for details on the composition of the court.

10. Before the judicial reforms of the late 1990s, federal judges at all levels were named by the president with the advice and consent of a simple majority in the Senate (Brinks 2008, 132).
11. Judge Adolfo Luis Bagnasco, Buenos Aires Federal Appeals Court, interview, Buenos Aires, August 9, 2000.
12. CONADEP was created by Decreto Ley 187/83 on December 15, 1983. Headed by writer Ernesto Sábato, the 13-member fact-finding committee and 60 assistants worked for nine months to collect testimonies and information about human rights violations. On the commission's establishment, work, and findings, and reactions to the final report, see Barahona de Brito (1992, 1997) and Roniger and Sznajder (1999).
13. The Argentine Forensic Anthropology Team under the leadership of Clyde Snow was formed later. This team was very successful in identifying a large number of killed and disappeared people.
14. For the long-term impact of the CONADEP findings on constructing public truth and providing legal evidence for prosecutions, see Crenzel (2008).
15. Decreto No. 158/83 of December 13, 1983, ADLA.
16. Garro (1993, 13–15, especially n. 32) provides legal details of military justice and jurisdiction. Nino (1996) examines the legal and political-strategic reasoning behind Alfonsín's policy of retributive justice and considers why the military courts failed to complete their mission.
17. A full account of the Argentine trials, *Texto completo de la sentencia,* was published by the Cámara Nacional de Apelaciones en lo Criminal y Correccional de la Capital Federal (1987). During the trial, the proceedings were recorded verbatim in *El diario del juicio* (Cámara Nacional de Apelaciones en lo Criminal y Correccional de la Capital Federal 1985). See also Amnesty International (1987).
18. Videla and Massera received life sentences. Viola was sentenced to 17 years of prison and Galtieri to 12 years. Agosti received four and a half years, and Lambruschini eight. Graffigna, Anaya, and Lami were acquitted (Nino 1996, 89).
19. *Latin American Weekly Report,* January 8, 1987, 8.
20. Ley No. 23.492, December 23, 1986, ADLA, 192 (available at http://www.nuncamas.org/document/nacional/ley23492.htm). For a legal discussion of the two amnesty laws, see Maier (1987a, 1987b).
21. Ley No. 23.521, June 4, 1987, ADLA, 1548 (available at http://www.derechos.org/ddhh/arg/ley/ley23521.txt).
22. Supreme Court of Argentina, June 22, 1987, "Causa No. 547 incoada en virtud del Decreto No. 280/84 del Poder Ejecutivo Nacional, 1987-D Revista La Ley 194–266." For the rationale of the majority opinion upholding the constitutionality of the due obedience law, see Garro (1993, 17, n. 43).

23. *Clarín,* June 25, 1987; *Página/12,* June 25, 1987. Few people expressed hope of solving the legacy of human rights violations (Catterberg 1991).
24. On Alfonsín's last desperate attempt to stabilize the Argentine economy, see Snow and Manzetti (1993).
25. His historical legacy has recognized these achievements. When Alfonsín died in 2009, thousands of people attended his funeral to pay tribute to the president "of democracy and human rights." Mariana Llanos, German Institute of Global and Area Studies (GIGA) (personal communication, February 26, 2010).
26. Taking over during an economic crisis, Menem ruled the country by presidential decree in order to sidestep Congress and enact his program of privatization. This halted hyperinflation and restored economic stability and growth, but it had negative side effects: increased governmental corruption, a badly discredited judicial system, and increasing skepticism about the administration's commitment to the rule of law (Vacs 1987).
27. The Alfonsín government had already started to bargain with the Peronist opposition to increase the number of Supreme Court justices from five to seven, which would have increased Alfonsín's control over the Court, but the reforms did not go through.
28. According to Acuña and Smulovitz (2001), Menem was only fulfilling the promise of pardons that Alfonsín had promised the military before the trials started.
29. The Court supported Menem in other policy areas too, principally with respect to economic policy and state reform. The Court also adopted the *per saltum* doctrine, which gave the Supreme Court the power to seize cases directly from a lower first instance court, thereby skipping the regular appellate court procedure (Helmke 2005, 22–23). This allowed the high court to hear political cases that had not been accepted before. For a comparison of the Alfonsín and Menem courts, see Miller (2000).
30. Ley No. 23.492 (Punto Final), article 5: "La presente ley no extingue las acciones penales en los casos de delitos de sustitución de estado civil y de sustracción y ocultación de menores." Ley No. 23.521 (Obediencia Debida), article 2: "La presunción establecida en el artículo anterior no será aplicable respecto de los delitos de violación, sustracción y ocultación de menores o sustitución de su estado civil y apropriación extorsiva de inmuebles."
31. Judge Adolfo Luis Bagnasco, interview, August 9, 2000.
32. Of 68 cases in which children had been located, investigators had managed to confirm family ties in about ten cases. Because it is hard to establish the origin of a kidnapped child, it has also been difficult to prosecute people for the crime. Judge Adolfo Luis Bagnasco, interview, August 9, 2000.

33. Quoted in Roniger and Sznajder (1999, 114–15). The ESMA was a detention center located at the Navy Mechanics School in Buenos Aires.
34. *Southern Cone Report,* RS-95–03, April 20, 1995, 3; CELS (1995, 123–45); Verbitsky (1995).
35. *Southern Cone Report,* RS-95-04, June 1, 1995, 6.
36. *Southern Cone Report,* RS-98-01, February 3, 1998, 2–3.
37. The importance of Scilingo's confession was repeatedly brought to my attention in interviews carried out in Argentina in July-August 2000 and was later confirmed by a number of scholars.
38. Fernando de la Rúa, candidate of the multiparty Alianza opposition, became president in December 1999. Before winning the October 1999 presidential elections, he served as the first elected mayor of Buenos Aires.
39. On the organization of the Argentine justice system, see Garrido (1994).
40. The Argentine judicial system is quite complex. And as in any judicial system, there are likely to be disputes over which court a particular case belongs in and which appellate procedures should be followed. The account of the Argentine judicial system in this section is based on a mixture of different written sources as well as personal communications with several jurists and legal experts in the field. I thank the following people for providing important information and clarifying the division of labor between the various courts as well as the procedures for criminal cases regarding past human rights violations: Fernando Basch, Leonardo Filippini, Roberto Gargarella, Alvaro Herrero, Mariana Llanos, Louise Mallinder, and María Luisa Piqué. Any mistakes or misinterpretations are my own responsibility.
41. All the courts whose names include the word *nacional* have jurisdiction in Buenos Aires City. Before the constitutional amendment of 1994, Buenos Aires City did not have its own system of justice: it was an appendix of the federal government. When speaking of courts located in Buenos Aires City, in order to distinguish federal courts with federal jurisdiction from federal courts with jurisdiction in ordinary affairs (common crimes, torts, labor issues), the latter were called *nacional.* They were federal, because they were financed with federal money, but they were ordinary regarding the issues they handled. María Luisa Piqué (personal communication, March 30, 2010).
42. Separate new criminal procedural codes were issued for federal and provincial courts. On federal and provincial criminal procedure before and after the reforms, see Brinks (2008, 110–14). On the guiding principles behind criminal justice reform in Argentina and elsewhere in Latin America, see Hammergren (2007, 27–54).

43. On the role and powers of the prosecutor, see Brinks (2008, 129–31) and Brown (2002).
44. Judge Adolfo Luis Bagnasco, interview, August 9, 2000.
45. I thank Christian Courtis, professor of law at the University of Buenos Aires, for pointing this out to me (personal communication, March 24, 2002).
46. Adrian Ventura, professor of constitutional law and journalist with *La Nación,* interview, Buenos Aires, July 20, 2000, and Christian Courtis (personal communication, March 25, 2002).
47. The "right to truth" is not formally stated in the American Convention on Human Rights. Rather, it is a legal construction by the Inter-American Commission on Human Rights, supported by the Inter-American Court of Human Rights. The Commission interprets it as the legal measure to be adopted by the State when a breach of a fundamental human right (such as the right to life, to freedom from torture, or to due process) has taken place. The investigation and acknowledgement of the truth by the State and the punishment of the officials who committed the violation is seen as redress by the State to the victims. In sum, though the "right to truth" is not an autonomous right, it is a duty that flows from a breach in the rights protected by the Convention. I thank Christian Courtis for pointing this out to me (personal communication, March 25, 2002).
48. "Privaciones ilegales de libertad en el centro clandestino de detención Club Atlético" (Lapacó case), Cámera Federal de Apelaciones en lo Criminal y Correcional, Sala II, October 14, 1997, cited by Roht-Arriaza (2005, 229, n. 13).
49. See "Aguiar de Lapacó Carmen s/ recurso extraordinario (causa no. 450) Suárez Mason," S. 1085, LXXXI, Corte Suprema de Justicia de la Nación, Buenos Aires, August 13, 1998.
50. See CELS (2000), Mallinder (2009a, 97–100), and Roht-Arriaza (2005, 101–2) for a detailed discussion of the *Lapacó* case.
51. Interviews with, among others, Mabel Gutiérrez, president, Familiares de Desaparecidos y Detenidos por Razones Políticos, Buenos Aires, August 1, 2000; Nora de Cortiñas, president, Madres de Plaza de Mayo, Buenos Aires, July 19, 2000; Adrian Ventura, journalist with *La Nación,* Buenos Aires, July 20, 2000.
52. Adrian Ventura, interview, July 20, 2000.
53. The issue was debated in July 2000 in the National Criminal Cassation Chamber and in the Supreme Court. *La Nación,* July 19, 2000, 5.
54. The informant is in regular contact with the judges involved but asked to remain anonymous.
55. Various human rights organizations, including the Familiares, Madres, and Abuelas, discussed their reasoning in interviews in Buenos Aires, July–August 2000.

56. Adrian Ventura, interview, July 20, 2000.
57. Adrian Ventura, interview, July 20, 2000.
58. Mabel Gutiérrez, interview, August 1, 2000.
59. BBC Radio 4, August 26, 1998.
60. For documentation of child kidnapping cases, see Nosiglia (1997). Many of these children have since been identified, and some have been reunited with their biological families. The 101st grandchild was restored in February 2010.
61. Information on CONADI is available on the website of the Abuelas de Plaza de Mayo (http://www.abuelas.org.ar/english/projects.htm).
62. Mabel Gutiérrez, interview, August 1, 2000.
63. *Videla, Jorge Rafael y otros s/presunta infracción a los artículos 146, 293 y 139 inciso 2 del Código Penal,* Causa No. 1285/85, Juzgado Federal No. 1 Criminal y Correcional de San Isidrio, a cargo del Dr. Roberto José Marquevich, resolution of May 14, 1997, at 2847 at sec. (Bianco), cited by Roht-Arriaza (2005, 230, n. 27).
64. Judge Adolfo Luis Bagnasco, interview, August 9, 2000. Judge Bagnasco did not choose this case; rather, it was assigned to him *por sorteo,* by the court's computerized selection system, a point noted by lawyer Pedroncini and journalist Ventura.
65. The detained officers were admirals Emilio Massera, Rubén Franco, and Antonio Vañek, generals Reynaldo Bignone and Cristino Nicolaides, and naval captains Jorge Acosta and Héctor Febres. *Southern Cone Report* RS-99-01, February 2, 1999, 3. Several more arrests were made later in this case.
66. Dr. Alberto Pedroncini, "Resumen de querella criminal que sera presentada el 30 de diciembre de 1996 por el delito de sustraccion de menores bajo la dictadura militar" (SERPAJ Argentina, available at http://www.derechos.org/serpaj/querella.txt).
67. "The Living Disappeared," *BBC News* online, August, 19, 1998. General Santiago Riveros was the 11th officer to be detained, in August 2000. "General Held in Kidnapped Babies Probe," *BBC News* online, August 11, 2000.
68. Dr. Pedroncini did not present the Grandmothers as an institution because this would have involved calling in witnesses from the entire organization. Instead, five of the Grandmothers plus Elena Quinteros, an Uruguayan woman whose child disappeared in Argentina, put forward individual cases that were representative of the rest. Dr. Alberto Pedroncini, interview, Buenos Aires, August 8, 2000. The Elena Quinteros case is discussed in Chapter 5.
69. Though not technically amnesty laws, as they limited investigation rather than secured impunity for the military, the Ley de Punto Final and Ley de Obediencia Debida had been thought to

effectively provide amnesty for past crimes. Horacio Verbitsky, "La Corte Suprema no tiene alternativas: La obligación," *Página/12,* November 1, 2001, 15.

70. *Southern Cone Report* RS-98-03, April 21, 1998, 6.
71. A public opinion poll taken in 1998 suggested that 80 percent of Argentines supported repeal of the laws. *Southern Cone Report* RS-98-02, March 10, 1998, 2.
72. *Southern Cone Report* RS-98-05, June 30, 1998, 3.
73. The child kidnapping cases are further detailed by Mallinder (2009a, 104–6) and Roht-Arriaza (2005, 108–13).
74. Judge Adolfo Luis Bagnasco, interview, August 9, 2000.
75. See coverage in Argentine newspapers *Clarín, Página/12,* and *La Nación,* July 17–20, 2000, for conflicting accounts of the case and military's role.
76. *Clarín,* August 3, 2000, 6.
77. Juzgado Nacional en lo Criminal y Correccional Federal No. 4 Buenos Aires, March 6, 2001, "Resolución del Juez Federal Gabriel R. Cavallo declarando la inconstitucionalidad y la nulidad insanable de los arts. 1 de la Ley de Punto Final y 1, 3 y 4 de la Ley de Obediencia Debida ("Simón Julio") (No. 17.768), No. 4, Sec. No. 7, Reg. 19.193." For a detailed discussion of this important case, see Brown (2002), Mallinder (2009a, 112–15), and Roht-Arriaza (2005).
78. According to Mallinder (2009a, 113), Judge Cavallo in the Julio Simón ruling "determined that the crimes that had been committed during the 'dirty war' were 'committed within the framework of a systematic plan of repression carried out by the government and due to their gravity—were tantamount to crimes against humanity,' and that under international law, states had a duty to investigate, prosecute and punish such crimes." Cavallo further "reasoned that amnesty laws that deny the courts their powers to provide remedy and justice to the victims of the dictatorship are examples of legislation that is in violation of Article 29" of the Constitution (113).
79. "Incidente de apelación de Simon, Julio, No. 17.889," Cámara Federal de Apelaciones en lo Criminal y Correccional, Sala II, November 9, 2001.
80. For an analysis of this court ruling, see Guembe (2005).
81. This was the shared view of more than 30 people I interviewed in Argentina in July-August 2000. It is supported by scholars such as Brown (2002).
82. Judge Horacio Cattani, Buenos Aires Federal Appeals Court, interview, Buenos Aires, August 9, 2000.
83. For a comprehensive analysis of the two amnesty laws from their inception until their annulment under the Kirchner government, see Mallinder (2009a).

84. In 2003, Duhalde, just before leaving office after a little more than a year in power, pardoned the leader of the last *carapintada* uprising along with a number of military officials and civilians involved in violence. For more information on Duhalde's pardons and his human rights policy, see Mallinder (2009a, 114).
85. In 1992 only 6 percent of Argentine lawyers believed that the courts were independent (Abregú 1992).
86. There is a large literature on courts and judicial behavior that supports this point of view, as discussed in Chapter 2.
87. On the new criminal procedural code for both the federal courts and the province of Buenos Aires, see Brinks (2008, 110–14).
88. Salaries of Supreme Court judges and lower court judges were already determined by law (article 110) and were not subject to change with the constitutional revisions. For the text of the constitutional articles and a discussion, see Sabsay and Onaindia (1998). For more details and comments on the changes, see CELS (1995, 79) and Haro (1998).
89. Article 114 of the 1994 Constitution lists the organs and institutions that should be represented within the Consejo de la Magistratura, but leaves it up to Congress to determine the exact composition of and balance between the sectors (Sabsay and Onaindia 1998, 379).
90. Judge Claudio Marcelo Kiper, Federal Appeals Court of Buenos Aires and member of the Consejo de la Magistratura, interview, Buenos Aires, August 4, 2000.
91. Judge Horacio Cattani, interview, August 9, 2000.
92. Judge Julio B. J. Maier, Superior Tribunal of Justice of Buenos Aires, interview, Buenos Aires, August 4, 2000.
93. Dr. Adolfo Luis Bagnasco, interview, August 9, 2000.
94. I thank Mariana Llanos for this information (personal communication, March 4, 2010).
95. The Jurado de Enjuiciamiento has nine members: one Supreme Court judge, two appellate court judges, three legislators, and three lawyers from the *matrícula federal*. See the judiciary's website at http://www.pjn.gov.ar/.
96. Note that financial independence was already guaranteed by the 1853 Constitution.
97. Among the more than 30 people I interviewed in Buenos Aires in July-August, who included legal scholars and judges, none brought up these changes as a central topic of discussion, with the exception of the establishment of the Judicial Council.
98. Judge Julio B. J. Maier, interview, August 4, 2000.
99. A number of scholars have supported this observation in recent years. For the constitutional text, see Sabsay and Onaindia (1998).
100. This point was supported by a large number of lawyers, judges, and law clerks interviewed in Buenos Aires in July–August 2000.

101. Horacio Verbitsky, "La Corte Suprema no tiene alternativas: La obligación," *Página/12,* November 1, 2001, 15.
102. On this case, see Abramovich and Courtis (1997, 325). On the development of the Argentine Supreme Court's rulings in cases dealing with crimes against humanity, see Horacio Verbitsky, "La Corte Suprema no tiene alternativas: La obligación," *Página/12*, November 1, 2001, 15.
103. *Priebke, Erich s/solicitud de extracción,* Corte Suprema, CSN Fallos 318, 2148, November 2, 1995, cited by Roht-Arriaza (2005, 229, n. 9). For discussions of this case, see Roht-Arriaza (2005) and Horacio Verbitsky, "La Corte Suprema no tiene alternativas: La obligación," *Página/12*, November 1, 2001, 15.
104. *Schwammberger, J.F.L. s/extradicción,* Cámera Federal de la Plata, Sala III penal, No. 41, 979, August 30, 1989, voto del Dr. Schiffrin. Cited by Roht-Arriaza (2005, 229, n. 20).
105. The full text of the 1988 ruling in the *Velásquez Rodríguez* case is available at the University of Minnesota Human Rights Library at http://www1.umn.edu/humanrts/iachr/b_11_12d.htm. For the final IACHR ruling closing this case in 1996, see http://www1.umn.edu/humanrts/iachr/rodr9-10.htm. On the issue of reparations in Argentina, see Acuña (2006, 215–21), Guembe (2006), and Mallinder (2009a, 83, 87).
106. For a discussion of some of the cases appealed by the Grandmothers to international courts, see, for example, Oren (2001).
107. Dr. Roberto Saba, professor of law, Universidad de Palermo, interview, Buenos Aires, August 3, 2000.
108. Judge Horacio Cattani, interview, August 9, 2000.
109. Judge Horacio Cattani, interview, August 9, 2000.
110. There were also Operación Cóndor cases running parallel in European countries, particularly in Spain under Judge Garzón, as well as in the United States. See Roht-Arriaza (2005, 150–69).
111. Judge Adolfo Luis Bagnasco, interview, August 9, 2000.
112. "Argentina Spurs 'Dirty War' Warrant," *BBC News* online, November 3, 1999.
113. "Spanish Judge Holds Argentine Ex-officer," *BBC News* online, August 1, 2001.
114. For example, Nora de Cortiñas, president of the Madres de Plaza de Mayo, traveled to Spain several times, representing the organization as well as herself as mother of one of the disappeared. Nora de Cortiñas, interview, July 19, 2000. Roht-Arriaza (2005) discusses how Argentine human rights organizations used Spanish and other European courts to raise cases when the domestic system seemed closed.
115. John Simpson, "Dealing with Dictators," *BBC News* online, January 19, 1999.

116. Judge Adolfo Luis Bagnasco, interview, August 9, 2000.
117. John Simpson, "Dealing with Dictators," *BBC News* online, January 19, 1999.
118. "Argentina Spurns 'Dirty War' Warrants," *BBC News* online, November 3, 1999.
119. "Argentina Identifies 124 'Disappeared,' " *BBC News* online, November 25, 1999.
120. In August 2000 a Mexican judge requested information from Garzón regarding Cavallo, who was traveling under a false name. Garzón had charged the same man with genocide. Cavallo was arrested in Mexico on the basis of an international arrest warrant issued by Judge Garzón's office. See "Torture Suspect Faces Extradition," *BBC News* online, August 27, 2000; "Argentine Charged with Genocide," *BBC News* online, September 1, 2000; and "Argentina Opposes Extradition Plan," *BBC News* online, September 6, 2000.
121. "Mexico Court Approves Extradition," *BBC News* online, January 12, 2001.
122. "Mexico Sanctions Extradition," *BBC News* online, February 3, 2001. For a detailed discussion of this landmark case, see Roht-Arriaza (2005, 140–49).
123. "Argentina Orders Dirty War Arrests," *BBC News* online, September 19, 2001.
124. Though the military no longer posed a physical threat to democracy in Argentina, executives during this period still seemed reluctant to instigate or support any legal action that could be perceived as threatening to the military. This may have to do with the prominent position that the Argentine military had enjoyed in politics for most of the century and the close relationship that has historically existed between the government and the armed forces.
125. On Sweden's request for Astiz, see Sikkink and Walling (2006, 315). On the French requests, see Roht-Arriaza (2005, 122–24).
126. "Life Sentences Demanded for Argentine Officers," *BBC News* online, November 9, 2000. Two senior officers received life sentences and the five others were sentenced to 24 years in prison. See "Argentina Generals Get Life," *BBC News* online, December 6, 2000.
127. The judge also issued an arrest warrant for Jorge Vildoza, also wanted by Italy. See "Argentine 'Dirty War' Officer Sought," *BBC News* online, June 30, 2001, and "Argentine 'Dirty War' Officer Arrested," *BBC News* online, July 2, 2001.
128. "Argentina Refuses Astiz Extradition," *BBC News* online, July 3, 2001; " 'Angel of Death' Walks Free," *BBC News* online, August 15, 2001.
129. "Germans Accuse Argentine Junta of Genocide," *BBC News* online, March 21, 2001; "Argentina, Germany: Ex-Junta Member Arrested," *BBC News* online, October 18, 2001.

130. "Resolución que deniega la extradición de Suárez Mason a Alemania," Buenos Aires, November 15, 2001 (http://www.nuncamas.org/juicios/argentin/smason_151101.htm).
131. "European Press Review," *BBC News* online, July 3, 2001.
132. "Argentina Reinstates "State of Siege" after President's Resignation," *Online NewsHour*, December 21, 2001.
133. "De la Rúa's Fall," *Nueva Mayoria.com,* December 21, 2001.
134. Decreto No. 222, Corte Suprema de Justicia de la Nación, "Nombramiento de Ministros, Procedimiento B.O.," June 20, 2003, preamble and article 2. The decree also called for the bench to reflect a balance of genders and regional origins.
135. Kirchner took great care to promote impeachments and (forced) resignations in such a way that he would not end up creating a new "automatic majority" on the Court, lest he be criticised for court packing as his predecessor Menem and others had (Brinks 2005, 609).
136. Ley No. 25.779, "Declaranse insanablemente nulas las Leyes Nros. 23.492 y 23.521," September 2, 2003.
137. The case known as Barrios Altos is *Chumbipuma Aguirre et al. v. Peru,* ser. C, No. 74 (2001).
138. Supreme Court, July 13, 2007, *Mazzeo, Julio Lilo y otros* (http://www.csjn.gov.ar). The 2003 pardons issued by President Duhalde were unaffected by this decision (Mallinder 2009a, 126, n. 886).
139. Tom Henningan, "Argentina Takes Step Toward Cleaning Up 'Dirty War,' " Christian Science Monitor, July 29, 2003.
140. Marcela Valente, "Human Rights in Argentina—Progress and Pending Tasks," Inter Press Service, Buenos Aires, December 21, 2007.
141. Decreto No. 606/2007, "Créase, en la órbita de la Jefatura de Gabinete de Ministros, el Programa Verdad y Justicia. Objetivos y Actividades del Programa. Consejo Asesor. Desígnase Coordinador," May 22, 2007. See Mallinder (2009a, 127).
142. "Argentina Orders Military Documents Declassified," AP News, January 6, 2010.
143. Figures from CELS cited by Laura Vales, "La Corte tiene que cumplir con su rol," *Página/12,* March 7, 2009. CELS also reported that as of December 2009, although Argentina had a higher number of former agents in custody than Chile did, most of them were on remand, that is, in pretrial detention. Of 68 former repressors who had been sentenced, only two were serving confirmed custodial sentences (Universidad Diego Portales 2010). One year earlier, only 31 people had been convicted out of 1,173 individuals who had been charged (Mallinder 2009a, 128). CELS data are available at http://www.cels.org.ar.
144. Several of the newspapers in Argentina covered the polemical debate between the executive and judiciary. See, for example, Laura Vales, "La Corte tiene que cumplir con su rol," *Página/12*, March

7, 2009, and Luciana Geuna, "Conflicto de poderes," *El País,* March 7, 2009.

145. Kirchner also reformed the Judicial Council in a way that was considered to reverse the plurality it had before, a move heavily criticized by the NGO sector. I thank Mariana Llanos for pointing out this to me (personal communication, February 26, 2010).
146. See Santiago O'Donnell, "Controversy between the President and Judges," International Herald Tribune, May 7, 2007, and Marcela Valente, "Argentina: Court Order to Release Rights Abusers Stirs Critics," Inter Press Service, December 19, 2008, both cited by Mallinder (2009a, 128–29).
147. Marcela Valente, "Argentina: Court Order to Release Rights Abusers Stirs Critics," Inter Press Service, 19 December 2008.
148. Marcela Valente, "Human Rights in Argentina—Progress and Pending Tasks," Inter Press Service, December 21, 2007.
149. Marcela Valente, "Human Rights Argentina: Justice Catches Up to the Cóndor," Inter Press Service, February 9, 2010.
150. Almudena Calatrava, "Trial Begins for Argentina's 'Angel of Death,'" *ABC News* online, December 11, 2009. Menem wanted to demolish the buildings at ESMA to achieve closure, but he backed off after intense protest from the human rights community. Néstor Kirchner later converted the site into a national memory museum, modeled on the Holocaust museum in Berlin. It will become the largest museum of its kind in Latin America when all the buildings are opened in 2011.
151. Jeanette Neumann, "3 Convicted in Argentine Adoption Trial," AP News, April 4, 2008.
152. Tom Leonard and Edward Owen, "Argentina Media Heirs Take DNA Test in Dirty War Abduction Row," Telegraph Media Group, December 30, 2009. Cristina Kirchner has been criticized for her move to make DNA testing mandatory by presidential decree; some believe her motivation was to get at the mother of the adopted twins, Ernestina Herrera de Noble, who is a political opponent.

## CHAPTER 4: CHILE

1. Hugo Gutiérrez, lawyer for Corporación de Promoción y Defensa de los Derechos del Pueblo (CODEPU), a Chilean human rights NGO, interview, Santiago, June 29, 2000.
2. Figures on Argentina are from Centro de Estudios Legales y Sociales (CELS), Buenos Aires, cited by Universidad Diego Portales (2010).
3. General Augusto Pinochet Ugarte overthrew the socialist democratically elected government of Salvador Allende on September 11, 1973. He immediately assumed the role of president of the

government junta of Chile. On June 26, 1974, Pinochet claimed the position of head of state of the Republic of Chile, which he held till Aylwin took over the presidency on March 11, 1990.

4. *Recurso de amparo* is the Chilean term for a petition for *habeas corpus*. Figures on how many *recurso de amparo* were presented to the courts vary from source to source. Matus (1999: 86–87) notes that already by mid-August of 1976, the courts had refused to hear more than 3000 cases of *recursos de amparo*. On the Chilean judiciary's response to human rights violations during the dictatorship period, see Hilbink (2007) and Couso (2005).
5. Though Chilean judges are considered true to the law and the Constitution, several scholars have questioned their role as rights protectors broadly speaking (see Couso 2005; Hilbink 2007; Huneeus 2009).
6. "Human rights" in this chapter refers specifically to human rights abuses committed during the authoritarian regime.
7. President Sebastián Piñera succeeded Bachelet on March 11, 2010. In the first round of presidential elections held in December 2009, Piñera, the candidate of the right-wing Alianza coalition, received 44.1 percent, while Eduardo Frei Ruiz-Tagle, of the center-left Concertación de Partidos por la Democracia (and former president 1994–98), received 29.6 percent. Piñera won the runoff election on January 17, 2010, with 51.6 percent against Frei's 48.4 percent. For detailed results by candidate, see "Presidential and Legislative Elections in Chile," Election Resources on the Internet (http://www.electionresources.org/cl/president.php?election=2009). Election results by province are available on the website of Electoral Geography 2.0 (http://www.electoralgeography.com), under "Chile: Presidential Election 2009–10."
8. On the *ejercicio de enlace,* or linking exercise, see Rabkin (1992) and Weeks (2000). On the 1993 *boinazo* and the *pinocheques* case, in which Pinochet's oldest son received almost US$3 million for selling weapons to the Chilean army, see Weeks (2000).
9. The Chilean junta issued the wide-reaching self-amnesty through Decreto Ley No. 2191, published in *Diario Oficial,* No. 30042, on April 19, 1978. The law applied to authors of crimes, their accomplices, and those who covered up the crimes. It also benefited some political prisoners sentenced throughout this period who were granted amnesty.
10. For definition of statute of limitations, see Chapter 2, note 28.
11. Lisa Hilbink (2007) offers a comprehensive analysis of how and why judges appointed under a democratic regime could tolerate, even condone, the atrocities of the Pinochet regime. Matus (2000) provides a fascinating (and unflattering) inside account of the Chilean judiciary.

12. For an English summary of the *Informe Rettig,* see Chilean Human Rights Commission (1992). For a comprehensive analysis of the truth commission's work, findings, and recommendations, as well as reactions to the report, see Barahona de Brito (1992, 1997) and Lira and Loveman (1999).
13. The CNRR was created by Ley 19.123, made official in the *Diario Oficial* on February 8, 1992.
14. This number includes cases established in a 1996 follow-up report. The list was reopened in 2010 to allow the addition of new cases. I thank Cath Collins of the Universidad Diego Portales for this information (personal communication, January 28, 2010).
15. On the elements in this first reform package, see Vaughn (1992, 589–90), Bickford (1998, 25, n. 21), and Correa Sutil (1999).
16. Interestingly, the South African Truth and Reconciliation Commission adopted this feature of offering immunity from prosecution in exchange for information several years later (Chapman and van der Merwe 2008). It remains the only one out of more than 40 truth commissions worldwide that has followed this strategy in order to secure information from those who were involved in repression.
17. The unresolved murder case had continued to sour the relationship between Chile and the United States. Due to the special character of the crime, this case started directly in the Supreme Court. At the time, Chile was the only country in the Southern Cone in which a trial initiated abroad led to the trial and indictments of military officers on national soil. For a more detailed account of the Letelier case, see Barahona de Brito (1997) and Roniger and Sznajder (1999).
18. José Zalaquett, interview, Santiago, June 7, 2000. Zalaquett, a law professor and lawyer in private practice, was a member of the Mesa de Diálogo and a former member of the Rettig commission.
19. José Zalaquett, interview, June 7, 2000.
20. The three were José Manuel Parada (then head of the analysis department of the Vicaría de la Solidaridad), Manuel Guerrero, and Santiago Nattino. All were assassinated by Carabinero (military police) officers on March 30, 1985. Six of the policemen were accused of kidnapping and murder, while the remaining 11 were accused of kidnapping and conspiracy.
21. Frei, like Aylwin a Christian Democrat from the Partido Demócrata Cristiano, won the December 11, 1993, elections with 58 percent of the vote. Arturo Alessandri, candidate of the right-wing Unidad Popular (Popular Unity) received 21.4 percent. Frei's center-left Coalition for Democracy, Concertación, controlled the House of Deputies but the right kept control of the Senate.
22. Veronica Reyna, president of FASIC, interview, Santiago, June 15, 2000.

23. Frei's presidency lasted until 2000. Legal developments during the latter part of his term are covered in the next section.
24. Three of the accused received life sentences, three others received long sentences, and the remaining 11 received shorter sentences. The names of the convicted are reported in *El Mercurio,* April 3, 1993, D4.
25. The DINA was immediately replaced by another intelligence service organ, the Centro Nacional de Informaciones (CNI). This was a specialized military organization linked to the government through the Ministry of the Interior, as opposed to the DINA's direct link with the president.
26. On the judicial reforms initiated by the Frei government, see Bickford (1998), Drake and Jaksic (1999), Galleguillos (2001), and Skaar (2003). The final full approval of the reform came in 1999. In addition to the Supreme Court bill, Congress also passed the criminal justice reform bill in 1997.
27. Pinochet's arrest in London, the extradition requests by Spain, and the House of Lords rulings allowing Pinochet to be returned to Chile have been extensively treated by other scholars and will not be discussed here. See, for example, Roht-Arriaza (2009a) and Sugarman (2000).
28. Supreme Court of Chile, September 9, 1998, Rol No. 469–98; Revista Fallos del Mes, No. 478, 1760–69 (Decision No. 3).
29. There is a huge scholarly literature on the Pinochet case and its possible impacts. See, for example, Brett (2008), Hilbink (2007), Roht-Arriaza (2009a), Sugarman (2002), A. Valenzuela (1999), Webber (1999), Weller (1999), and Woodhouse (2000).
30. The following sections do not necessarily treat events in chronological order. A thematic approach has been chosen here since many of the events discussed are parallel processes.
31. For good sources on the domestic legal proceedings in the Pinochet case, see Collins (2010b). On the parallel proceedings in Spanish courts, see Roht-Arriaza (2009a) and Sugarman (2002).
32. The Caravana de la Muerte was the name given to a military delegation that toured provincial cities in northern and southern Chile right after the coup against Allende in 1973, killing political opponents of the military junta headed by Pinochet. The army unit traveled from city to city in a Puma helicopter, landing in places such as Cauquenes, La Serena, Copaipó, Antofagasta, and Calamá. At least 75 leftists were killed, 19 of whom remain among the disappeared. Verdugo (2001) provides a critical analysis of this period in the Chilean politics of repression.
33. For the full text of the appellate court's ruling, see "Texto del fallo que desafuera a Senador Pinochet," *El Mercurio,* June 6, 2000, C7.
34. For a discussion of the main points in the Supreme Court ruling, see Roht-Arriaza (2009a, 88).

35. "Pinochet 'Must Face Trial,' " *BBC News* online, March 8, 2001.
36. "Pinochet's Charges Suspended," *BBC News* online, July 9, 2001.
37. See also "Chile Drops Pinochet Trial," *BBC News* online, July 1, 2002.
38. Carlos Prats was commander in chief of the army and vice president of the Republic under Allende. Court cases in the Prats assassination were run in both Chile and Argentina. On the judicial proceedings in Argentina related to the case, see Quezada (2002).
39. The information about court proceedings in the wake of the Riggs Bank scandal is taken from Collins (2010b) and Roht-Arriaza (2009a).
40. "Court Lifts Pinochet's Immunity," *BBC News* online, May 28, 2004.
41. "Chile Strips Pinochet of Immunity," *BBC News* online, August 26, 2004.
42. "Pinochet Murder Case Blocked," *BBC News* online, March 24, 2005.
43. "Mixed Day in Court for Pinochet," *BBC News* online, June 7, 2005.
44. "Pinochet Charged Over Dissidents," *BBC News* online, November 24, 2005.
45. On the Riggs scandal, see Collins (2010b) and Roht-Arriaza (2009a).
46. "Pinochet's Fraud Immunity Lifted," *BBC News* online, August 19, 2006.
47. "House Arrest for Chile's Pinochet," *BBC News* online, October 30, 2006.
48. The *New York Times* produced 625 and the *BBC News* more than 1,000 online articles on Pinochet between October 1998 and March 2001. By contrast, these two news outlets devoted only a few pages to the processes against other Chilean military during the same period.
49. Eduardo Contreras, human rights lawyer in private practice, interview, Santiago, May 25, 2000.
50. FASIC, the Chilean human rights NGO that inherited the files from the Vicaría when the latter closed its offices in 1992, kept a detailed record until 2003 of most of the court cases. Summary of the various cases, including names of the victims and the accused, as well as some of the judgments, are available on the FASIC website (http://www.fasic.org/juri/juridico.htm). Universidad Diego Portales in Santiago publishes monthly case statistics for Chile and analyzes comparative data across a network of Southern Cone countries that are going through post-transitional justice processes.
51. Appointment of a special judge, or *ministro en visita,* "is a standard tool available to the courts to expedite the investigation of cases considered to be of particular urgency or social/political importance.

The *ministro en visita* is a judge, normally from a second-instance (appeals) court, who is removed from normal duties and assigned exclusively to such a case" (Collins 2010b,89, n. 47). In the Tucapel Jiménez case, nine people were accused of masterminding the murder, 12 more were accused of being accomplices, and another two were charged with covering up the murder. One of the accused, Humberto Gordon, died on June 15, 2000, taking with him some of the evidence that was to be used in the case. The third chamber (*sala penal*) of the Santiago Court of Appeals sent some of the accused in this case to prison in August 2000, but others were released on bail in November 2000. The Supreme Court awarded financial damages to the victim's family in 2008.

52. On July 19, 2000, the seventh chamber of the Santiago Court of Appeals unanimously upheld an appeal from the prosecution to ignore the ruling of judge Sergio Valenzuela Patiño and let the case have another hearing with a different judge in charge. Three people were given life sentences: army major and operative chief of the CNI Alvaro Corbalán Castilla, army major Carlos Herrera Jiménez, and Carabinero under-officer Armando Cabrera Aguilar. Osvaldo Pincetti Gac received a ten-year sentence for collaboration in the crime.
53. Jorge Mario Saavedra, lawyer, interview, Santiago, May 29, 2000. Saavedra was the main prosecutor in three cases, including both Tucapel Jiménez and Juan Alegría.
54. "Perpetua para ex jefe de la CNI por caso Albania," *La Nación,* August 29, 2007.
55. Those murdered were José Carrasco T., Felipe Rivera, Gastón Vidaurrázaga, and Abraham Muskablitt.
56. The case concerned the disappearance of Luis Baeza Cruces in 1974 and the assassination of Alfonso Carreño Díaz the same year. The accused were retired air force colonel Edgar Ceballos Jones, retired air force lieutenant Franklin Bello, police officer José Cerda, and air force officer Ramón Cáceres Jorquera. See case summary on the FASIC Chile website (http://www.fasic.org/) under "Ambito jurídico" and "Sometidos a proceso." This case is found at http://www.fasic.org/juri/na2.htm.
57. Case summary on the FASIC Chile website under "Ambito jurídico" and "Sometidos a proceso" (http://www.fasic.org/juri/na4.htm).
58. Case summary on the FASIC Chile website under "Ambito jurídico" and "Sometidos a proceso" (http://www.fasic.org/juri/na6.htm).
59. According to a 2001 report from Amnesty International, "Despite moves to restrict the ambit of military jurisdiction, the power of the military courts remains largely undiminished. Civilian judges who initiate investigations into human rights violations frequently have to hand over the case to the military courts, who under Articles 2 and 3 of the Code of Military Justice (*Código de Justicia*

*Militar*) generally claim jurisdiction for crimes involving members of the security forces. Civilian judges do not have the power to carry out investigations in establishments belonging to the military. In the military appeals courts (*Cortes Marciales*) three of the five members in Santiago and two of the four members in Valparaíso are officers on active service and therefore suffer a clear conflict of interest" (16).

60. Case summary on the FASIC Chile website under "Ambito jurídico" and "Sometidos a proceso" (http://www.fasic.org/juri/nb4.htm).
61. Case summary on the FASIC Chile website under "Ambito jurídico" and "Sometidos a proceso" (http://www.fasic.org/juri/na5.htm).
62. Case summary on the FASIC Chile website under "Ambito jurídico" and "Sometidos a proceso" (http://www.fasic.org/juri/na7.htm). For a historical account of the Gloria Nilsson case, which dates back to the first *recurso de amparo* presented to the Santiago Court of Appeals the day after Nilsson disappeared in 1974, see CEME (2009). For a synopsis of some of the more prominent cases that Romo figured in, see PIDH (2009).
63. *C/ Marcelo Moren Brito – Juan Contreras Sepulveda – Osvaldo Romo Vera – Miguel Krassnopff Martchenko – Fernando Lauriani Maturana – Francisco Ferrer Lima – Orlando Manzo Duran* (Corte Suprema, Sentencia No. 33420).
64. Case summary on the FASIC Chile website under "Ambito jurídico" and "Sometidos a proceso" (http://www.fasic.org/juri/nc2.htm).
65. For an analysis of the final legal developments in Argentina, see Juan Araya Diaz, "La búsqueda del eslabón: Llega a su fin el juicio por el crimen de Prats," *emol* (*El Mercurio* online), November 5, 2000.
66. There were deep splits within the Socialist Party with respect to how the Pinochet issue should be handled. On the presidential campaign and elections of 1999–2000, see Angell (2007).
67. It remains unclear exactly when the civilian-military dialogue started. There is an official version that says the roundtable talks were suggested even before Pinochet was arrested in London.
68. For names of the Mesa participants and a discussion of the roundtable's formation and work, see the essay by one of its members, Zalaquett (2000).
69. Ministerio de Interior de Chile, Ley No. 19.687, "Establece Obligación de Secreto para Quienes Remitan Información Conducente a la Ubicación de los Detenidos Desaparacidos," June 23, 2000.
70. See section on "Jueces Especiales" on the FASIC website (http://www.fasic.org/juri/jueces.htm).
71. El Programa de Derechos Humanos, formally known as the Programa Continuación Ley 19.123, was established by Supreme Decree No. 1.005 of April 1997. It was a follow-up to the Corporación Nacional de Reparación y Reconciliación, which ceased

to exist on December 31, 1996. See Programa de Derechos Humanos (2010) for a chronology.

72. The Programa was the official repository of testimonies and other background material from the Rettig commission, to which judges had access on request.
73. Fifth Chamber of the Santiago Appellate Court, Rol No. 11.821-2003, January 5, 2004. For analysis, see Amnesty International (2007c, 9–10). For an analysis of the Supreme Court ruling in the Sandoval case, see Lafontaine (2005).
74. How Bachelet performed in these areas will not be dealt with here, but it appears that indigenous issues turned into the unresolved (and explosive) issue of her presidency.
75. Bernardita Marino and Felipe Cádiz, "Bachelet sobre caso degollados: 'Fue uno de los momentos más tristes de mi vida,'" *emol* (*El Mercurio* online), March 29, 2006.
76. Some authors have questioned whether her government had a firm legal pro-accountability strategy (Collins 2010a).
77. Lillie Langtry, "Chile: National Day to Commemorate Political Victims," October, 2009 (http://memoryinlatinamerica.blogspot.com/2009/10/chile-national-day-to-commemorate.html).
78. Javier Couso, professor of Law, Universidad Diego Portales (personal communication, January 1, 2010).
79. Some military installations removed their flags altogether so as to avoid having to comply with this instruction. Only the army within the armed forces eventually decided to decree official mourning. Cath Collins (personal communication, January 28, 2010).
80. Extradition seems to be in theory an exclusively judicial issue in Chile. Official statements made hours after Fujimori's arrival said that the lack of an administrative detention statute in Chile meant the executive could not intervene on one side or the other. Both detention and extradition would therefore have to be resolved by the courts. Cath Collins (personal communication, October 25, 1999).
81. On the legal basis for Alvarez's decision and how it contradicted international law, see Amnesty International (2007c). On the Fujimori case, see Gamarra (2009).
82. Salas Wenzel, former director of the CNI, had been sentenced to life in January 2005 for his role in the Operación Albania massacre of 1987, during which 12 members of the Manuel Rodríguez Patriotic Front were murdered. The Santiago Court of Appeals sentenced Salas Wenzel along with 14 other CNI agents to jail, a ruling upheld by the Supreme Court in August 2007.
83. Figures in this paragraph are from the Human Rights Observatory of the Universidad Diego Portales (2010), based on figures from the Human Rights Program of the Chilean Interior Ministry as well as other research.

84. Cath Collins (personal communication, October 25, 2009). Collins adds: "A lot of people think they 'brought a case' in the aftermath of 1998, but it was either turned down or accumulated as an effectively inert additional piece of information to a case that was already being investigated."
85. Cath Collins (personal communication, October, 25, 2009). One of the most recent developments in a long-running case involves the issue of an arrest warrant against 129 former security officials allegedly involved in the illegal detention, torture, assassination, and disappearance of 77 dissidents during the Pinochet dictatorship as part of Operación Cóndor (ICTJ 2009).
86. Many of these cases have taken years to resolve as they may have gone through several rounds of appeal, both in the Santiago Court of Appeals (where the majority of the cases started) and in the Supreme Court.
87. "Pinochet Arrives in Chile," *BBC News* online, March 3, 2000.
88. The amendment created the status of "past president" and required senators-for-life (General Pinochet and ex-president Eduardo Frei) to resign their seats in the upper house of Congress in order to acquire the new title—and hence enjoy the immunity. See "Chile Offers Pinochet New Immunity," *BBC News* online, March 25, 2000.
89. "Freed by Britain, Pinochet Faces New Legal Battles at Home," *New York Times* online, March 3, 2000.
90. The full text of the declaration was published in *La Nación* on November 5, 2004 (Cheyre 2004) and is available at http://www.dawson2000.com/cheyre1.htm. Bachelet also oversaw a reform of the military pension system and continued modernizing the Chilean armed forces with the purchase of new military equipment while engaging in international peace operations.
91. Here I agree with Collins (2010b), though she attributes more importance to the human rights network in bringing about the breakthrough of post-transitional justice than I would.
92. For a discussion of the democratization and demilitarization process preceding the 2005 constitutional reforms, see Montes and Vial (2005).
93. Redress Trust (2009, 6–7), citing Supreme Court of Chile, "Appeal on Annulment of Sentence, Don Pedro Poblete Córdoba, Rol 8895-96," September 9, 1998. The Redress Trust report further states: "In an appeal filled in the case of Don Pedro Poblete Córdoba, the Supreme Court overturned the final dismissal by the Martial Court in a judgment of January 2008 and ordered the re-opening of the investigation and the identification of those responsible for the disappearance of Don Pedro (crime of kidnapping in the domestic legislation) in order to apply the amnesty law. According to the

Court, in order to grant amnesty, it was essential to identify its beneficiary."

94. In 2002 it was noted that Poblete-Córdoba was "the only case in which the Supreme Court has explicitly recognized the pre-eminence of treaties on international humanitarian law. But after that case, the high court never pronounced on this issue again. It has accepted various motions for review, overturning sentences that applied the Amnesty Law, but its legal grounds have been different from those cited in the Poblete Córdoba case" (Quezada 2002).
95. Fifth Chamber of the Santiago Appellate Court, Rol No. 24.471-2005, April 10, 2006, sections 11 and 16, respectively. Cited by Amnesty International (2007c, 10).
96. Inter-American Court of Human Rights, judgment of February 5, 2001, case of "The Last Temptation of Christ" (*Olmedo-Bustos et al. v. Chile*).
97. On the application of international law in various cases and of the most important rulings by the Inter-American Court of Human Rights, see Amnesty International (2007c).
98. This activism contrasts with Chilean judges' behavior in other kinds of rights cases, where they have displayed a much more conservative attitude (Couso 2005; Hilbink 2007; Huneeus 2009). Nevertheless, Chile is considered to have achieved "a high degree of legality" and is viewed as "one of the most solid rule-of-the-law regimes in the region" (Couso 2004, 70). I would argue that failing to display activism on broader rights questions, such as health rights, HIV/AIDS policies, social rights, and so on, is qualitatively different from failing to pursue cases of human rights violations. Human rights of the first type are regarded as part of the political domain in most countries around the world. In Chilean history, judges have been reluctant to interfere in policy making in the social sphere (Faundez 2010), so their lack of activism on these questions has a historical explanation. However, a state's failure to protect its citizens from violent death, disappearance, and torture constitutes a severe breach of national criminal law and such cases *should* be addressed by the courts through legal action.
99. Chile ranks as either "independent" or "quite independent" in most comparative studies of courts prior to the onset of military rule in Latin America.
100. Hilbink is summing up the point made by Henríquez (1980, 112–16). For an even longer historical perspective on legality in Chile, see Faundez (2007).
101. Cases start at first instance level. For sensitive cases, the judge assigned is more senior than normal, usually at appellate court rank or above. However, his or her first ruling on the case counts only as first, not appellate, instance. This means that the case then has to go to an appellate court in the normal way. In other words, it is not

the appellate court as such, only the individual judge, who is investigating and pronouncing in the first instance. I thank Cath Collins of the Universidad Diego Portales for pointing this out to me (personal communication, February 2, 2010).

102. Jorge Mario Saavedra, interview, May 29, 2000. The 2008 documentary *The Judge and the General,* by filmmakers Patricio Lanfranco and Elizabeth Farnsworth, traces Guzmán's conversion.
103. Víctor Espinoza, executive general of CODEPU, interview, Santiago, June 9, 2000.
104. Recall that appellate court judge Carlos Cerda was temporarily suspended from his position for having taken on a human rights case after the transition to democratic rule. For details, see Garro (1993).
105. Collins notes Juica's "progressive reputation" in human rights cases (2010b, 136).
106. This definition was used by a human rights defense lawyer as early as 1974 and has been regularly employed since then. It was first accepted at the appellate court level in the Poblete-Córdoba case.
107. See also Huneeus (2009) for comments on the role of the media with respect to human rights cases.
108. Cath Collins (personal communication, February 2, 2010).
109. The "Garzón effect" is a phrase apparently coined by Roberto Garretón (Cath Collins, personal communication, February 2, 2010). Roht-Arriaza (2005) asserts that Garzón's work in the investigation of Pinochet both had a shaming effect on Chilean judges who had failed to deal with human rights abuses under the dictatorship and served to encourage those Chilean judges who favored domestic prosecutions.
110. Eduardo Contreras, interview, May 25, 2000.
111. José Zalaquett, interview, June 7, 2000.
112. For two comprehensive accounts of the "Pinochet effect" using different approaches, see Brett (2008) and Roht-Arriaza (2005).
113. Increased national concern with human rights is reflected in the incorporation of international human rights law as part of the new curriculum for the training of judges.
114. *Almonacid-Arellano et al. v. Chile*, Judgment, Series C, No. 154 (2006), IACHR (September 26, 2006), para. 110.
115. José Zalaquett, interview, June 7, 2000. However, Pinochet's lawyers were not arguing against the Amnesty Law but rather invoking international law when arguing for things like concessions for age, due process guarantees, and benefits.
116. Jorge Mera, professor of law, Escuela de Ley, Universidad Diego Portales, interview, Santiago, May 16, 2000.
117. "Pinochet's Appeal Begins," *BBC News* online, June 9, 2000.
118. For details on various public opinion polls related to the human rights issue, see Angell (2007).

119. Recent research suggests "the change in the constitutional discourse of Latin America has been radical, going from a strict adherence to a formalist legal positivism hostile to judge-created law and routine interference with the elected branches of government, to a kind of natural law approach ('neoconstitutionalism'), based on the preeminence of human rights and constitutional principles over legislated law, as well as an activist conception of the role of courts in a democracy. This new constitutional orthodoxy, in which the human rights provisions of the Constitution—and even international human rights law—can be invoked to void legislation by judges empowered with the power of judicial review, represents a crucial cultural factor encouraging the judicialization of Latin American politics" (Couso 2010, 158).
120. Javier Couso (personal communication, January 1, 2010).

## Chapter 5: Uruguay

1. At one point, Argentina had more than two former presidents/junta leaders in prison, albeit only for a short period before they were granted presidential pardons by Menem.
2. Garro estimates that 200,000 people were imprisoned and tortured, but this figure is contested. He asserts that "between 1973 and 1985 Uruguay acquired the dubious distinction of having the world's highest per capita rate of political incarceration" (1993, 11, n. 24). According to a report by Amnesty International in 1976, an estimated 60,000 people had been arrested and detained in Uruguay, meaning that one of every 50 Uruguayans endured some kind of imprisonment after the coup. 78 people died in prison, many of them as a result of torture (SERPAJ 1989, cited in Sikkink 2005).
3. Gabriela Fried Amilivia, assistant professor, Department of Sociology, California State University Los Angeles, personal communication, Montevideo, January 30, 2010.
4. Several judges, lawyers, and academics raised this point in interviews carried out in Montevideo in March–April 2001.
5. The other major political party, the Partido Nacional, excluded itself from the negotiations.
6. "El Acuerdo del Club Naval Sigue Sonando," *Alternativa Socialista,* February 23, 1989. See also Barahona de Brito (1997, 68–80).
7. According to a survey carried out by Equipos Consultores (1984), 71 percent of Montevideans thought that the pact at the Club Naval had occurred at the right moment. Only 22 percent thought that the politicians should have waited for a better opportunity.
8. Barahona de Brito (1997) and Roniger and Sznajder (1999) give a full account of the official human rights policies of the Uruguayan government, including the pardoning of political prisoners and material compensation to victims and their families.

9. The number of disappeared would be challenged by the findings of the Comisión para la Paz two decades later.
10. Hayner (2001, 54), in her extensive comparative analysis of truth commissions all over the world, lists the Uruguayan commissions among "sixteen less-prominent commissions."
11. "Qué otras pruebas pretende el gobierno," *El Popular*, September 5, 1986. My translation.
12. The SERPAJ team worked in cooperation with lawyers and doctors and a public polling organization. Funding came from various sources, including the United Nations Voluntary Fund for Victims of Torture, the United Church of Canada, Bread for the World of West Germany, Diakonia of Sweden, and the MacArthur Foundation (Barahona de Brito 1997, 12).
13. The lower courts (*juzgados letrados*) in Uruguay are divided into civil, criminal, juvenile, family, contentious-administrative, bankruptcy, the interior, and substitutes (*suplentes*), all of which hear matters under their jurisdiction in the first instance.
14. For an excellent account of the initial trials and the subsequent "long and winding road to amnesty" for the military, see Barahona de Brito (1997, 130–50).
15. Uruguay has only separate lower-level military courts. At the appellate court and Supreme Court levels, existing civilian courts are expanded by including two military judges in cases that involve the military. Estela Jubette, judge, first instance civil court, Montevideo, interview, Montevideo, April 4, 2001.
16. On the discussions preceding adoption of the amnesty law, see Mallinder (2009b). According to Mallinder, there was also another amnesty law, different in character and purpose, enacted in 1985, which "benefited those who had suffered directly from military abuses in numerous ways including being dismissed from government posts, being forced into exile, being detained and tortured, and in many cases being imprisoned for lengthy periods" (2009b, 1).
17. Law of Cancellation of the Punitive Pretension of the State. The full text of Ley No. 15.848 is available in Spanish on the website of the Uruguayan Parliament (http://www.parlamento.gub.uy/Leyes/Ley15848.htm).
18. Translation by Barahona de Brito (1997, 126).
19. Note, though, that Alfonsín had already repealed the 1983 amnesty law and pursued limited trials (see Chapter 4).
20. Thanks to Roberto Gargarella, Universidad de Buenos Aires, for translating the text of this article into English. The full text of the law in Spanish is available on the Uruguayan Parliament website (see note 17).
21. Semino (1988) provides an analysis and judicial-constitutional defense of the Ley de Caducidad.

22. The Pro-Referendum Committee was represented by María Esther Gatti de Islas together with Matilde Rodríguez and Elisa Dellepiane, the widows of Héctor Gutiérrez Ruiz and Zelmar Michelini, respectively.
23. For a detailed account of the referendum and its surrounding debates, see Barahona de Brito (1997), Roniger and Sznajder (1999), and Goldman (1989).
24. This view was expressed by, among others, Supreme Court lawyer Lilia Ferro Clérico, *Brecha* journalist Raul Zibechi, and Uruguayan scholar Gabriela Fried in interviews in Montevideo, March 2000.
25. Although the 2009 election result produced a vote to uphold the amnesty by a similar margin, one cannot infer that the same people voted the same way twice, or that they voted yes or no for the same reasons in 1989 and 2009.
26. Suprema Corte de Justicia, Sentencia No. 184, "Sobre denuncia de inconstitucionalidad Ley No. 15.848, Arts. 1, 2, 3 y 4," May 2, 1988. This was a 3-2 decision. Judge Balbela was one of the dissenting judges.
27. *Hugo Leonardo de los Santos Mendoza et al. v. Uruguay,* Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375, Report No. 29/92, OEA/Ser./L/V/II.83 (1992). Cited by Mallinder (2009b).
28. For Sanguinetti's statement, see "Sanguinetti: Amnistía y caducidad son el precio político de la democracia," *El Día,* March 9, 1987.
29. Two central works on human rights issues in the Southern Cone, those of Barahona de Brito (1997) and Roniger and Sznajder (1999), do not mention Lacalle in their extensive accounts of post-dictatorship policies. Neither does Ferro Clérico (1998) in her thorough analysis of post-transitional human rights politics in Uruguay.
30. This may not be so different from the political trajectories in other post-conflict states where there is not much political will to address the abuses of the past. I thank Louise Mallinder for this comment (personal communication, January 13, 2010).
31. The group now called Asociación de Madres y Familiares de Uruguayos Detenidos Desaparecidos, or Familiares, is the merger of two human rights organizations: Madres y Familiares de los Uruguayos Desaparecidos en Argentina (MFUDA), founded in 1977, and Madres y Familiares de los Uruguayos Desaparecidos en Uruguay (MFDU), founded in 1983 with the help of SERPAJ.
32. Familiares, group interview, Montevideo, August 2000.
33. Although Uruguayan judges can in theory open cases, in practice they only act on cases that are brought before them.
34. According to the chief editor of *La República,* Federico Fasano, *Búsqueda*'s editorial policy was not to talk about human rights at all (interview, Montevideo, March 30, 2001).

35. The timing of the Ley de Caducidad's enactment, just hours before alleged torturer Gavazzo was due in court, is taken as a sign of how close Uruguay was to a political crisis, if not actually a coup. I thank Louise Mallinder for pointing out this important fact to me (personal communication, January 13, 2010).
36. Sanguinetti was elected for a five-year term in the November 1994 presidential elections. The Partido Colorado (Colorado Party) received 31.4 percent of the vote, followed by the Partido Nacional (National Party, or Blancos) with 30.2 percent and Tabaré Vásquez's Encuentro Progresista (Progressive Encounter) with 30 percent. Rafael Michelini's Nuevo Espacio (New Sector Coalition) received 5 percent. Political Database of the Americas, Georgetown University (http://pdba.georgetown.edu/Elecdata/Uru/uruguay.html).
37. Translation by Roniger and Sznajder (1999, 125).
38. For a more detailed account of the March of Silence, see Roniger and Sznajder (1999, 121, 124, 211–13) and SERPAJ (1997).
39. The ruling by the Tribunal de Apelaciones en lo Penal de 2o Turno was published in full in *La República* on June 14, 1997.
40. It seems likely that the executive in the meantime had established the facts that the military had committed the crimes in question and that the events had taken place prior to March 1, 1985, when the Ley de Caducidad was issued (Ferro Clérico 1998, 19).
41. Dr. Felipe Michelini, member of Parliament and professor of human rights at Universidad de la República, personal communication, July 12, 2001.
42. For a detailed discussion of Chile's roundtable talks, see Chapter 4.
43. Most of the information on this case is taken from Ferro Clérico (1998).
44. Eduardo Pirotto, Madres y Familiares de Uruguayos Detenidos Desaparecidos, interview, Montevideo, April 3, 2001.
45. *Búsqueda,* May 7, 1998, 10.
46. Information on the Gelman case is mainly taken from SERPAJ (2000).
47. From a letter by Sanguinetti to Günter Grass, published on January 29, 2000, cited in SERPAJ (2000, 65–66). My translation.
48. At least three of Sara Méndez's Uruguayan fellow prisoners at the detention center remain missing. Her fate was typical of that of many Uruguayan activists in political or social opposition movements. Between September and October 1976 a second operation to kidnap Uruguayans had taken place in Argentina, where the same military who had been involved in the Sara Méndez case participated. By 2000, 33 of the 62 people kidnapped remained among the disappeared.
49. For details of the agreement between Menem and Sanguinetti to shelter and/or pardon perpetrators of human rights violations

holding Argentine or Uruguayan citizenship, see Roniger and Sznajder (1999, 128).

50. Sentencia No. 93, August 29, 1995 (SERPAJ 1997).
51. *María del Carmen Almeida de Quinteros et al. v. Uruguay,* Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990).
52. La Primera Instancia de lo Contencioso Administrativo de 2o Turno. There are two such administrative courts in Uruguay, both of which are responsible for resolving civilian cases to which the state is a party. The 30-day limit in a *recurso de amparo* was subject to legal debate in this case. See Jubette's Sentencia No. 28, Para Sentencia Definitiva de Primera Instancia, "Almeida de Quinteros Maria del Carmen c/Poder Ejecutivo (Ministerio de Defensa Nacional), Amparo, Ficha 216/99," Montevideo, May 10, 2000. *Recurso de amparo* is a legal action used when all other potential courses of action have been explored and none is available (see Chapter 1, note 17).
53. The five people signing the legal document agreeing to invoke the Ley de Amparo in the Elena Quinteros case were Tota Quinteros (who brought the charge), Pablo Chargonia (the lawyer who presented the case), Estela Jubette (the judge who took the case), and Pablo Mella and German H. Amondaray (lawyers representing the Ministry of Defense).
54. In the first-round elections on October 31, 1999, Jorge Batlle's Partido Colorado received only 32.8 percent of the vote, while Tabaré Vásquez's Encuentro Progresista received 40.1 percent (Luis Alberto Lacalle's Partido Nacional had 22.3 percent and Rafael Michelini's Nuevo Espacio had 4.6 percent). In the November 28, 1999, run-off elections, Batlle got 54.1 percent against Vásquez's 45.9 percent (Area of Politics and International Relations Data Bank, Social Science School, Universidad de la República, http://www.fcs.edu.uy/pri/en/electoral.html).
55. Carlos Ramela, the president's personal adviser, interview, Montevideo, April 5, 2001, and José Claudio Williman, the president's close friend, interview, Montevideo, April 9, 2001. Both Ramela and Williman were members of the Comisión Para la Paz.
56. Familiares, group interview, August 2000.
57. The first DNA test was carried out in Uruguay. President Batlle publicly announced the results on June 5, 2000: it was highly probable (99.2 percent) that the woman living in Montevideo was the granddaughter of the poet Juan Gelman. On June 13, Uruguayan specialist Carlos Azambuja confirmed that a second DNA test done in Paris confirmed with 99 percent certainty that the first test was correct (SERPAJ 2000, 84). The search for Gelman's kidnapped daughter-in-law meanwhile continued. In 2005 her remains were discovered in a mass grave north of Montevideo.

58. Uruguay had a much smaller number of disappeared children than Argentina, though the pain for families was no less real. According to official reports, 13 Uruguayan children were reported missing in Argentina at the beginning of the dictatorship. By 2000, nine of these children had been found and restored to their families. Only four remained missing, including Simón Riquelo. For details see SERPAJ (2000, 97). By contrast, in Argentina the Grandmothers claim more than 400 disappeared grandchildren, around 100 of whom had been identified and restored to their biological families by 2010.
59. My translation. For the full text of the decree in Spanish, see SERPAJ (2000). The text is also available on the website of the president of Uruguay (http://www.presidencia.gub.uy/noticias/archivo/2000/agosto/2000080912.htm).
60. The peace commission was headed by Monseñor Nicolás Domingo Cotugno Fanizzi of the Catholic Church. Other members were José Artigas D'Elía Correa, honorary president of PIT-CNT, the central labor union; Pastor Luis Pérez Aguirre, founder of SERPAJ and spokesperson for the Familiares; José Claudio Williman, a prominent Partido Nacional politician and close personal friend of President Batlle; Gonzalo Fernández, legal expert and adviser to Tabaré Vásquez of the Partido Encuentro Progresista–Frente Amplio, who was Batlle's principal opponent in the presidential campaign; and Carlos Ramela, a legal expert and personal adviser to President Batlle from the Colorado Party. Pérez Aguirre died in a traffic accident in January 2001 and was replaced by Pastor Jorge Osorio. Ramela and Fernández were the official spokespersons. José Claudio Williman, interview, April 9, 2001.
61. The peace commission members agreed that the time frame set for completing the work was too short. Yet Batlle insisted on the deadline to ensure that the commission would work efficiently and not drag out the proceedings. Gonzalo Fernández, Carlos Ramela, and José Claudio Williman, interviews, Montevideo, March 30, April 5, and April 9, 2001, respectively.
62. The Comisión para la Paz also published an interim report (2002).
63. The vast bulk of the information came from Familiares, as they had the most complete archives on the disappeared. This, after all, had been their preoccupation throughout the dictatorship as well as afterwards. SERPAJ, by contrast, had a broader mandate and had focused much of its effort on political prisoners and the executed in preparing the *Nunca Más* report. Eduardo Pirotto, interview, Montevideo, April 2, 2000 (Pirotto, the former SERPAJ president, became a volunteer for Familiares working with the Comisión para la Paz).
64. The exact information would become available only after a new round of DNA tests. See "Se redujo el dolor: Hallaron restos de

10 desaparecidos," *La República,* April 4, 2001; "Identifican restos de dos Uruguayos en Argentina," *El Observador,* April 4, 2001; and "Hallan los primeros restos de desaparecidos Uruguayos," *El País,* April 4, 2001.

65. This information provided by military sources was later proven inaccurate, as at least two bodies were found that had not been scattered. The misinformation was probably a deliberate attempt to discourage further searches. Gabriela Fried, personal communication, January 28, 2010.
66. Gabriela Fried, personal communication, March 25, 2010.
67. Pablo Chargoñia, labor lawyer with PIT-CNT, interview, Montevideo, April 9, 2001.
68. My translation. For more details on the case and the rulings, see SERPAJ (2000, 79).
69. This information was confirmed by human rights lawyer Javier Miranda in an interview, Montevideo, April 5, 2000.
70. The official legal document from the Montevideo Court of Appeals, Case No. 98, May 31, 2000, was authored by Héctor Olagüe García. The unanimous verdict was signed by the three appellate court judges, Sara Bossio Reig, Héctor Olagüe García, and Felipe Hounie, as well as court secretary Elena Celi de Liard.
71. Javier Miranda, interview, April 5, 2001.
72. Pablo Chargoñia, interview, April 9, 2001.
73. Judge Estela Jubette, interview, April 4, 2001.
74. Jubette countered that the date that Elena's mother had presented the case after Pintero had given new evidence to the Supreme Court was unclear. This apparently took place at the end of the year and the judicial holiday started soon after. She therefore chose a liberal interpretation of when the information had been given by Pintero, since the Supreme Court refused to give the exact date for the confession. She asked the Supreme Court for an extension to gather the evidence and was granted one. Judge Estela Jubette, interview, April 4, 2001.
75. Javier Miranda voiced both these objections in an interview, April 5, 2001.
76. Jacinta Balbela, interview, Montevideo, April 6, 2001. Balbela at the time was the only woman to be appointed a Supreme Court judge in the entire democratic history of Uruguay. Another woman served on the Supreme Court under the civilian-military junta in the 1970s, but she was forced to leave her position at the transition in 1985, reportedly because of lack of necessary qualifications.
77. The Uruguayan military made the comment at an official gathering, and it was later quoted by the press. Judge Guzmán's role is discussed in Chapter 4.
78. Exhumations had not occurred yet.

79. Oscar Destouet, professor of history, interview, Montevideo, March 28, 2001.
80. Familiares, group interviews, August 2000 and April 2001.
81. Gonzalo Fernández, Carlos Ramela, and José Claudio Williman, interviews, March 30, April 5, and April 9, 2001, respectively.
82. Eduardo Pirotto, interview, April 3, 2001.
83. Alberto Marchesi, historian, interview, Montevideo, March 27, 2001.
84. Alberto Marchesi, interview, March 27, 2001. Vásquez's personal adviser, Fernández, along with Ramela and Williman, confirmed this. Gonzalo Fernández, interview, March 30, 2001.
85. Dr. Felipe Michelini, interview, Montevideo, March 29, 2001.
86. For information on the Court's judicial review powers, see Calleros (2009, 97) and Hammergren (2007, 187, 197).
87. José Claudio Williman, interview, April 9, 2001. Williman was one of the authors of the Ley de Caducidad.
88. However, in 2006 a false bomb threat was made against the houses of judges who were investigating human rights violations (Mallinder 2009b, 57–58).
89. Sznajder and Roniger (2009) provide a comprehensive analysis of the politics of exile in Latin America and the Uruguayan diaspora in particular. On the subject of exile, see also Barahona de Brito (1997), Fried (2004), and Roniger and Sznajder (1999).
90. Political "opportunity structures," a term borrowed from social movements theory, can be defined as "a consistent dimension of the political environment that provides incentives and constraints for people to undertake collective action by affecting their expectations of success or failure" (Sikkink 2005, 265).
91. Much of the technical information in this section regarding the institutional setup of the Uruguayan justice system comes from Brinks (2008).
92. The criteria for measuring judicial independence obviously matter. Ríos-Figueroa (2006, 67) gives Uruguay low to medium scores on different indicators of autonomy and independence.
93. 1980 Código del Proceso Penal, established by decree in Decreto Ley No. 15.032. This code dating from the dictatorship period was replaced by Codigo del Proceso Penal, Ley No. 16.893 of 1997, but that law has not been implemented. For more information on the Uruguayan code of criminal procedure, see Brinks (2008, 180–84).
94. I thank Javier Miranda for pointing out the obstacle of protection from forced testimony (interview, Montevideo, April 5, 2001).
95. This view is held by, among other informants, human rights lawyer Miranda, labor lawyer Chargoñia, Judge Jubette, and ex–Supreme Court justice Balbela.
96. This, of course, can swing both ways: lower court judges are not bound by sound, or poor, Supreme Court judgments.

97. Jacinta Balbela, Judge Estela Jubette, and Jorge Marabotto, interviews, Montevideo, March–April 2001.
98. The appointment system did not change after the transition. During civilian-military rule, Supreme Court justices were appointed by the military.
99. Javier Miranda, interview, April 5, 2001. I thank Roberto Gargarella for the translation.
100. Eduardo Pirotto, interview, April 3, 2001.
101. Jacinta Balbela and Judge Estela Jubette, interviews, Montevideo, April 2001.
102. Judge Estela Jubette, interview, April 4, 2001.
103. In the presidential elections of October 31, 2004, Tabaré Vásquez (Encuentro Progresista–Frente Amplio–Nueva Mayoría) received 51.7 percent of the vote, followed by Jorge Larrañaga (Partido Nacional) with 35.1, Guillermo Stirling (Partido Colorado) with 10.6, and Pablo Mieres (Partido Independiente) with 1.9 percent (Area of Politics and International Relations Data Bank, Social Science School, Universidad de la República, http://www.fcs.edu.uy/pri/en/electoral.html).
104. After coming to office following the presidential elections of late 1971, Bordaberry dissolved the General Assembly in 1973 and ruled by decree as the first dictator until disagreements with the military led to his ouster before his original term of office had expired. Blanco had already been charged in 2002 with the unlawful imprisonment of Elena Quinteros by judge María del Rosario Berro of the Juzgado Penal after Elena Quintero's mother brought the case to court in November 2000 (SERPAJ 2003). This was the first time anyone had been detained for human rights violations committed during military rule in Uruguay (Amnesty International 2003). Legal proceedings against Blanco in this case continued from 2002 through 2009.
105. "Former Uruguay Leader Detained," Al Jazeera.net, October 18, 2007; "Uruguayan Dictator Guilty of Murder," Al Jazeera.net, October 23, 2009.
106. I thank Gabriela Fried for this information (personal communication, January 28, 2010).
107. Ley No. 18.026, "Cooperación Con la Corte Penal Internacional en Materia de Lucha Contra el Genocidio, los Crímenes de Guerra y de Lesa Humanidad," available on the Uruguayan Parliament website, under "Leyes promulgadas por legislatura: Legislatura 2005–2010 (XLVIa)," no. 18013 (http://www.parlamento.gub.uy/palacio3/abms2/dbtextoleyes/LeyesXLegislatura.asp?Legislatura=46). For progress of the proposal through the domestic political system, see CICC (2006).
108. "Sabalsagaray Curutchet, Blanca Stela. Denuncia, Excepción de Inconstitucionalidad Arts. 1, 3 y 4 de la Ley No 15.848," Ficha

97-397/2004, Sentencia No. 355, Montevideo, October 19, 2009. Preceding the decision, in February 2008, the Uruguayan Parliament (where the Vásquez government had a clear majority in both chambers) had already signaled that it favored declaring the Ley de Caducidad unconstitutional. "Uruguayan Court Throws Out Special Amnesty for Crimes under Dictatorship," MercoPress, October 20, 2009.

109. Raul O. Garces, "Uruguay Supreme Court Rules Out Dirty War Amnesty," Associated Press, October 19, 2009.
110. "Supreme Court Strikes Blow Against Uruguayan Amnesty Law," dpa International, *Earth Times* online, October 20, 2009.
111. This was the sixth general election in Uruguay since the return to democracy in November 1984. The Partido Colorado won in 1984, 1994, and 1999, the Partido Nacional (Blancos) in 1989, and the Frente Amplio in 2004. The Uruguayan electoral system, based on laws dating back to 1924 and 1925, is considered one of the most transparent and fraud-proof in Latin America, as it grants the most guarantees to political parties and voters. "Uruguay Votes for President and a New Parliament on Sunday," MercoPress, October 24, 2009.
112. For the arguments of those campaigning for the referendum, see Rico (2009).
113. Raul O. Garces, "Uruguay Supreme Court Rules Out Dirty War Amnesty," Associated Press, October 19, 2009.
114. Voting is compulsory in Uruguay, and turnout was estimated at 90 percent. Referendum results by department can be found on the website of Electoral Geography 2.0 (http://www.electoralgeography.com), under "Uruguay: Amnesty Law Referendum 2009." Vote totals for the 2009 presidential election come from the Area of Politics and International Relations Data Bank, Social Science School, Universidad de la República (http://www.fcs.edu.uy/pri/en/electoral.html).

## CHAPTER 6: THE INDEPENDENCE OF JUDGES AND POST-TRANSITIONAL JUSTICE

1. Given the fact that the Uruguayan judiciary remains unreformed up to the present and thus scores low on formal indicators of independence, all the post-dictatorship Uruguayan governments are listed on the left-hand side of the table where judges are considered "not independent."
2. This was also the situation toward the end of the Alfonsín government in Argentina, where the judges pushed human rights cases after the transition to democracy and the government tried to limit the scope of prosecutions by issuing two amnesty laws.
3. Judicialization of politics is a worldwide rather than a specifically Latin American trend. Although definitions vary, one of the core meanings is "the process by which courts and judges come to make or increasingly

to dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other governmental agencies, especially legislatures and executives." This "alludes to court-led social change—typically exercised by high courts or specially created constitutional courts" (Tate and Vallinder 1995, cited in Couso 2005, 106).

# References


Abramovich, Víctor, and Christian Courtis. 1997. "Hacia la exibilidad de los derechos económicos, sociales y culturales: Estándares internacionales y criterios de aplicación ante los tribunales locales." In *La aplicación de los tratados internacionales sobre derechos humanos por los tribunales locales,* ed. Martín Abregú and Christian Courtis, 283–350. Buenos Aires: Editoriales del Puerto/CELS.

Abregú, Martín. 1992. "Cría Cuervos." *No Hay Derecho* 3 (8).

Acuña, Carlos H. 2006. "Transitional Justice in Argentina and Chile: A Never-Ending Story?" In *Retribution and Reparation in the Transition to Democracy,* ed. Jon Elster, 206–38. New York: Cambridge University Press.

Acuña, Carlos H., and Catalina Smulovitz. 2001. "Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts." In McAdams 2001, 93–122.

Aguilar, Paloma. 2008. "Transitional or Post-transitional Justice? Recent Developments in the Spanish Case." *South European Society and Politics* 13 (4): 417–33.

Akhavan, Payam. 2001. "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* 95 (7): 7–31.

Alfonsín, Raúl. 1993. "Confronting the Past: 'Never Again' in Argentina." *Journal of Democracy* 4 (1): 15–19.

Amnesty International. 1987. *Argentina: The Military Juntas and Human Rights: Report of the Trial of the Former Junta Members, 1985.* London: Amnesty International.

Amnesty International. 2001. *Chile: Testament to Suffering and Courage: The Long Quest for Justice and Truth.* London: Amnesty International.

Amnesty International. 2002. "2002 Annual Report for Uruguay."

Amnesty International. 2003. "2003 Annual Report for Uruguay."

Amnesty International. 2004. "2004 Annual Report for Uruguay."

Amnesty International. 2006. "2006 Annual Report for Uruguay."

Amnesty International. 2007a. "2007 Annual Report for Uruguay."

Amnesty International. 2007b. "The Case of Simón Riquelo: A 25-year Struggle for Truth and Justice."

Amnesty International. 2007c. "Chile: Fujimori Case: The Supreme Court of Justice Must Comply with Obligations of International Law Contracted by Chile."

Amnesty International. 2008. "2008 Annual Report for Uruguay."
Amnesty International. 2009. "Chile: Ratification of Rome Statute Positive Step, Justice Must Follow." Press release, June 18.
Angell, Alan. 2007. *Democracy After Pinochet: Politics, Parties and Elections in Chile*. London: University of London, Institute for the Study of the Americas.
Banks, Arthur S., and Thomas C. Muller, eds. 1998. *Political Handbook of the World 1998*. Binghamton, NY: CSA Publications.
Barahona de Brito, Alexanda. 1992. "A Comparative Study of Truth Telling in the Southern Cone: The 'Never Again' Reports of Brazil, Argentina and Uruguay and the Informe Rettig of Chile in the Transition from Military Rule to Democratic Rule." PhD dissertation, University of Oxford.
Barahona de Brito, Alexanda. 1997. *Human Rights and Democratization in Latin America: Uruguay and Chile*. New York: Oxford University Press.
Becker, David G. 1999. "Latin America: Beyond 'Democratic Consolidation.' " *Journal of Democracy* 10 (2): 138–51.
Bell, Christine. 2009. "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field.' " *International Journal of Transitional Justice* 3 (1): 5–27.
Bickford, Louis N. 1998. "Democracy, Stakeholdership, and Public Policy-Making in Chile, 1990–1997: The Case of Judicial Reform." Paper presented at the XXI International Congress of the Latin American Studies Association, Chicago, September 24–26.
Bickford, Louis N. 2000. "Human Rights Archives and Research on Historical Memory: Argentina, Chile, and Uruguay." *Latin American Research Review* 35 (2): 160–82.
Biebesheimer, Christina. 2001. "Justice Reform in Latin America and the Caribbean: The IDB Perspective." In Domingo and Sieder 2001, 99–141.
Blank, Theodore. 2007. "Measuring Transitional Justice in Latin America." Centre for Security and Defence Studies, Carleton University, Ottawa.
Boeninger, Edgardo. 1997. "Latin America's Multiple Challenges." In Diamond, Plattner, and Tien 1997, 26–63.
Booth, John A., Christine J. Wade, and Thomas W. Walker. 2006. *Understanding Central America: Global Forces, Rebellion, and Change*. 4th ed. Boulder, CO: Westview Press.
Bratton, Michael, and Nicolas van de Walle. 1997. *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*. New York: Cambridge University Press.
Brett, Sebastian. 2008. *The Pinochet Effect: Ten Years On from London 1998*. Report of a conference held at Universidad Diego Portales, Santiago, October 8–10. Ed. Cath Collins. Santiago: Universidad Diego Portales.
Brinks, Daniel. 2005. "Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?" *Texas International Law Journal* 40 (3): 595–622.

Brinks, Daniel. 2008. *The Judicial Response to Police Killings in Latin America: Inequality and the Rule of Law*. New York: Cambridge University Press.

Brody, Reed, and Felipe González. 1997. "Nunca Mas: An Analysis of International Instruments on 'Disappearances.' " *Human Rights Quarterly* 19 (2): 365–405.

Brown, Andrew S. 2002. "Adiós Amnesty: Prosecutorial Discretion and Military Trials in Argentina." *Texas International Law Journal* 37: 203–25.

Burns, Jimmy. 1987. *The Land that Lost its Heroes: Argentina, the Falklands and Alfonsín*. London: Bloomsbury.

Buscaglia, Edgardo Jr., Maria Dakolias, and William Ratliff. 1995. *Judicial Reform in Latin America: A Framework for National Development*. Palo Alto, CA: Stanford University Press.

Calleros, Juan Carlos. 2009. *The Unfinished Transition to Democracy in Latin America*. New York: Routledge.

Cámara Nacional de Apelaciones en lo Criminal y Correccional de la Capital Federal. 1985. *El libro de el diario del juicio*. Buenos Aires: Editorial Perfil.

Cámara Nacional de Apelaciones en lo Criminal y Correccional de la Capital Federal. 1987. *Texto completo de la sentencia dictada el 9 de diciembre de 1985 por la excelentísima Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal en la causa 13 del año 1984 seguida al Tte. Gral. (r) Jorge Rafael Videla* . . . [et al.]. 2 vols. Buenos Aires: Congreso de la Nación.

Carothers, Thomas. 2001. "The Many Agendas of Rule of Law Reform in Latin America." In Domingo and Sieder 2001, 4–16.

Catterberg, Edgardo. 1991. *Argentina Confronts Politics: Political Culture and Public Opinion in the Argentine Transition to Democracy*. Boulder, CO: Lynne Rienner.

CEH (Comisión para el Esclarecimiento Histórico). 1999. *Guatemala: Memoria del Silencio: Informe de la Comisión para el Esclarecimiento Histórico*. Guatemala City: F&G Editores.

CELS (Centro de Estudios Legales y Sociales). 1995. *Informe Annual 1995*. Buenos Aires: Eudeba.

CELS (Centro de Estudios Legales y Sociales). 1996. *Informe Annual 1996*. Buenos Aires: Eudeba.

CELS (Centro de Estudios Legales y Sociales). 1998. *Informe Annual 1998*. Buenos Aires: Eudeba.

CELS (Centro de Estudios Legales y Sociales). 2000. *Informe Annual 2000*. Buenos Aires: Eudeba.

CEME (Centro de Estudios Miguel Enríquez). 2009. "Lagos Nilsson, Gloria Esther." Archivo Chile. http://www.archivochile.com/Memorial/caidos_mir/L/lagos_nilsson_gloria.pdf.

Chapman, Audrey R., and Hugo van der Merwe, eds. 2008. *Truth and Reconciliation in South Africa: Did the TRC Deliver?* Philadelphia, PA: University of Pennsylvania Press.

Cheyre, General Juan Emilio. 2004. "Ejército de Chile: El fin de una visión." Reprinted in *La Nación*, November 5. http://www.lanacion.cl/prontus_noticias/site/artic/20041105/pags/20041105090447.html.

Chilean Human Rights Commission. 1992. *Summary of the Truth and Reconciliation Commission Report*. Santiago: Chilean Human Rights Commission and Centro IDEAS, Ministry of Foreign Affairs.

CICC (Coalition for the International Criminal Court). 2006. "Uruguay Is the First Latin American Country to Fully Implement ICC Treaty into Domestic Law." Press release, October 31.

CNVR (Comisión Nacional de Verdad y Reconciliación). 1991. *Informe de la Comisión Nacional de Verdad y Reconciliación*. 3 vols. Santiago: Gobierno de Chile, Secretaría de Comunicación y Cultura, Ministerio Secretaría General de Gobierno.

Collins, Cath. 2010a. "Human Rights Trials in Chile during and after the 'Pinochet Years.' " *International Journal of Transitional Justice* 4 (1): 67–86.

Collins, Cath. 2010b. *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador*. University Park, PA: Penn State University Press.

Comisión Nacional Sobre Prisión Política y Tortura. 2005. *Informe de la Comisión Nacional Sobre Prisión Política y Tortura*. Santiago: Gobierno de Chile, Ministerio del Interior.

Comisión para la Paz. 2002. *Informe preliminar: Comisión para la Paz*. Montevideo: Presidencia de la República. Reprinted in *La República* and *Búsqueda*, October 31, 2002. http://www.uc.org.uy/d1002.htm.

Comisión para la Paz. 2003. *Informe final de la Comisión Para la Paz: Uruguay*. Montevideo: Presidencia de la República.

CONADEP (Comision Nacional sobre la Desaparicion de Personas). 1991. *Nunca Más: Informe de la Comisión Nacional Sobre la Desaparición de Personas*. 16th ed. Buenos Aires: Editorial Universitaria de Buenos Aires. Orig. pub. 1984.

Constable, Pamela, and Arturo Valenzuela. 1991. *A Nation of Enemies: Chile Under Pinochet*. New York: W.W. Norton.

Corey, Allison, and Sandra F. Joireman. 2004. "Retributive Justice: The *Gacaca* Courts in Rwanda." *African Affairs* 103: 73–89.

Correa Sutil, Jorge. 1997. " 'No Victorious Army Has Ever Been Prosecuted . . .': The Unsettled Story of Transitional Justice in Chile." In *Transitional Justice and the Rule of Law in New Democracies,* ed. A. James McAdams, 123–54. Notre Dame, IN: University of Notre Dame Press.

Correa Sutil, Jorge. 1999. "Judicial Reforms in Latin America: Good News for the Underprivileged?" In Méndez, O'Donnell, and Pinheiro 1999, 255–77.

Couso, Javier. 2004. "The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990–2002." In Gloppen, Gargarella, and Skaar, 70–91.

Couso, Javier. 2005. "The Judicialization of Chilean Politics: The Rights Revolution that Never Was." In Sieder, Schjolden, and Angell 2005, 105–29.

Couso, Javier. 2010. "The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America." In Couso, Huneeus, and Sieder 2010, 141–60.

Couso, Javier, Alexandra Huneeus, and Rachel Sieder, eds. 2010. *Cultures of Legality: Judicialization and Political Activism in Latin America*. New York: Cambridge University Press.

Crenzel, Emilio. 2008. "Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice." *International Journal of Transitional Justice* 2: 173–91.

Cross, Frank B. 1999. "The Relevance of Law in Human Rights Protection." *International Review of Law and Economics* 19 (1): 87–98.

CVES (Comisión de la Verdad para El Salvador). 1993. De la locura a la esperanza: La guerra de 12 años en El Salvador: Informe de la Comisión de la Verdad para El Salvador (1992–1993). San Salvador: Editorial Arcoiris. Available in English at http://www.derechos.org/nizkor/salvador/informes/truth.html.

CVR (Comisión de la Verdad y Reconciliación). 2003. *Informe de la Comisión de la Verdad y Reconciliación*. 9 vols. Lima: CVR. http://www.cverdad.org.pe/ifinal/index.php. Available in English at http://www.usip.org/resources/truth-commission-peru-01.

Dakolias, Maria. 1995. "A Strategy for Judicial Reform: The Experience in Latin America." *Virginia Journal of International Law* 36 (1): 167–231.

Dakolias, Maria. 1996. "The Judicial Sector in Latin America and the Caribbean: Elements of Reform." Technical Paper 319, World Bank, Washington, D.C.

Diamond, Larry. 1999. *Developing Democracy: Toward Consolidation*. Baltimore, MD: Johns Hopkins University Press.

Diamond, Larry, and Marc F. Plattner, eds. 1993. *The Global Resurgence of Democracy*. Baltimore, MD: Johns Hopkins University Press.

Diamond, Larry, Marc F. Plattner, Yun-han Chu, and Hung-mao Tien, eds. 1997. *Consolidating the Third Wave Democracies*. Baltimore, MD: Johns Hopkins University Press.

Domingo, Pilar. 1999. "Judicial Independence and Judicial Reform in Latin America." In Schedler, Diamond, and Plattner 1999, 151–75.

Domingo, Pilar. 2010. "Rule of Law Reform, Accountability and Transitional Justice in Latin America." Unpublished paper.

Domingo, Pilar, and Rachel Sieder, eds. 2001. *Rule of Law in Latin America: The International Promotion of Judicial Reform*. London: Institute of Latin American Studies, University of London.

Drake, Paul, and Iván Jaksic, eds. 1999. *El modelo chileno: Democracia y desarrollo en los noventa*. Santiago: Editorial LOM.

Epp, Charles. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago, IL: University of Chicago Press.

Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, D.C.: Congressional Quarterly Press.

Equipo Nizkor. 1997. "Tensa situación en Uruguay entre el poder legislativo y el Ejército." Madrid. http://www.derechos.org/nizkor/uruguay/doc/zanahoria.html.

Equipos Consultores. 1984. "Informe Mensual No. 3." December. Montevideo.

Espinoza, Manuel José Cepeda. 2005. "The Judicialization of Politics in Colombia: The Old and the New." In Sieder, Schjolden, and Angell 2005, 67–103.

Fagen, Patricia Weiss. 1992. "Repression and State Security." In *Fear at the Edge: State Terror and Resistance in Latin America*, ed. J. E. Corradi, Patricia Weiss Fagen, and Manuel Antonio Garretón, 39–71. Berkeley, CA: University of California Press.

Faundez, Julio. 2005. "Democratization Through Law: Perspectives from Latin America." *Democratization* 12 (5): 749–65.

Faundez, Julio. 2007. *Democratization, Development, and Legality: Chile, 1831–1973*. New York: Palgrave Macmillan.

Faundez, Julio. 2010. "Chilean Constitutionalism before Allende: Legality without Courts." *Bulletin of Latin American Research* 29 (1): 35–50.

Ferro Clérico, Lilia E. 1998. "Conjugando el pasado: El debate actual en Uruguay sobre los detenidos desaparecidos durante la dictadura." In collaboration with Diego Escuder. Paper presented at the XXI International Congress of the Latin American Studies Association, Chicago, September 24–26.

Finkel, Jodi. 1999. "Judicial Reform in Latin America: Market Economies, Self-Interested Politicians, and Judicial Independence." Paper presented at the annual meeting of the American Political Science Association, Atlanta, September 2–5.

Finkel, Jodi. 2004. "Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change." *Latin American Research Review* 39 (3): 56–80.

Fiss, Owen M. 1993. "The Right Degree of Independence." In Stotzky 1993, 55–72.

Frankel, Marvin E. 1993. "Concerning the Role the Judiciary May Serve in the Proper Functioning of a Democracy." In Stotzky 1993, 23–33.

Freedom House. 1999. *Freedom in the World, 1998–1999: The Annual Survey of Political Rights and Civil Liberties*. New Brunswick, NJ: Transaction Publishers.

Fried Amilivia, Gabriela. 2004. "The Dynamics of Transmissions of Traumatic Experience among Uruguayan Families of the Disappeared, Political Prisoners and Exiles in the Era of State Repression, 1973–1985." PhD dissertation, Department of Sociology, University of California, Los Angeles.

Frühling E., Hugo, ed. 1991. *Derechos humanos y democracia: La contribución de las organizaciones no gubernamentales*. Santiago: Instituto Interamericano de Derechos Humanos.

Frühling E., Hugo. 1992. "Resistance to Fear in Chile: The Experience of the Vicaría de la Solidaridad." In *Fear at the Edge: State Terror and Resistance in Latin America,* ed. Juan E. Corradi, Patricia Weiss Fagen, and Manuel Antonio Garretón, 121–41. Berkeley, CA: University of California Press.

Frühling E., Hugo. 1998. "Judicial Reform and Democratization in Latin America." In *Fault Lines of Democracy in Post-Transition Latin America,* ed. Felipe Agüero and Jeffrey Stark, 237–62. Miami: North-South Center Press, University of Miami.

Fuentes, Claudio. 2006. La transición de los militares: Relaciones civiles-militares en Chile, 1990–2006. Santiago: LOM Ediciones.

Galleguillos, Nibaldo H. 2001. "Judicial and Legal Reforms in the Democratic Transition: An Assessment of the Changing Roles of the Judiciary in Chile." Paper presented at the XXIII International Congress of the Latin American Studies Association, Washington, D.C., September 6–9.

Gamarra, Ronald. 2009. "A Leader Takes Flight: The Indictment of Alberto Fujimori." In Lutz and Reiger 2009, 95–110.

García-Godos, Jemima. 2008. "Victim Reparations in the Peruvian Truth Commission and the Challenge of Historical Interpretation." *International Journal of Transitional Justice* 2 (1): 63–82.

Gargarella, Roberto, Pilar Domingo, and Theunis Roux, eds. 2006. *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* Burlington, VT: Ashgate.

Garretón, Manuel Antonio. 1989. *The Chilean Political Process.* Boston, MA: Unwin Hyman.

Garretón, Manuel Antonio. 1992. "Fear in Military Regimes: An Overview." In *Fear at the Edge: State Terror and Resistance in Latin America,* ed. Juan E. Corradi, Patricia Weiss Fagen, and Manuel Antonio Garretón, 13–25. Berkeley, CA: University of California Press.

Garrido, Carlos Manuel. 1994. "Informe sobre Argentina." In *Situación y políticas judiciales en América Latina: Cuadernos de análisis jurídico,* ed. Jorge Correa Sutil, 31–120. Santiago: Escuela de Derecho, Universidad Diego Portales.

Garro, Alejandro M. 1993. "Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?" *Colombia Journal of Transnational Law* 31 (1): 1–102.

Garro, Alejandro M. 2000. "Staffing the Judiciary and Prosecutorial Offices in Argentina: Trials and Tribulations in Search of Merit, Integrity, and Accountability." *Southwestern Journal of Law and Trade in the Americas* 7: 349–68.

Geddes, Barbara. 1994. *Politician's Dilemma: Building State Capacity in Latin America*. Berkeley, CA: University of California Press.

Gloppen, Siri. 2002. *Reconciliation and Democratisation: Outlining the Research Field*. CMI Report R 2002:5. Bergen, Norway: Chr. Michelsen Institute.

Gloppen, Siri, Roberto Gargarella, and Elin Skaar, eds. 2004. *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*. London: Frank Cass.

Gloppen, Siri, Bruce Wilson, Roberto Gargarella, Elin Skaar, and Morten Kinander. 2010a. "Accountability Functions of Courts: A Framework for Inquiry." In Gloppen, Wilson, Gargarella, Skaar, and Kinander 2010b, 11–34.

Gloppen, Siri, Bruce Wilson, Roberto Gargarella, Elin Skaar, and Morten Kinander. 2010b. *Courts and Power in Latin America and Africa*. New York: Palgrave Macmillan.

Goldman, Robert K. 1989. *Challenging Impunity: The Ley de Caducidad and the Referendum Campaign in Uruguay*. New York: Americas Watch.

Guembe, María José. 2005. "Reopening of Trials for Crimes Committed by the Argentine Military Dictatorship." *Sur: Revista Internacional de Direitos Humanos* 2 (3): 120–37.

Guembe, María José. 2006. "Economic Reparations for Grave Human Rights Violations: The Argentinean Experience." In *The Handbook on Reparations,* ed. Pablo de Greiff, 21–54. New York: Oxford University Press.

Guest, Iain. 1990. *Behind the Disappearances: Argentina's Dirty War Against Human Rights and the United Nations*. Philadelphia, PA: University of Pennsylvania Press.

Hamilton, Alexander. 1788. "The Federalist No. 78." In *The Federalist: A Commentary on the Constitution of the United States*, by Alexander Hamilton, John Jay, and James Madison. Reprinted, New York: Modern Library, 2000.

Hammergren, Linn A. 1998. *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective*. Boulder, CO: Westview Press.

Hammergren, Linn A. 2002. "Fifteen Years of Judicial Reform in Latin America: Where We Are and Why We Haven't Made More Progress." Program on Governance in the Arab Region, United Nations Development Programme. http://www.undp-pogar.org/publications/judiciary/linn2/index.html#top.

Hammergren, Linn A. 2007. *Envisioning Reform: Improving Judicial Performance in Latin America*. University Park, PA: Penn State University Press.

Haro, Ricardo. 1998. "El Consejo de la Magistratura y el Jurado de Enjuiciamiento en el actual ordenamiento institucional Argentino." Paper presented at Congreso de Academias Iberoamericanas de Derecho, Córdoba, Argentina, October 17.

Hayner, Priscilla B. 1994. "Fifteen Truth Commissions—1974 to 1994: A Comparative Study." *Human Rights Quarterly* 16 (4): 597–655.

Hayner, Priscilla B. 2001. *Unspeakable Truths: Confronting State Terror and Atrocity*. New York: Routledge.

Helmke, Gretchen. 2002. "The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy." *American Political Science Review* 96 (2): 291–303.

Helmke, Gretchen. 2005. *Courts under Constraints: Judges, Generals, and Presidents in Argentina*. New York: Cambridge University Press.

Helmke, Gretchen, and Frances Rosenbluth. 2009. "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective." *Annual Review of Political Science* 12: 345–66.

Henríquez, Helia. 1980. "La crisis del estado y el poder judicial en Chile." Unpublished paper.

Hilbink, Lisa. 2007. *Judges beyond Politics and Dictatorship: Lessons from Chile*. New York: Cambridge University Press.

Huneeus, Alexandra. 2009. "Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn." University of Wisconsin Legal Studies Research Paper 1084, University of Wisconsin Law School, Madison.

Huneeus, Alexandra, Javier Couso, and Rachel Sieder. 2010. "Cultures of Legality: Judicialization and Political Activism in Contemporary Latin America." In Couso, Huneeus, and Sieder 2010, 3–21.

Hunter, Wendy. 1997. "Continuity or Change? Civil-Military Relations in Democratic Argentina, Chile, and Peru." *Political Science Quarterly* 112 (3): 435–75.

Hunter, Wendy. 1998. "Negotiating Civil-Military Relations in Post-authoritarian Argentina and Chile." *International Studies Quarterly* 42 (2): 295–317.

Huntington, Samuel P. 1991. *The Third Wave: Democratization in the Late Twentieth Century*. New York: Cambridge University Press.

Huyse, Luc, and Mark Salter, eds. 2008. *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*. Stockholm: International IDEA (Institute for Democracy and Electoral Assistance).

ICTJ (International Center for Transitional Justice). 2009. "World Report: Americas." *Transitions: Transitional Justice News from Around the World*. October. http://www.ictj.org/images/content/1/7/1714.pdf.

Jarquín, Edmundo, and Fernando Carrillo, eds. 1998. *Justice Delayed: Judicial Reform in Latin America*. Washington, D.C.: Inter-American Development Bank.

Kahn, Paul W. 1993. "Independence and Responsibility in the Judicial Role." In Stotzky 1993, 73–87.

Kapiszewski, Diana, and Matthew M. Taylor. 2008. "Doing Courts Justice? Studying Judicial Politics in Latin America." *Perspectives on Politics* 6: 741–67.

Karl, Terry Lynn, and Philippe C. Schmitter. 1991. "Modes of Transition in Latin America, Southern and Eastern Europe." *International Social Science Journal* 128: 269–89.

Keith, Linda Camp. 2002. "Judicial Independence and Human Rights Protection around the World." *Judicature* 85 (4): 195–200.

Kritz, Neil, ed. 1995. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes.* 3 vols. Washington, D.C.: United States Institute of Peace Press.

Lafontaine, Fannie. 2005. "No Amnesty or Statute of Limitation for Enforced Disappearances: The *Sandoval* Case before the Supreme Court of Chile." *Journal of International Criminal Justice* 3: 469–84.

Lagos, Ricardo. 2003. "Mensaje al país al dar a conocer propuesta en materia de derechos humanos 'No hay mañana sin ayer.' " Ministerio del Interior, Subsecretaria del Interior, Programa de Derechos Humanos, Santiago. http://www.ddhh.gov.cl/propuesta_mensaje.html.

Landfried, Christine. 1994. "The Judicialization of Politics in Germany." *International Political Science Review* 15 (2): 113.

Langer, Máximo. 2001. "Reforms to the Criminal Justice Systems in the Nineties in Latin America: A Real Break with Authoritarian Legal Practices?" Paper presented at the XXI International Congress of the Latin American Studies Association, Washington, D.C., September 6–8.

Langtry, Lillie. 2009. "Chile: National Day to Commemorate Political Victims." Memory in Latin America, October 31. http://memoryinlatinamerica.blogspot.com/2009/10/chile-national-day-to-commemorate.html.

Larkins, Christopher M. 1996. "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis." *American Journal of Comparative Law* 44 (4): 605–26.

Larkins, Christopher M. 1998. "The Judiciary and Delegative Democracy in Argentina." *Comparative Politics* 30 (4): 423–42.

Lawyers Committee for Human Rights. 2000. *Building on Quicksand: The Collapse of the World Bank's Judicial Reform Project in Peru.* New York. http://www.humanrightsfirst.org/pubs/descriptions/perubuilding.aspx.

Levit, Janet Koven. 1998. "The Constitutionalization of Human Rights in Argentina: Problem or Promise?" *Columbia Journal of Transnational Law* 37 (1): 281–355.

Linz, Juan J., and Alfred Stepan, eds. 1996. *Problems of Democratic Transitions and Consolidation: Southern Europe, South America, and Post-Communist Europe.* Baltimore, MD: Johns Hopkins University Press.

Lira, Elizabeth. 2001. "La mesa de diálogo de derechos humanos." Paper presented at the XXI International Congress of the Latin American Studies Association, Washington, D.C., September 6–8.

Lira, Elizabeth, and Brian Loveman. 1999. "Derechos humanos en la transición 'modelo': Chile 1988–1999." In *El modelo chileno: Democracia y desarrollo en los noventa,* ed. Paul Drake and Iván Jaksic, 339–74. Santiago: LOM Ediciones.

Llanos, Mariana, and Constanza Figueroa Schibber. 2008. "El Presidente y el Senado frente a los nombramientos del Poder Judicial en la Argentina democrática (1983–2007)." *Desarrollo Económico* 47 (188): 607–37.

Lutz, Ellen, and Caitlin Reiger, eds. 2009. *Prosecuting Heads of State.* New York: Cambridge University Press.

Lutz, Ellen, and Kathryn Sikkink. 2001. "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials." *Chicago Journal of International Law* 2 (1): 1–33.

Maier, Julio B. J. 1987a. "Desobediencia Debida (A propósito de la llamada ley de 'obediencia debida')." *Separata de Doctrina Penal* 38: 239–43.

Maier, Julio B. J. 1987b. "El Proyecto de 'Punto Final.' " *Separata de Doctrina Penal* 37: 141–62.

Mainwaring, Scott, Guillermo O'Donnell, and J. Samuel Valenzuela, eds. 1992. *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective*. Notre Dame, IN: University of Notre Dame Press.

Mainwaring, Scott, and Christopher Welna, eds. 2003. *Democratic Accountability in Latin America*. New York: Oxford University Press.

Malamud-Goti, Jaime. 1990. "Transitional Governments in the Breach: Why Punish State Criminals?" *Human Rights Quarterly* 12 (1): 1–16.

Malamud-Goti, Jaime. 1991. "Punishment and a Rights-Based Democracy." *Criminal Justice Ethics* 10 (2): 3–13.

Malamud-Goti, Jaime. 1998a. "Dignity, Vengeance, and Fostering Democracy." *University of Miami Inter-American Law Review* 29 (3): 417–50.

Malamud-Goti, Jaime. 1998b. "State Terror and Memory of What?" *University of Arkansas at Little Rock Law Review* 21 (1): 107–18.

Mallinder, Louise. 2008. *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*. Oxford, UK: Hart.

Mallinder, Louise. 2009a. "The Ongoing Quest for Truth and Justice: Enacting and Annulling Argentina's Amnesty Laws." Working Paper 5 from "Beyond Legalism: Amnesties, Transition and Conflict Transformation," Institute of Criminology and Criminal Justice, Queen's University Belfast.

Mallinder, Louise. 2009b. "Uruguay's Evolving Experience of Amnesty and Civil Society's Response." Working Paper 4 from "Beyond Legalism: Amnesties, Transition and Conflict Transformation," Institute of Criminology and Criminal Justice, Queen's University Belfast.

Matus, Alejandra. 1999. *El libro negro de la justicia chilena*. Buenos Aires: Editorial Planeta.

McAdams, A. James, ed. 2001. *Transitional Justice and the Rule of Law in New Democracies*. 2nd ed. Notre Dame, IN: University of Notre Dame Press.

Mendeloff, David. 2009. "Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice." *Human Rights Quarterly* 31 (3): 592–623.

Méndez, Juan E., Guillermo O'Donnell, and Paulo Sérgio Pinheiro, eds. 1999. *The (Un)Rule of Law and the Underprivileged in Latin America*. Notre Dame, IN: University of Notre Dame Press.

Michelini, Felipe. 2000. "Las comisiones de la verdad en el Cono Sur: Una perspectiva desde el año 2000." In *Homenaje a Emilio Mignone*. Buenos Aires: Instituto Interamericano de Derechos Humanos/Centro de Estudios Legales y Sociales (CELS).

Mignone, Emilio F. 1996. "Argentina: Los desafíos del fin del siglo." In *¿. . . Y Ahora Qué? Desafíos para el trabajo por los derechos humanos en América Latina,* ed. C. I. Basombrío, 207–24. La Paz: Diakonía Acción Ecuménica Sueca.

Miller, Jonathan M. 2000. "Evaluating the Argentine Supreme Court Under Presidents Alfonsín and Menem (1983–1999)." *Southwestern Journal of Law and Trade in the Americas* 7: 369–433.

Minnow, Martha. 1998. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston, MA: Beacon Press.

Montes, J. Esteban, and Tomás Vial. 2005. *The Role of Constitution-Building Processes in Democratization: Case Study Chile*. Stockholm: International IDEA (Institute for Democracy and Electoral Assistance).

Moustafa, Tamir. 2003. "Law Versus the State: The Judicialization of Politics in Egypt." *Law & Social Inquiry* 28: 883–930.

Nino, Carlos Santiago. 1991. "The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina." *Yale Law Journal* 100 (8): 2619–40.

Nino, Carlos Santiago. 1992. "The Debate over Constitutional Reform in Latin America." *Fordham International Law Journal* 16 (3): 635–51.

Nino, Carlos Santiago. 1996. *Radical Evil on Trial*. New Haven, CT: Yale University Press.

Nosiglia, Julio E. 1997. *Botín de Guerra*. Buenos Aires: Editorial La Página.

OAS (Organization of American States). 1994. "The Improvement of the Administration of Justice in the Americas: Protection and Guarantees for Judges and Lawyers in Exercise of their Functions." Inter-American Juridical Committee, OAS, Rio de Janeiro.

O'Donnell, Guillermo. 1999a. "Horizontal Accountability in New Democracies." In Schedler, Diamond, and Plattner 1999, 29–51.

O'Donnell, Guillermo. 1999b. "Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion." In Méndez, O'Donnell, and Pinheiro 1999, 303–37.

Orellana, Patricio, and Elizabeth Quay Hutchison. 1991. *El movimiento de derechos humanos en Chile 1973–1990*. Santiago: CEPLA.

Oren, Laura. 2001. "Righting Child Custody Wrongs: The Children of the 'Disappeared' in Argentina." *Harvard Human Rights Journal* 14 (Spring): 123–95.

Osiel, Mark J. 1995. "Dialogue with Dictators: Judicial Resistance in Argentina and Brazil." *Law & Social Inquiry* 20 (2): 481–560.

Panizza, Francisco. 1995. "Human Rights in the Process of Transition and Consolidation of Democracy in Latin America." *Political Studies* 43: 168–88.

PIDH (Proyecto Internacional de Derechos Humanos). 2009. "Osvaldo Enrique Romo Mena 'Guaton Romo.'" Memoria Viva digital archive. http://www.memoriaviva.com/culpables/criminales%20r/romo.htm.

Pion-Berlin, David. 1994. "To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone." *Human Rights Quarterly* 16 (1): 105–30.

Pion-Berlin, David, and Craig Arceneaux. 1998. "Tipping the Civil-Military Balance: Institutions and Human Rights Policy in Democratic Argentina and Chile." *Comparative Political Studies* 31 (5): 633–61.

PIT-CNT (Plenario Intersindical de Trabajadores-Convención Nacional de Trabajadores). 2000. "Resoluciones de la Mesa Representativa del PIT/CNT del 24/07/00." Ed. Pablo Chargoñia. Montevideo.

Plattner, Marc F. 1999. "Traditions of Accountability." In Schedler, Diamond, and Plattner 1999, 63–67.

Popkin, Margaret. 2000. *Peace Without Justice: Obstacles to Building the Rule of Law in El Salvador*. University Park, PA: Penn State University Press.

Powell, Emilia Justyna, and Jeffrey K. Staton. 2009. "Domestic Judicial Institutions and Human Rights Treaty Violation." *International Studies Quarterly* 53 (1): 149–74.

Prillaman, William C. 2000. *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*. Westport, CT: Praeger.

Programa de Derechos Humanos. 2010. "Línea cronológica del programa: De la Comisión Nacional de Verdad y Reconciliación al Programa de Derechos Humanos." Ministerio del Interior, Subsecretaria del Interior, Santiago. http://www.ddhh.gov.cl/historia_programa.html.

Quezada C., Hernán. 2002. "The Carlos Prats Case: An Historic Trial." Memória y Justicia. http://www.memoriayjusticia.cl/english/en_focus-carlosprats.htm.

Rabkin, Rhoda. 1992. "The Aylwin Government and 'Tutelary' Democracy: A Concept in Search of a Case?" *Journal of Interamerican Studies and World Affairs* 34 (4): 119–94.

Ramseyer, J. Mark. 1994. "The Puzzling (In)Dependence of Courts: A Comparative Approach." *Journal of Legal Studies* 23 (2): January 1994, 721–47.

Redress Trust. 2009. *Observations to the Committee Against Torture for the Consideration of the Fifth Periodic Report Submitted by Chile*. London: Redress Trust.

Rico, Alvaro. 2009. "Represión y exterminio de uruguayos en la dictadura: Razones para la anulación de la ley de caducidad." Taller de Estudios Laborales, Buenos Aires, October 14. http://www.tel.org.ar/spip/spip.php?article21. Originally published in *Brecha*, October 9, 2009.

Ríos-Figueroa, Julio. 2006. "Judicial Independence: Definition, Measurement, and Its Effects on Corruption: An Analysis of Latin America." PhD dissertation, Department of Politics, New York University.

Ríos-Figueroa, Julio, and Jeffrey K. Staton. 2009. "Unpacking the Rule of Law: A Review of Judicial Independence Measures." División de Estudios Políticos, Centro de Investigacion y Docencia Economicas (CIDE), Mexico City; Department of Political Science, Emory University, Atlanta.

Risse, Thomas, Stephen C. Ropp, and Kathryn Sikkink, eds. 1999. *The Power of Human Rights: International Norms and Domestic Change*, 382. New York: Cambridge University Press.

Roht-Arriaza, Naomi, ed. 1995. *Impunity and Human Rights in International Law and Practice*. New York: Oxford University Press.

Roht-Arriaza, Naomi 2004. "Reparations in the Aftermath of Repression and Mass Violence." In *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity,* ed. Eric Stover and Harvey M. Weinstein, 121–39. New York: Cambridge University Press.

Roht-Arriaza, Naomi. 2005. *The Pinochet Effect: Transnational Justice in the Age of Human Rights.* Philadelphia, PA: University of Pennsylvania Press.

Roht-Arriaza, Naomi. 2009a. "The Multiple Prosecutions of Augusto Pinochet." In Lutz and Reiger 2009, 77–94.

Roht-Arriaza, Naomi. 2009b. "Prosecutions of Heads of State in Latin America." In Lutz and Reiger 2009, 46–76.

Roht-Arriaza, Naomi, and Javier Mariezcurrena, eds. 2006. *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice.* New York: Cambridge University Press.

Roniger, Luis. 1997. "Human Rights Violations and the Reshaping of Collective Identities in Argentina, Chile and Uruguay." *Social Identities* 3 (2): 221–46.

Roniger, Luis, and Mario Sznajder. 1999. *The Legacy of Human Rights Violations in the Southern Cone: Argentina, Chile, and Uruguay.* New York: Oxford University Press.

Rosenn, Keith S. 1987. "The Protection of Judicial Independence in Latin America." *University of Miami Inter-American Law Review* 19 (1): 1–35.

Rotberg, Robert I., and Dennis Thompson, eds. 2000. *Truth v. Justice: The Morality of Truth Commissions.* Princeton, NJ: Princeton University Press.

Rozitchner, León. 1985. *Las Malvinas: De guerra "sucia" a la guerra "limpia."* Buenos Aires: Centro Editor de América Latina.

Sabsay, Daniel A., and José M. Onaindia. 1998. *La Constitución de los Argentinos: Análisis y comentario de su texto luego de la reforma de 1994.* 4th ed. Buenos Aires: Errepar.

Sadat, Ladat Nadya. 2004. "Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable." In *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law,* ed. Stephen Macedo, 193–213. Philadelphia, PA: University of Pennsylvania Press.

Sáez García, Felipe. 1998. "The Nature of Judicial Reform in Latin America and Some Strategic Considerations." *American University International Law Review* 13 (5): 1267–1325.

Salas, Luis. 2001. "From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America." In Domingo and Sieder 2001, 17–46.

Sarles, Margaret. 2001. "USAID's Support of Justice Reform in Latin America." In Domingo and Sieder 2001, 47–79.

Schedler, Andreas, Larry Diamond, and Marc F. Plattner, eds. 1999. *The Self-Restraining State: Power and Accountability in New Democracies.* Boulder, CO: Lynne Rienner.

Schiffrin, Leopoldo. 1997. "La primacía del derecho internacional sobre el derecho argentino." In *La aplicación de los tratados internacionales sobre*

*derechos humanos por los tribunales locales,* ed. Martín Abregú and Christian Courtis, 115–25. Buenos Aires: Editoriales del Puerto/CELS.

Schor, Miguel. 2000. "The Rule of Law and Democratic Consolidation in Latin America." Unpublished paper.

Segal, Jeffrey Allan, and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.

Semino, Miguel Angel. 1988. *Paz Uruguaya*. Montevideo: Ingranusi Ltda.

SERPAJ (Servicio Paz y Justicia de Uruguay). 1989. *Nunca más Uruguay: Informe sobre las violaciones a los derechos humanos, 1972–1985*. Montevideo: SERPAJ.

SERPAJ (Servicio Paz y Justicia de Uruguay). 1997. *Informe sobre los derechos humanos en el Uruguay, 1987*. Montevideo: SERPAJ.

SERPAJ (Servicio Paz y Justicia de Uruguay). 2000. *Derechos humanos en el Uruguay*. Montevideo: SERPAJ.

SERPAJ (Servicio Paz y Justicia de Uruguay). 2003. *Derechos Humanos en el Uruguay: Informe 2003*. Montevideo: SERPAJ.

Sieder, Rachel, Line Schjolden, and Alan Angell, eds. 2005. *The Judicialization of Politics in Latin America*. New York: Palgrave Macmillan.

Sikkink, Kathryn. 1993. "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America." *International Organization* 47 (3): 411–41.

Sikkink, Kathryn. 2005. "The Transnational Dimension of the Judicialization of Politics in Latin America." In Sieder, Schjolden, and Angell 2005, 263–92.

Sikkink, Kathryn. 2008. "From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights." *Latin American Politics and Society* 50 (1): 1–29.

Sikkink, Kathryn, and Carrie Booth Walling. 2006. "Argentina's Contribution to Global Trends in Transitional Justice." In Roht-Arriaza and Mariezcurrena 2006, 301–24.

Sikkink, Kathryn, and Carrie Booth Walling. 2007. "The Impact of Human Rights Trials in Latin America." *Journal of Peace Research* 44 (4): 379–84.

Skaar, Elin. 1999. "Truth Commissions, Trials—or Nothing? Policy Options in Democratic Transitions." *Third World Quarterly* 20 (6): 1109–28.

Skaar, Elin. 2002. "Judicial Independence: A Key to Justice; An Analysis of Latin America in the 1990s." PhD dissertation, Department of Political Science, University of California, Los Angeles.

Skaar, Elin. 2003. "Un análisis de las reformas judiciales de Argentina, Chile y Uruguay." *América Latina Hoy* 34: 147–86.

Skaar, Elin, Siri Gloppen, and Astri Suhrke, eds. 2005. *Roads to Reconciliation*. Lanham, MD: Lexington Books.

Smulovitz, Catalina. 1995. "Constitución y poder judicial en la nueva democracia Argentina: Las experiencia de las instituciones." In *La nueva matriz política argentina,* ed. Carlos H. Acuña. Buenos Aires: Ediciones Nueva Visión.

Snow, Peter G., and Luigi Manzetti. 1993. *Political Forces in Argentina*. 3rd ed. Westport, CT: Praeger.

Staats, Joseph L., Shaun B. Bowler, and Jonathan T. Hiskey. 2005. "Measuring Judicial Performance in Latin America." *Latin American Politics & Society* 47 (4): 77–106.

Stepan, Alfred, ed. 1989. *Democratizing Brazil: Problems of Transition and Consolidation*. New York: Oxford University Press.

Stotzky, Irwin P., ed. 1993. *Transition to Democracy in Latin America: The Role of the Judiciary*. Boulder, CO: Westview Press.

Sugarman, David. 2000. "Review Article: The Pinochet Case: International Criminal Justice in the Gothic Style?" *Modern Law Review* 64 (6): 933–44.

Sugarman, David. 2002. "From Unimaginable to Possible: Spain, Pinochet and the Judicialization of Power." *Journal of Spanish Cultural Studies* 3 (1): 107–24.

Sunkin, Maurice. 1994. "Judicialization of Politics in the United Kingdom." *International Political Science Review* 15 (2): 125–33.

Sznajder, Mario, and Luis Roniger. 2009. *The Politics of Exile in Latin America*. New York: Cambridge University Press.

Tate, C. Neal, and Torbjörn Vallinder, eds. 1995. *The Global Expansion of Judicial Power*. New York: New York University Press.

Teitel, Ruti. 2000. *Transitional Justice*. New York: Oxford University Press.

Teitel, Ruti. 2003. "Transitional Justice Genealogy." *Harvard Human Rights Journal* 16 (Spring): 69–94.

Teitel, Ruti. 2005. "The Law and Politics of Contemporary Transitional Justice." *Cornell International Law Journal* 38 (3): 837–62.

Teitel, Ruti. 2008. "Editorial Note: Transitional Justice Globalized." *International Journal of Transitional Justice* 2: 1–4.

Thome, Joseph R. 1998. "Searching for Democracy: The Rule of Law and the Process of Legal Reform in Latin America." Paper presented at workshop of the Instituto Internacional de Sociología Jurídica, Oñati, Gipuzkoa, Spain, April 6–7.

Thoms, Oskar N. T., James Ron, and Roland Paris. 2008. "The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners." CIPS Working Paper, Center for International Policy Studies, University of Ottawa.

Tróccoli, Jorge. 1996. "Carta del Capitán Jorge Troccoli: Yo asumo . . . yo acuso." Info Nizkor. http://www.derechos.org/nizkor/uruguay/troccoli1.html. Originally published in *Brecha*, May 10, 1996.

Tsebelis, George. 1990. *Nested Games: Rational Choice in Comparative Politics*. Berkeley, CA: University of California Press.

Ungar, Mark. 2002. *Elusive Reform: Democracy and the Rule of Law in Latin America*. Boulder, CO: Lynne Rienner.

UNHRC (United Nations Human Rights Committee). 2007. "International Covenant on Civil and Political Rights. General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial." CCPR/C/GC/32. New York.

United Nations. 2004. "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General." UN document S/2004/616. New York.

Universidad Diego Portales. 2010. "Human Rights in Chile: Summary of court cases for past human rights crimes, to end Dec. 2009." Bulletin no. 3, January. Observatorio de Derechos Humanos, Instituto de Investigación en Ciencias Sociales/Centre de Derechos Humanos, Universidad Diego Portales, Santiago. http://www.icso.cl/images/M_images/ddhheneroingles.pdf.

USIP (United States Institute of Peace). 2009. "Truth Commission: Bolivia." Truth Commissions Digital Collection. http://www.usip.org/resources/truth-commission-bolivia.

Vacs, Aldo C. 1987. "Authoritarian Breakdown and Redemocratization in Argentina." In *Authoritarians and Democrats: Regime Transition in Latin America*, ed. James M. Malloy and Mitchell A. Seligson, 15–42. Pittsburgh, PA: Pittsburgh University Press.

Valenzuela, Arturo. 1999. "Judging the General: Pinochet's Past and Chile's Future." *Current History* 98 (626): 99–104.

Valenzuela, J. Samuel. 1992. "Democratic Consolidation in Post-Transitional Settings." In Mainwaring, O'Donnell, and Valenzuela 1992, 57–104.

Valenzuela, Sebastián, and Teresa Correa. 2009. "Press Coverage and Public Opinion on Women Candidates: The Case of Chile's Michelle Bachelet." *International Communication Gazette* 71 (203): 203–23.

Vallinder, Torbjörn. 1994. "The Judicialization of Politics—A World-wide Phenomenon: Introduction." *International Political Science Review* 15 (2): 91–99.

Vargas Viancos, Juan Enrique, and Mauricio Duce Julio. 2000. "Informe sobre independencia judicial en Chile." Prepared for Due Process of Law Foundation, Washington, D.C.

Vaughn, Robert G. 1992. "Proposals for Judicial Reform in Chile." *Fordham International Law Journal* 16 (3): 577–607.

Verbitsky, Horacio. 1995. *El Vuelo*. Buenos Aires: Grupo Editorial Planeta.

Verdugo, Patricia. 2001. *Chile, Pinochet, and the Caravan of Death*. Miami: North-South Center Press, University of Miami.

Waldorf, Lars. 2006. "Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice." *Temple Law Review* 79 (1): 1–88.

Walker, Christopher J. 2007. "Judicial Independence and the Rule of Law: Lessons from Post-Menem Argentina." *Southwestern Journal of Law and Trade in the Americas* 14: 89–118.

Walsh, Brian. 1996. "Resolving the Human Rights Violations of a Previous Regime." *World Affairs* 158 (3): 111–35.

Webber, Frances. 1999. "The Pinochet Case: The Struggle for the Realization of Human Rights." *Journal of Law and Society* 26 (4): 523–37.

Weeks, Gregory. 2000. "The Long Road to Civilian Supremacy over the Military: Chile 1990–1998." *Studies in Comparative International Development* 35 (2): 65–82.

Weller, Mark. 1999. "On the Hazards of Foreign Travel for Dictators and Other International Criminals." *International Affairs* 75 (3): 599–617.

Wilson, Bruce M. 2009. "Institutional Reform and Rights Revolutions in Latin America: The Cases of Costa Rica and Colombia." *Journal of Politics in Latin America* 2: 59–85.

Wilson, Bruce M., and Juan Carlos Rodríguez Cordero. 2006. "Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics." *Comparative Political Studies* 39 (3): 325–51.

Woodhouse, Diana, ed. 2000. *The Pinochet Case: A Legal and Constitutional Analysis*. Oxford, UK: Hart.

Zalaquett, José. 1991. *The Ethics of Responsibility: Human Rights, Truth and Reconciliation in Chile*. Issues on Human Rights Papers 2. Washington D.C.: Washington Office on Latin America.

Zalaquett, José. 1992. "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations." *Hastings Law Journal* 42 (6): 1425–38.

Zalaquett, José. 2000. "La Mesa de Diálogo sobre Derechos Humanos y el proceso de transición política en Chile." *Estudios Públicos* 79: 5–30.

# Index

Note: The locators in italics refers to tables and figures in the text. The letters 'n' and 'nn' following the locators refers to note numbers cited in the text.