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BALANCING THE SCALES OF JUSTICE: THE ADVANCE OF HUMAN RIGHTS PROSECUTIONS IN ARGENTINA AND CHILE

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CONTENTS

Abstract

This study examines the recent advance of human rights prosecutions in Argentina and Chile and seeks to explain the underlying causes. The thesis challenges a 'transnational justice' interpretation that places primary explanatory weight on the impact of transnational proceedings, especially those following the arrest of General Pinochet in Britain in 1998. Instead, it suggests that cases have advanced due to a complex interplay of domestic and transnational factors. Changes conducive to case progression were already underway prior to the significant stage of development of transnational proceedings and had already produced some positive results. Transnational justice acted as a catalyst on these processes, serving to reinforce and consolidate them, with a greater impact evident in Chile than in Argentina. The thesis thereby builds upon current models of transnational/domestic interaction, identifying the importance of domestic opportunity structures within the causal relationship.

The procedural development of a representative sample of 14 domestic human rights cases across Argentina and Chile is scrutinised through documentary analysis and elite-level interviews. The study determines precisely how, procedurally and politically, each case advanced. It explores the procedural development of cases through the use of evidence and legal arguments utilised in transnational cases. The political dimension of case development is explored through analysis of changes in the judiciary, the military and 'political society' for each country. In both countries progress has been made in subordinating the military to civilian rule; increasing the autonomy and independence of the judiciary; and reducing factionalism within political society, permitting a gradual convergence over the human rights issue

The removal of political and legal obstacles put in place during, or shortly after, democratic transition, has implications for the rule of law and democratic consolidation. Whereas the human rights issue was previously symptom and cause in a vicious circle of democratic non-consolidation, it has been transformed into a driver of a virtuous circle of democratic change.

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Having a grand-father born in Buenos Aires, I had always been interested in South America. However, it was General Pinochet's sensational arrest in London that focused my attention on the region's past. Reading about the human rights atrocities committed in Argentina during a trip to Buenos Aires, I began to appreciate the effects of impunity. Knowing that people responsible for these crimes were not only walking the street, but were quite possibly seated next to me on the bus, I couldn't help thinking about the long-terms effect on democracy. Clearly many Argentines had lost their faith in the judicial system. In 2000, General Pinochet returned to Chile having seemingly escaped justice. Although much of the western media began to lose interest, I started to develop a research proposal with which to study the rapidly increasing number of human rights prosecutions in both countries.

Chapter 1: From Rule by Junta to the Rule of Law?

INTRODUCTION

On 4 January 2005, the Chilean Supreme Court confirmed the indictment of former dictator General Augusto Pinochet Ugarte for human rights crimes in connection with 'Operation Condor', a joint plan of repression launched in the 1970s by the military governments of Chile, Argentina, Brazil, Uruguay, Bolivia and Paraguay. The Supreme Court's decision upheld an earlier ruling by the Santiago Appeals Court that rejected the argument that the former dictator's ill health prevented his indictment (Human Rights Watch, 2005a). Just two months prior to this landmark ruling, a Chilean presidential commission released its report on the first ever nation-wide investigation into the use of torture during the military dictatorship.[1] The report found that more than 27,000 individuals had been systematically tortured between 1973 and 1990 and its publication prompted the government to introduce legislation to compensate the victims (Human Rights Watch, 2004a). At roughly the same time, the Chilean Supreme Court was confirming the prison sentences of five high-ranking military officers for a 1975 case of forced disappearance, ruling that a military-generated amnesty decree was invalidated by the circumstances of the crime (Human Rights Watch, 2004b). A significant number of military personnel, including numerous high-ranking officers, are presently incarcerated for human rights atrocities committed during military rule; it is estimated that several hundred more are indicted within ongoing proceedings.

Events across the border in Argentina have moved equally rapidly. In August 2003, the Argentine Senate voted to annul the country's two Amnesty Laws (Human Rights Watch, 2003a). This decision ratified an earlier vote in the Chamber of Deputies after the newly elected president, Néstor Kirchner, had insisted that 'those who violated human rights during military rule should be held accountable' (Human Rights Watch, 2003b). The repeal of these laws has permitted hundreds of cases to reopen and allowed the fate of the disappeared to

[1] See the report of the *Comisión Nacional sobre Prisión Política y Tortura*, published 28 November 2004.

be investigated. Such decisive legislative action built on the foundations laid in 2001 by several federal judges who had ruled the Amnesty Laws to be unconstitutional. This paved the way for the prosecution of many high-ranking officers (including the former leaders of the military government). In June 2005, the Supreme Court finally annulled the Amnesty Laws permitting all cases to proceed unhindered (Human Rights Watch, 2005b). Those charged remain either in prison or under house arrest (a provision granted to the over-75s) pending trial.

These striking developments in human rights prosecutions would have been inconceivable just a few years ago. Although military rule in Chile ended in 1990, attempts to bring perpetrators of human rights atrocities to justice during the early-to-mid 1990s foundered on the political and legal obstacles constructed by Pinochet and the military as the price of democratic transition. In contrast, attempts at prosecutions in post-1983 Argentina were initially successful and resulted in a number of high profile convictions. Within a few years, however, economic crisis, military discontent and the uncertainty surrounding an anxious transfer of civilian power led to the passage of the Amnesty Laws and to a series of presidential pardons of those previously convicted. By the mid 1990s, in both countries, something of a line had been drawn under human rights prosecutions. Campaigners continued to press, but the obstacles (outlined later in this chapter) appeared insurmountable.

Recent developments entail a dramatic shift in both the 'quantity' and 'quality' of prosecutions since the late 1990s. The number of cases has increased exponentially, more arrests and convictions are now secured, and it appears that no-one, even the previously unassailable Pinochet, is immune from prosecution. What explains such a spectacular turnaround? How and why are those who were once considered untouchable now languishing in prison or under house arrest? There is evidence of a snowball effect at work, but what set the snowball rolling? If impunity is successfully challenged, and convictions secured, the implications are potentially huge. After years in which democratic pessimists had the upper-hand, the increase in human rights trials could signify the ascendancy of the optimists.

If we wish to explain the advance of human rights trials, the international media coverage since the late 1990s suggests an elegant solution: Pinochet. Before his arrest in London in October 1998, prosecutions were heading nowhere; afterwards, they mushroomed. This 'journalistic interpretation' has been mirrored strongly by human rights organisations and by some scholars writing in the aftermath of Pinochet's arrest. *Transnational Justice*, the pursuit of justice in third-party countries, has been argued to be the primary - and occasionally the *sole* - causal factor explaining the advance of cases. Thus, the Pinochet case and the set of Spanish prosecutions of which it forms a part are representative of a wider phenomenon that has spearheaded the charge for justice in South America.

The theoretical basis of the 'Pinochet effect' lies in an ideational interpretation that stresses the importance of 'transnational advocacy networks' working at both domestic and international levels to bring pressure to bear on domestic governments to alter their behaviour, in this case to allow prosecutions (Keck and Sikkink, 1998). Transnational coalitions of non-governmental organisations (NGOs) initiated foreign judicial proceedings (transnational justice) in order to pressurise and shame domestic governments into allowing domestic trials to take place unheeded. This 'boomerang pattern' of political influence underpins a number of significant works that seek to explain why prosecutions in the Southern Cone have advanced in recent years (Keck and Sikkink, 1998; Risse and Sikkink, 1999; Lutz and Sikkink, 2001; Sikkink, 2004; Barahona de Brito 2001, 2003; Roht-Arriaza, 2001, 2003; Angell, 2003a).

Those that argue that transnational justice is the main explanatory variable do not, however, ignore the domestic dimension of case progression. To the contrary, the transnational effect is necessarily mediated through domestic political actors – by 'spurring on' the judiciary, say, or by encouraging the government to take action to protect its international image. The combined effect of transnational pressure and consequential actions taken in the domestic arena creates openings in what social movement theorists term 'political opportunity structures' (Tarrow, 1998; Kitschelt, 1986). Where domestic political

opportunity structures are 'open' human rights activists are more likely to be successful in pushing for domestic human rights prosecutions.

This view remains pervasive among many human rights groups and campaigners, although it has been tempered somewhat in recent scholarly contributions. As we shall see, a number of scholars now argue that the effect of transnational justice must be considered alongside other domestic political developments. In this later view, domestic changes were in train that were conducive to human rights trials *independent of* the development of transnational justice. Moreover, as I shall demonstrate in this thesis, there is evidence of these changes feeding through into tangible progress in prosecutions *prior to* the significant stages of development of transnational cases.

Throughout this thesis, I argue that these independent domestic factors have played an important role in opening domestic political and legal opportunity structures, thereby permitting trials to take place. Rather than rejecting the effect of transnational advocacy networks bringing pressure to bear from 'above' and 'below', I argue that domestic factors have worked in conjunction with transnational processes to produce a domestic political environment more conducive to human rights trials (Brysk, 1994). The interaction between these independent domestic factors and transnational processes has significant implications for the study of domestic and international political interactions concerning human rights, but also more broadly for studying the intricacies of democratic consolidation.

Research Strategy

My principal aim in this study is to explain the advance of human rights trials in Argentina and Chile. These countries had markedly different democratic transitions but both have experienced a similar recent escalation of prosecutions. The level of domestic case activity for Argentina and Chile far outstrips that of other Latin American countries and the vast majority of transnational cases have been focused on these two countries. In order to provide an explanation of case advances, I outline the extent of overall case progression and analyse in detail the progression of a sample of cases for each country in order to address the

following question: How have the political and legal obstacles to trials, established during and shortly after the transition to democracy, been overcome? A focus on the procedural development of cases, neglected in many other studies, supports the core objective of this thesis: to evaluate the role played by transnational justice in explaining case progression. This is achieved by an analysis of the impact of transnational justice alongside domestic factors in both Argentina and Chile. Examining how transnational processes have interacted with independent domestic factors to open domestic political and legal opportunity structures and comparing the findings for these two countries also sheds light on a wider theoretical (and indeed practical) debate: the relationship between human rights trials, the rule of law and democratic consolidation.

Chapter Overview

In the present chapter, I place the human rights issue in context by exploring the nature of military authoritarianism in South America, focusing on the experiences of Argentina and Chile. I then examine the intricacies of the democratic transition process and highlight the difficulties of prosecuting human rights crimes in this context. After exploring the conditions of transition in Argentina and Chile, I then look at how transitional settlements in Argentina and Chile affected post-transitional human rights policies regarding justice over past crimes up to a 'cut-off' point where most concluded that justice had been forsaken in the name of political stability. However, examining the process of democratic consolidation and identifying the prerequisite of the rule of law, I argue that in certain circumstances, prosecuting past human rights atrocities becomes essential to the democratisation process. As such, it is important to examine recent advances in human rights cases as they represent further progress towards this goal.

In Chapter 2, I develop a theoretical framework by examining the various explanations posited by the literature for the recent advent of human rights prosecutions. After first exploring the historical and political context of human rights prosecutions in general, I briefly examine alternative theoretical approaches derived from the International Relations literature, namely realist and liberal. After critiquing these, I look in more detail at the ideational approach,

mentioned above, that sees the advent of human rights prosecutions as a process of norm diffusion and socialisation operationalised through transnational advocacy networks. I explore conceptual models of interaction that explain how transnational networks operate at the domestic and international levels to effect domestic political change. Moving on from abstract concepts, I then review literature that specifically seeks to explain the rise of prosecutions in the Southern Cone and develop a research strategy accordingly, setting out the parameters of investigation. A more detailed version of the methodology is in Appendix 1.

In Chapter 3, I examine developments in human rights cases in Argentina and Chile, establishing the extent of case progression since the respective 'cut-off' point in both case study countries. According to an established criterion (detailed in Appendix 1), I select a sample of legal cases in both Argentina and Chile and recreate their specific procedural history. This acts as the basis for investigation and analysis for the later chapters on Argentina and Chile, in Chapters 5 and 6 respectively.

In Chapter 4, I explore the process of transnational justice and attempt to ascertain its plausible impact on domestic cases by identifying and examining foreign proceedings concerning human rights crimes committed under military rule in Argentina and Chile. By correlating procedural details with those of the selected domestic cases, the scope for further investigation is narrowed to several examples of transnational justice. Focusing on categories of potential effect, I examine the transnational cases and conclude on their potential effect on cases in Argentina and Chile, both procedurally and politically.

In Chapters 5 and 6, I examine in greater detail the advance of the selected human rights cases in Argentina and Chile, analysing their procedural development (presented in Chapter 3) in context with the potential impact of transnational justice. Drawing substantially on data generated through field research, after reaching conclusions over transnational justice's procedural role, I address the political dimension by examining its relationship with domestic

political developments focusing specifically on 'political society', the judiciary and the military.[2]

Having discerned the role of transnational justice and its interaction with domestic factors for each country, in Chapter 7, I discuss the findings of my research. I compare results for each country and consider the implications for human rights prosecutions in both Argentina and Chile as well as elsewhere. I reflect finally on the implications for the democratic consolidation process and our understanding of the interaction between domestic and international political processes.

It is necessary then to begin by providing a contextual overview of the nature of military government, repression and human rights in South America.

MILITARY GOVERNMENT, REPRESSION AND HUMAN RIGHTS IN SOUTH AMERICA

Originating from its role in the independence movements of the Nineteenth Century, the military has been traditionally regarded as the guardian of the state throughout Latin America. The notion of a duty and obligation to guarantee the integrity of the state has often been used to explain widespread military intervention throughout the region. In this light, a military coup was not an attack on the state but was regarded as the accustomed action to cope with political crisis in order to guarantee the continuation of the state. Throughout much of Twentieth Century Latin America, military intervention was thus considered a legitimate means of resolving political and economic crises by a substantial portion of society. Weak political institutions, unable to successfully incorporate developing political forces, failed to manage conflicts between competing socio-economic groups. This was often exacerbated by periodic economic crises. Urbanisation and import-substitution industrialisation had produced a substantial working class in many Latin American countries. Successive economic crises, stemming from an over-reliance on primary product exports, encouraged an

[2] The concept of 'political society' incorporated within this study is described in full later on in this Chapter.

increase in popular political participation. However, existing weak political institutions were unable to incorporate the new political forces and failed to manage conflicts between working class, elite, and middle class interests. As the constitutional democracies lost popular support and legitimacy, military intervention was seen as a way to safeguard personal interests (Fitch, 1998:13-14).

The military would often be persuaded to 'step in to govern' for 'relatively brief periods' (Farcau, 1996:16). As the military's basic role was to 'fix' the short term political situation, in some countries military coups were welcomed by a 'substantial portion of the political elite', including civilian legislators, party leaders, judges and the business community, as a way to restore political and economic stability (Farcau, 1996:16; Loveman, 1999:228). This 'moderator' form of military government was usually 'relatively limited in scope' (Stepan, 1971:61; Farcau, 1996). The military had little or no institutional involvement; its purpose was often exclusively concerned with ousting a particular candidate or political party from rule and the rapid holding of a new round of elections 'under rules that would ensure the election of an acceptable new civilian government' (Farcau, 1996:16; Fitch, 1998:23).

From the mid-1960s however, regional military authoritarianism had begun to change in nature. In Brazil, Argentina, Chile and Uruguay, regimes became 'typically institutional', and were 'dedicated to more or less indefinite military rule' (Fitch, 1998:23). Many explanations have been posited for this phenomenon, ranging from the cultural (Finer, 1988) to the economically determinist (O'Donnell, 1973). One important explanation focuses on shifts in military thinking in the context of the Cold War and the adoption of a US-style national security doctrine (Stepan, 1973; Zagorski, 1992). The Cuban Revolution in particular led to a perception that the real threat to regime maintenance and stability was internal, not external (Fitch, 1998:12). The new threat (exemplified by the guerrillas in Algeria, Malaysia, and Vietnam) was now located inside one's territory and was basically indistinguishable from the civilian population (Farcau, 1996:17). The rise in support for left-wing and communist ideology and organisations was seen as a threat to the established order; revolutionary groups

multiplied in the 1950s and 1960s. Perceiving indirect Soviet aggression, the United States provided regional military assistance programmes that focused on counterinsurgency operations (Fitch, 1998:13).[3] The effect was to reinforce the military's perception of an internal enemy and thereby emphasise the need to destroy its 'war making capability', located within the left-wing networks that had penetrated many areas of society, including the universities, unions, and government (Farcau, 1996:17). These networks were shielded by, and exploited, the democratic rules of government. In order to expose the threat and to eliminate it, democracy had to be suspended. Intervention was therefore justified by the military, acting in its role as guardian of the state in order to protect the interests and integrity of the nation.

However, according to Farcau (1996:17), one lesson that had been learnt from the past (particularly from the French in Algeria) was that 'if there is a guerrilla movement in existence, it could only survive if there were some basic failing of the social and political system'. In order to remove the incentive to support the subversive ideology, the military sought to reorganise society. By 'reforming' society, the economy and the political system, the military would be able to increase the standard of living according to its values of state, religion and sovereignty, and thus eliminate the cause of subversion rather than merely attacking the symptom, as had occurred in the past (Farcau, 1996:17). The new military regimes thus differed in their long-term mission to reshape the socio-economic and political systems according to a blueprint in which their professional skills would enable them to rule more effectively than partisans and demagogues (Farcau, 1996:1). It is no coincidence that such regimes were characterised by technocratic decision-making, demonstrated most notoriously by the Chilean 'Chicago boys'.

Although each regime differed, typical tactics included ousting the previous democratic leader and suspending the legislature. In some cases, such as in Argentina and initially in Chile, all executive power was transferred either to a

[3] Latin American military officers were trained in the 1960s at the US Southern Command in Panama, and at Fort Bragg, North Carolina (Loveman and Davies, 1989 cited in Robben, 2001:111).

nominated military president or to a military *junta* comprised of the various branches of the armed forces, which then ruled by decree. In others, such as Brazil, military control was asserted by the 'appropriate' candidate always winning the election under an artificial party system (Farcau, 1996:25). Union activity was either banned or brought under tight control; the judiciary and universities were often purged of those that opposed the regime. Usually all party political activity would be outlawed, although on occasions, especially concerning the regime's supporters, it was sometimes allowed to exist on a semi-official basis.

Whilst repression to some extent had always occurred during military rule, these regimes were different in kind. Through the attempt to reshape society, the military essentially sought to eliminate (or at least exclude through terror) left-wing ideology and its supporters, extending such actions towards those suspected of being associates of 'subversives' and even those sympathetic to their cause.[4] As Argentine General Ibérico Saint-Jean infamously stated in 1977: 'First we will kill all the subversives. Then we'll kill the collaborators, then the sympathisers, then the undecided. And finally, we'll kill the indifferent' (cited in Loveman, 1999:xi). Consequently, human rights atrocities were carried out on a massive scale affecting not only radical armed militias but also the intelligentsia from where they drew their ideology and support. Left-wing idealists, mainly students, were identified as dangerous subversives and were marked for arrest and elimination.

The immediate objective of the military was to sow terror and confusion among its opponents, although repression would soon spread to civil society as a whole. The means employed would regularly involve imprisonment, torture, 'disappearance', extra-judicial execution, child abduction and even trafficking, most commonly without any attempt at legal justification (Amnesty International, 2003a). Human rights atrocities were especially pronounced in countries where armed conflicts between left-wing and right-wing militias had taken place under civilian administrations as in Argentina. The use of

[4] The exception in Latin America is Peru where the military proclaimed a new economic order, 'neither capitalist nor communist' (Skidmore and Smith, 1997:217).

disappearance as an instrument of terror debilitated the guerrilla organisations and political opposition because of the fear that under torture those detained would betray their comrades. Robben (2001) comments that the operational goal of the disappearances was closely tied to the aim of annihilating the enemy by breaking its will to fight; 'this objective turned in to the obsession to annihilate opponents physically; not only by killing them but by destroying their remains (Robben, 2001:111). The estimated number of victims either executed or disappeared in Argentina was over 30,000 people; in Chile over 3,000; and, in Uruguay, where the number of killings was fewer, but the proportion of the population arrested higher, over 120 remain missing (Human Rights Watch, 2001; Barahona de Brito, 2001:144). In each, thousands were also tortured and many were forced into exile. The sheer scale of these atrocities ensured that the human rights legacy would become a key political and ethical issue to be faced during any future transition to democracy (Barahona de Brito, González-Enríquez and Aguilar, 2001:1)

Before moving on to examine the internal dynamics of the transition process and exploring the implications for the ability to hold human rights prosecutions, I now examine more closely the nature of military rule in Argentina and Chile. By examining each country's experience of the breakdown in democracy and the nature of military rule in detail, we can more fully appreciate the difficulties and challenges faced by incoming governments at transition who would have to deal with the human rights issue.

MILITARY INTERVENTION IN ARGENTINA

After enjoying a degree of political stability almost unknown in Latin America and a level of economic development that rivalled countries of Southern Europe, from 1930, Argentina was characterised by economic stagnation and political uncertainty. Burns (2002:11) comments:

> Overcautious reform, conservative obstructionism and increasing working class militancy influenced by European anarchist and socialist movements, turned Argentina into a conflict-ridden society in which political argument

> could be easily generated and where elected Congressmen were ill-equipped or unwilling to meet rising expectations.

Typical throughout Latin America, the Argentine military saw itself as 'independent of the government, exempt from subordination to the law, endowed with the privilege to define the national interest, and with the prerogative to be the central organs for the protection of such interest' (Waisman, 1987:97). The first military coup, in 1930, was in response to economic crisis, ever-increasing governmental corruption and widespread popular disillusionment. After several years of civilian government that failed to respond to and cater for the massive increase in the working class population, in 1943 the military again stepped in to take power. It was during the following years that General Juan Perón rose to prominence and presided over an enormous expansion of the trade union. Elected twice as President in 1946 and 1951, Perón continued the process of unionisation, increased wages, created a modern social security system and oversaw a redistribution of income that favoured wage earners. However, after moving steadily towards authoritarianism, and having lost much of his labour support, in 1955 Perón was deposed by the military who, urged on by the business and landowning community, set about destroying Peronism.

After the Peronist party had been banned from putting forward a candidate, the 1958 elections saw power transferred back to civilian hands under the presidency of Arturo Frondizi, leader of the Intransigent Radical Civic Union (UCRI). Despite moderate success in improving the nation's economic situation, in 1962, the military again stepped in to assume power after the Peronist Party (recently legalised by the UCRI) was victorious in congressional and gubernatorial elections. After a year of political chaos, elections were held in 1963 and saw Arturo Illia, leader of the People's Radical Civic Union (UCRP) become president; the Peronists had again been prevented from putting forward a candidate. However, political inaction amid continuing economic strife, led again to military intervention in 1966.

Under the leadership of General Onganía, attempts were made by the military to restructure the nation's political system. Efforts were made to exclude the

working class from the political process and to depoliticise groups such as trade unions and student organisations. However, these were largely unsuccessful as the military was unwilling to resort to the high levels of repression that such initiatives required. By 1970, the regime had accomplished very little and the public acquiescence it had originally enjoyed had virtually disappeared. Democratic rule was re-established in 1973 with the election of Peronist candidate Hector Cámpora; Perón himself had been prevented from running for office by the military. Within 49 days Cámpora resigned allowing new elections to seal the return of Perón and his wife María Estela Martínez de Perón (Isabel) on a Perón-Perón ticket.

During the intervening years, starting in 1970, there had been a considerable rise in the degree of political violence instigated by urban guerrilla movements. Out of the large number of groups, the Montoneros and the People's Revolutionary Army (ERP) were the most prominent. The Montoneros saw in Peronism a means of national liberation within a neo-Marxist framework. The ERP was the armed wing of the Trotskyite Revolutionary Workers party (PRT) and claimed to take its ideas from Lenin, Mao, and Che Guevara. Between them, these groups carried out a number of high-profile political assassinations and kidnappings. One of the most infamous was that of former president, Pedro Aramburu, who was kidnapped and executed by the Montoneros for his 'crimes' against the Argentine people (Snow, 1996:100). Despite a mutual commitment to the overthrow of the government and the liberal, capitalist system, the groups were unable to coordinate their actions due to strategic differences and different attitudes to Perón and Peronism. With the return of Perón in 1973 the violence employed by these groups abated somewhat.[5] However, when Perón died in 1974 and his wife Isabel took over the presidency, violence reached new unprecedented levels.

Rising economic problems, including rapidly rising inflation and a decline in real wages amid increasing prices, as well as rampant levels of corruption only

[5] The Montoneros initially supported Perón until he moved decidedly to the right and supported their opponents in the labour movement. The ERP however, never identified with Perón or Peronism.

exacerbated the political instability. The armed guerrilla groups went underground as a right-wing guerrilla opposition group known as the AAA (Argentine Anti-Communist Alliance) (in secret supported and funded by the government), increased the scale of its armed conflict against them.[6] Government repression intensified against leftist union opposition with increased silencing of 'subversives' using the AAA. By the second half of 1975, the Montoneros and the ERP fought openly against military targets, an escalation that served to further distance them from popular protest. By 1976 it was clear that military intervention was imminent and finally, amid a standoff between the government and workers striking in protest over economic measures, the expected coup occurred, overthrowing the government without opposition.

Between 1930 and 1983 not one civilian government survived its six-year term without interruption by the armed forces. The only elected government to have entered a second term was that of General Perón, yet no other figure 'was more instrumental in strengthening the foundations of a militarised society' (Burns, 2002:13). Perón's electoral victories legitimised the military's presence in government rather than democratising its involvement in politics (Burns, 2002:13). And to varying degrees the last four military coups can be seen as a result of anti-Peronism. Described as the 'impossible game of Argentine politics', O'Donnell (1973:200) summarises the dichotomy faced by the country's political system:

> The largest section of society supported a party (the Peronists) that was uncommitted if not complacent towards democracy. The minority section of society opposed to this party, yet fragmented in their support for others, usually produced a government unsupported by most of the electorate. Thus, it became the military's duty to step in and end the round of the political game in order to instigate a new one that would end with similar results; either the Peronists, which the business and landowning community were against, including the army, but supported by the majority of people, or a disunited government against the majority of the people which would create instability and internal conflict.

[6] Alianza Argentina Anticomunista.

Political opposition to the government of the day was frequently 'not willing to await its manifestation at the polls but instead went to the military in an effort to convince it of the necessity of revolution' (Snow, 1996:92). This habitual 'knock at the doors of the barracks' only served to reinforce the notion of the military as the last guardians of the state and thereby strengthened the legitimacy of intervention in the eyes of the military. In each case, the leaders of the armed forces claimed that they had simply acceded to popular demands for intervention.

Military Rule in Argentina: 1976-1983

Typical of the later form of military authoritarianism in South America, the regime initiated in 1976 aimed to modify the whole system of social relations eliminating what it perceived to be undesirable or 'subversive' ideology that was the cause behind political instability and economic failure (Cavarozzi, 1986:45). Through the *Proceso de Reorganización Nacional* (*Proceso*) the military reached into every part of the nation's life.[7] Congress was suspended and party political activity was outlawed, both the judiciary and the universities were purged (Burns, 2002:86). Strikes were banned, the CGT (General Labour Confederation) and its affiliated unions were placed under the control of military administrators, and hundreds of its leaders in addition to politicians were imprisoned (Burns, 2002:86, Mcguire, 1995:183).[8] Supreme state power was exercised by a *junta* composed of the Commanders-in-Chief of the three branches of the armed forces and a nominated military president (Cavarozzi, 1986:45). Effective power however, lay with the Commanders-in-Chief who not only divided cabinet and governmental positions between them but also the entire country down to the remotest villages (Cavarozzi, 1986:44).

The military regime claimed that protectionism and state interventionism had deformed and distorted the workings of the market, fostering the growth of inefficient industries that granted inordinate power to organised labour (Crawley, 1984: 425). The regime's long-term economic plan, directed by the civilian economy minister José A. Martínez de Hoz, thus aimed at 'replacing state

[7] Process of National Organisation.
[8] *Confederación General del Trabajo* (CGT).

spending, inefficient industry, and trade restrictions with a free market economic model based on agricultural exports' (Mcguire, 1995:183). Not only would this affect the fiscal and financial situation but would also work to reduce the size and power of the industrial working class, seen by the military as the source of insurrection (Mcguire, 1995:183). This long-term aspiration of demobilising a social sector would be assured by means of harsh repression, justified as the 'unavoidable cost of a 'Dirty War' against leftist subversion' (Mcguire, 1995:183).

In the weeks following the coup, killings, often carried out by state agents travelling in unmarked cars, rose to over a hundred and arrests took place by the thousand (Crawley, 1984:426). The military regime spoke publicly of armed clashes between security forces and 'Marxist subversives', however, the death rate among the 'subversives' was inordinately high; less than one in 30 casualties were merely injured, whereas twice as many security forces were reported as injured as killed in action (Crawley, 1984:426). In fact, the use of 'disappearance' as an instrument of terror became widespread. On average, one out of every 30 families was affected by disappearances, arrest, or violent death (Crawley, 1984:431). Those abducted would usually be taken to one of over 61 clandestine detention centres situated throughout the country where they would be tortured, interrogated, and then either killed, transferred to another detention centre or, if lucky, released. The majority of the 30,000 people disappeared were eventually buried in graves marked NN (the official acronym for unknown) within municipal cemeteries. Others were thrown out of aircraft over the Rio de la Plata, where it was expected their bodies would be taken out to sea (Verbitsky, 1995).

Military commanders were given large degrees of local regional autonomy and this increased the degree of repression. It allowed the military to be able to suppress subversion at a local level while making human rights violations less attributable to the government. The ruling executive could thus legitimately claim to be ignorant over any 'excesses' that may have occurred. Despite the enormous scale of atrocities, the military regime denied any knowledge of the 'so-called disappeared', claiming they were no more than terrorists who had

gone into hiding, or fled the country, or had been killed by their comrades (Crawley, 1984:431). According to Periera (2001:567), it was a lack of legality that led to the widespread use of disappearance as the military's preferred means of repression.[9] As there was 'no attempt to erect a framework of virtual legality around the repression' [...], there were no legal actions to legitimate' (*ibid*). By entirely bypassing the courts, the military avoided the need to justify its actions and merely denied all knowledge of the abductions. Widespread censorship prevented the media from shedding any light on the disappearances; the press was specifically banned from carrying any reports, comments or references about terrorist activities, abductions, the discovery of bodies, deaths of terrorists or security personnel, and disappearances, unless they were announced by an official source (Crawley, 1984:422). Held in check by fear of reprisal, self-censorship quickly replaced outright censorship and the repressive measures taken by the military soon became shrouded in secrecy.

To combat this veil of silence, a number of human rights groups (of which the *Madres de la Plaza de Mayo* became the most famous) arose and began to demand information on the whereabouts of the disappeared.[10] The public protestations of the human rights groups soon gained international attention as links developed with international NGOs, such as Amnesty International. Faced with repression and blockage at home, domestic human rights groups sought out allies in the international arena in order to bring pressure to bear from above on their own government. Brysk (1994:52) comments that the work of the human rights movement 'mobilised domestic awareness and lobbying in Europe and the United States [...] and served as the concrete basis for international policy decisions'. These took the form of an US aid cut-off under the pro-human rights administration of President Carter; a 1979 inspection visit of the Organisation of American States (OAS) Human Rights Commission, whose closing recommendations echoed the demands of the domestic human rights groups; UN investigations, that ultimately pursued over 7,000 cases of human rights

[9] Periera also argues that as clandestine repression had been initiated under Isabel Perón in 1972, the military merely made these tactics into government policy.

[10] The 'mothers of the disappeared' began to hold weekly protests in front of the presidential palace at the Plaza de Mayo and became a symbol of the struggle against the repression of the military.

violations and resulted in the passing of a resolution condemning Argentina's violation of international norms. Following the presentation of evidence by a number of Argentine NGOs, the UN specifically recognised and condemned the practice of disappearance, which in 1980 led to the establishment of a Working Group on Forced Disappearance, largely in response to the situation in Argentina (Brysk, 1994:54).

The impact of the Argentine human rights movement created an information network and a principle of moral interdependence that helped to propagate the human rights movement's concerns across national boundaries (Brysk, 1994:53). While there is much debate over the wider consequences of international criticism of the human rights situation in Argentina, at minimum it served to sustain and amplify the demands of the domestic human rights groups.[11]

By 1979, armed opposition to the regime was virtually at an end, the Montoneros and ERP members having been either killed or forced to flee. After this seeming victory over armed insurgency, complimented by initial economic success, plans were formulated laying the groundwork for an eventual return to civilian rule (Mcguire, 1995:185). However, deterioration in the economy by 1981 demonstrated the need for a revised economic plan. Additionally, there had been a breakdown in military cohesion following its success in the 'Dirty War', the military had essentially completed its task and now suffered from a lack of mission (Mcguire, 1995:185). This provoked inter-service rivalry, as conflict grew over economic policy and how to structure a future civilian government (Mcguire, 1995:185). In March 1981, the original *junta* leader, General Jorge Videla, retired and much to the consternation of the navy (who wanted to nominate the next president) army commander General Roberto Viola became President.

General Viola supported expansionary economic policies and preliminary dialogue with pre-1976 party and union leaders in order to lay the groundwork for a transition to civilian rule (Mcguire, 1995:186). Amid a general relaxing of

[11] Brysk (1994:56) goes further to suggest that this challenge was sustained long enough for civil society to re-emerge; the military's response to which de-legitimated the government.

the repression but worsening economic crisis, in July 1981, a general strike was called and five political parties created a coalition known as the *Multipartidaria* to negotiate a return to civilian rule (Mcguire, 1995:187). However, hardliners (especially in the army) were opposed to dialogue with the former politicians and in December 1981, Viola was ousted from power by General Leopoldo Galtieri.

Galtieri realised that an eventual return to civilian rule was almost inevitable but desired 'a maximalist strategy' where the military would retain considerable power throughout the process (Mcguire, 1995:187). Realising the need for a successful economic policy, societal support for the military (and perhaps him personally) and for restoring military cohesion, Galtieri looked to 'shore up the battered legitimacy of the regime' (Mcguire, 1995:187, Torre and de Riz, 1993:338).

Military forces were sent to occupy areas in the British controlled Falkland Islands. The possession of the islands (Las Malvinas to Argentines) had long been a source of dispute between Britain and Argentina. Nevertheless, Galtieri gambled that their significance to Britain was insufficient to provoke hostilities and that following the election of President Reagan his new US ally would protect him.[12] The war that ensued (especially its intensity) was a miscalculated error that had severe consequences for the military regime. The quick defeat of the Argentine forces demonstrated levels of internal dispute within the armed forces confirming to the population that the humiliated military were no longer fit rulers (Linz and Stepan, 1996:191). In order to quell mass popular protest it became clear that control of the government must be returned to civilian hands. According to Nino (1991:2623), the military failure amid internal dispute within the armed forces, unprecedented economic problems, alleged acts of corruption, and the stories of gross human rights violations 'unmasked the deceit it was prepared to impose upon the population'.

[12] Relations between the US and Argentina had improved dramatically following Reagan's election as president in the US. In agreement with President Regan, adopting a markedly different position to that of Carter, Argentine intelligence and counter-insurgency experts were flown to El Salvador and Guatemala to share their expertise acquired during operations in Argentina. A larger group was also flown to Honduras to train Nicaraguan exiles in irregular warfare against the Sandinistas (Crawley, 1984:441).

On 14 June 1982, the same day of the Argentine surrender in the Malvinas, General Galtieri resigned as Commander-in-Chief of the army (Dabat and Lorenzano, 1984:126). The military *junta* was dissolved as the air force and the navy departed amidst internal divisions and dispute over who was to blame for the military failure. General Reynaldo Bignone was appointed to the presidency on 1 July with the aim of transferring power to a democratically elected government as soon as possible (Burns, 2002:400). Elections were announced for October 1983 and the remaining duration of military rule was absorbed with attempts to face the impending economic crisis and to obtain assurances from the political parties that would absolve the military of any 'excesses' of repression during its reign (Nino, 1991:2626).[13]

MILITARY INTERVENTION IN CHILE

Unlike Argentina, Chile did not have a long history of military intervention. Military coups had occurred in 1924 and 1925, and Colonel Ibáñez ruled as dictator during the years 1927-1931, although he had been formally elected as president. In fact widely regarded as the exception in Latin America, Chile had always stood out for its high level of institutionalisation, governmental stability and democratic development. Rather, the breakdown of democracy in Chile in 1973 was the result of long-term developments contributing to the erosion of the country's political system that had always operated on generally agreed rules of accommodation, compromise, and consensus (Valenzuela, 1989:182). This traditional party system broke down in the late 1960s and early 1970s as doctrinaire ideologies came to dominate parties of the left, centre and right (Angell, 2003b:197).

Integral to this process was the rise in the 1960s of an ideological centre party, the Christian Democrats (PDC), which was less willing to 'play the game of political give and take' (Valenzuela, 1989:182). The PDC saw itself as the middle ground between 'Marxist transformation' and 'preservation of the status quo'. Elected in 1958, President Jorge Alessandri, the leader of the right, had

[13] On 23 March 1983, the military passed a law (Ley 22.924) granting an amnesty for all acts committed 'in the line of duty' during their rule. It was however, rejected by all parties.

failed to make progress against the mounting social problems created by Chile's slow and uneven economic growth. As political polarisation increased alongside a fivefold expansion of the electorate, the right recognised the growing force of the PDC and endorsed their presidential candidate, Eduardo Frei, for the 1964 election fearing a victory by the Socialist-Communist alliance (FRAP). The result was that Frei won the election with 56 per cent of the vote over the 39 per cent received by Salvador Allende, the FRAP candidate (Skidmore and Smith, 1997:131).

In power, the PDC 'went out of their way' to govern as a single party turning its back on the country's tradition of political compromise and accommodation. This led to radicalise the left, who feared the electoral challenge of the centre party, and create profound resentment among the right, who felt betrayed by land reforms enacted by their erstwhile coalition partners (Valenzuela, 1989:184). In a system described by Sartori (1976:160) as one of extreme polarisation, there followed bitter party hostility. Scully comments, 'as the party system was reduced to three increasingly irreconcilable thirds, centrifugal patterns of competition drove the extremes of the party system further outward'. This 'ideological escalation' made compromise extremely unlikely, paving the way for an eventual breakdown of democracy (Scully, 1995:121).

By the 1970 presidential elections, unable or unwilling to form coalitions, the left, centre, and right had all nominated their own candidates in the mistaken hope of obtaining a majority vote. The result was that the Salvador Allende, the candidate for the Socialists and Communists under the new banner of *Unidad Popular* (Popular Unity, UP), won the election with only 36.2 per cent of the vote. Rather than being demonstrative of a new radicalism in Chile, the result, according to Valenzuela, 'underscored the repercussions of the failure of the right and centre to structure a pre-election coalition' (Valenzuela, 1989:184).

The weak status of Allende and a lack of a majority support in Congress meant that he would have to cope with the realities of coalition politics in order to succeed (Valenzuela, 1989:185). However, this was unlikely as the UP remained 'committed to a revolutionary transformation in the socioeconomic order and the

institutional framework of Chilean Politics' with a view to the eventual establishment of a Socialist state (Valenzuela, 1989:185). The government quickly embarked upon a project of complete nationalisation of the foreign copper firms, owned mainly by US companies. Endorsed by a unanimous vote of Congress in 1971, the process of nationalisation was one of the few bills proposed by Allende that got through the opposition controlled legislature, where the Christian Democrats constituted the largest single party.[14] The government later argued that no compensation was due to the companies because of what was regarded as previous illegally high profits (Skidmore and Smith, 1997:136). This gave to some, including much of the business community, the PDC and the US government, proof that the UP had declared war on private property in Chile (*ibid*).

Outside Chile, the US saw the UP government as ideologically linked with the USSR and Cuba, fearing that the election of Allende would lead to a 'Communist toe-hold' in South America. Henry Kissenger, National Security Advisor to President Nixon, was infamously minuted as saying 'I don't see why we need to stand by and watch a country go Communist due to the irresponsibility of its own people' (Power, 2002:100). In order to avoid 'another Cuba', and pressured by big US corporations in Chile such as ITT, Anaconda Copper, General Telephone and Electronics and Pepsi Cola, its reaction was to undermine the Allende government, initially by mounting an 'invisible blockade' against Chile.[15] This included a hold on all loans from the World Bank, the Inter-American Development Bank and the US Export-Import Bank, as well as halting private foreign investment (Skidmore and Smith, 1997:136).

The second major policy initiative of the UP government was the redistribution of agricultural land. Expropriations came faster than the government's ability to ensure the services needed by the new small owners or by the state-controlled cooperatives (Skidmore and Smith, 1997:137). Increasingly, as leftist radicals

[14] A system of partial nationalisation had already begun under President Frei and many felt that this had not gone far enough. This underscores why Allende's nationalisation program was initially endorsed by Congress.
[15] The US later used intelligence operations to undermine Allende and encouraged the military to overthrow the government.

took possession of the land themselves, the government lost control of the situation. By 1972 food production fell causing the rise of food imports; the government introduced emergency legislation allowing expropriation of industries without having to seek congressional approval, turning many factories over to the state.

During the second and third years of the UP, economic problems worsened, demand outstripped supply, the economy shrank, deficit spending snowballed, new investments and foreign exchange became scarce, the value of copper sales dropped, shortages appeared, and inflation skyrocketed, eroding previous gains enjoyed by the working class (Angell, 1993:161-167). The government responded with direct distribution systems in working-class neighbourhoods. However, it was essentially paralysed in its response because it would not impose harsh economic measures on its supporters, the workers, it was unable to get new taxes approved by an opposition dominated Congress and, thanks to the US blockade, could not borrow enough money abroad to make up the gap. The government's 'ill conceived redistributive and stimulative economic measures' taken in response 'alienated not only Chile's corporate elite, but also small businessman and much of Chile's middle class' (Valenzuela, 1989:185).

Allende tried to stabilise the situation by changing cabinet personnel several times and appointing military officers to cabinet posts in 1972 and 1973. This new political role for the military caused divided reactions as some officers viewed the move as an attempt to take advantage of the popular support and prestige of the armed forces (Aravena, 2001:154). Outside the government, Allende's supporters continued direct takeovers of land and businesses further disrupting the economy and alienating landowners.

In Congress the centre-right coalition blocked all UP initiatives, harassed cabinet ministers and denounced the administration as illegitimate and unconstitutional. The Supreme Court joined Congress in criticising the executive branch for overstepping its constitutional bounds. In March 1973, congressional elections were held; the opposition expected the Allende coalition to be punished for mismanaging the economy to the point of crisis and its unpopular reforms. The

right and the PDC hoped to win two-thirds of the seats, which would give a large enough majority to enable the impeachment of Allende. However, after gaining only 55 per cent of the vote, they were short of the majority needed to initiate impeachments proceedings. The UP's 43 per cent share actually represented an increase over the 36.2 per cent presidential vote, giving Allende's coalition six additional congressional seats.

Due to the failure to break the deadlock that had formed in this political stalemate, both sides escalated the degree of confrontation, casting threats of insurgency at each other. Street demonstrations became increasingly frequent and violent as both sides became polarised to the extremes. Conditions worsened from June 1973 onwards as middle and upper-class businessmen and professionals launched waves of workplace shutdowns and lockouts. Their protests against the government coincided with strikes by the trucking industry and by the left's erstwhile allies among the copper workers. The right and the PDC backed the strikers in calling for Allende's resignation or military intervention.

Meanwhile, inflation reached an annual rate of more than 500 percent; by mid-1973 the economy and the government were in crisis. In August 1973, the right and centre representatives in the Chamber of Deputies accused Allende of systematically violating the constitution and called for military intervention. On the morning of 11 September 1973, the Commanders-in-Chief of the military, headed by the newly appointed army commander, General Augusto Pinochet Ugarte, purged the armed forces of any officers sympathetic to the president.[16] The coup that followed has been described as 'the most violent military coup in Twentieth-Century South American history', all the more perverse as it 'happened in a country that prided itself on its deeply grounded democratic traditions' (Skidmore and Smith, 1997:141).

The collapse of Chilean democracy was thus the result of a 'constellation of national and international factors; 'Chile's political class was not able to resolve

[16] The previous Commander-in-Chief, General Prats, had resigned in the face of criticism over the military's involvement with the UP government.

the severe tensions that originated between order and social incorporation, equity and accumulation, participation and governability, resulting in the growing polarisation of the political arena' (Aravena, 2001:154). The short term causes of the coup were born out of political crisis as Socialist President Salvador Allende sought to implement economic and political reform unpopular with the political right and centre. The polarisation of Chilean politics led to economic crisis, facilitated by the US who was opposed to the establishment of a left-wing, 'Soviet-friendly' government in the continent. Overtures had been made to the military for three years from the political right and centre (as well as by the US government) especially from the business community who felt threatened by Allende's reforms. However, when the coup finally came, it was never intended to merely stabilise the political and economic climate before returning power to civilian hands, although this is what many of the military coup's supporters, especially the PDC, had expected.

Military Rule in Chile: 1973-1990

As in Argentina, the country was initially ruled by a military *junta* composed of the four branches of the armed forces (including the *Carabineros* police) with a nominated leader, the army commander General Augusto Pinochet Ugarte.[17] Although the leadership of the military *junta* was intended to rotate on a periodic basis, power was soon consolidated by General Pinochet to form his own personalised regime. In 1974, Decree Law 527 applied the 1925 Constitution to the military government, making the *junta* president 'Supreme Chief of the Nation'.

From the outset the military regime had two main objectives. The first, in accordance with National Security Doctrine, was to destroy the parties of the left and their collaborators who the military blamed for the nation's economic and political crises. This would be achieved by an 'all-out war' against subversion to 'crush an enemy it believed had infiltrated close to half the population' (Valenzuela, 1989:188). As the military perceived part of the problem to be the

[17] The original *junta* members were: General Augusto Pinochet Ugarte (Army); General Gustavo Leigh Guzmán (Air Force); Admiral José Toribio Merino (Navy); and General César Mendoza Durán (commander of the *Carabineros* – Police).

inherent weakness of liberal democracy (an explanation for the rise of the left), the second objective of military rule was a 'fundamental restructuring of Chilean political institutions and political life aimed at "cleaning" impurities from the body politic' (Valenzuela, 1989:188). The military's vision of a 'protected democracy' saw a new political order of committed and patriotic citizens dedicated to modernising the country' (Valenzuela, 1989:188).

In order to meet its first objective, a 'state of siege' was declared immediately after the coup whereby civil liberties were suspended allowing the military to wage an internal war against left-wing subversion (Human Rights Watch, 2003c). Congress was suspended, political parties were either banned or declared in 'recess', and all labour movements were sharply circumscribed (Valenzuela, 1989:188). Thousands of left-wing politicians, activists, union leaders, and supporters were arrested and tried in military courts known as War Councils; they were mostly executed or imprisoned.[18] As with Argentina, there were also numerous massacres, extra-judicial executions, tortures and disappearances. According to official records gathered after democratic transition, there were 3,197 victims of executions, disappearances and killings between the years 1973-1990 (Human Rights Watch, 1999).

This scale of repression, unprecedented in Chile, was made possible through the 'creation of a coercive legal framework which eliminated judicial protection and guarantees of due process' as military courts were given jurisdiction over a wide range of civilian offences (Barahona de Brito, 1997:41). According to Pereira, the trials in military courts 'created a kind of "official story" of the regime's repression, in which state violence was portrayed as having been administered within a rule of law' (Pereira, 2001:563). In contrast to Argentina, where the repression was veiled in almost total secrecy, in Chile the military sought legitimacy by invoking this 'official story', thereby creating a 'virtual legality' within which the systematic violation of human rights was permitted (Pereira, 2001:563). This reflects the constitutional basis used by the armed forces in justifying and (in its view) legitimising military intervention; legal limits on

[18] Consejos de Guerra.

military power were thus bypassed without ever departing from formal constitutional rule (Barahona de Brito, 1997:41).

Beyond this framework of 'virtual legality' there also existed a clandestine network of terror operationalised by the newly created Directorate of National Intelligence (DINA).[19] Answerable only to General Pinochet himself, the DINA's structures, operations and governing laws were secret. Free from all controls and protected from interference by the courts as well as the commanders of the other branches of the armed forces, the DINA became an immensely powerful tool of repression, as well as a means of further consolidating Pinochet's personal rule. A general involvement of the military could have led to tensions between the different branches of the armed forces with potentially serious consequences for political stability, such as those seen in Argentina (Barahona de Brito, 1997:45). However, by creating an all but autonomous body of repression, excessive decentralisation, with its associated problems, was avoided.

The worst period of repression occurred between the years 1973-1976 during which thousands of left-wing political activists and supporters, particularly members of the Left Revolutionary Movement (MIR), the Communist Party (PC), and the Socialist Party (PS), were arrested and detained in secret detention centres, were tortured or disappeared.[20] Between 1974 and August 1977 the number of kidnappings, illegal arrests without trial, torture and disappearances peaked. By 1975 it is estimated that between 40,000 and 50,000 people had been detained, the majority of whom were tortured (Barahona de Brito, 1997:49). From February 1974 onwards, repressive methods changed; intelligence services ceased to publicly announce deaths and the detained began to disappear as increased use was made of clandestine, rather than official, detention centres. Later in 1974, the DINA set up a network of cooperation between the intelligence services of the Southern Cone countries, known as Operación Cóndor (Operation Condor). This operation facilitated cross-border repression as political prisoners were traded between countries. The operation also involved

[19] The Dirección de Inteligencia Nacional (DINA) was set up in October 1973.
[20] Movimiento Izquierda Revolucionario.

the assassination of opposition politicians and generals in exile, notably, the murder of General Prats, former head of the Chilean army, in Argentina; of Orlando Letelier, Allende's ambassador, in the US; and the attempted assassination of Bernardo Leighton, leader of the PDC, in Italy.

Domestic opposition to the repression took the form of a number of human rights groups, often protected by the church.[21] The *Vicaria del Solidaridad* in particular, became 'models for human rights groups throughout Latin America and sources of information and inspiration for human rights activists in the US and Europe' (Keck and Sikkink, 1998:90). Following condemnation by the UN General Assembly, and damning reports by Amnesty International and the Inter-American Commission on Human Rights (IACHR) after investigating alleged human rights abuses in Chile, pressure from abroad increased (Hawkins, 2002:53).[22] Pinochet was 'shunned by most foreign governments'; the British Labour government halted its arm sales, the US Congress supported a similar move, and Italy refused to appoint an ambassador (Power, 2002:104). Following the Letelier assassination in the US in 1976 coinciding with the election of the more pro-human rights President Carter and a visit by a UN delegation to assess the state of human rights, further pressure was placed upon Pinochet to rectify Chile's human rights record.

In January 1978, partly in response to domestic and international criticism over Chile's human rights record, steps were taken by Pinochet to legitimise the regime and consolidate his personal rule. A plebiscite was held to affirm the legitimacy of 'President Pinochet' in which he received (supposedly) 75 per cent of the vote (Valenzuela, 1989; Philip, 1985:316-317). The vote, opposed by some of the *junta* members and the PDC, who realised that power would not be returned to civilian hands for some time, consolidated Pinochet's personal rule and ended any internal power struggles (Philip, 1985:317). In March 1978, the 'state of siege' was declared over, and an amnesty law was legislated absolving

[21] In contrast to Argentina, the Catholic Church in Chile was active in opposing governmental repression.

[22] That Amnesty International were not prevented from conducting investigations into alleged violations, and in fact were 'well received' by the government, reinforces the notion that the military felt its repressive actions were legally justifiable (quoted in Power, 2002:102).

all those involved (on both sides) of any criminal responsibility.[23] The by now infamous DINA was disbanded and replaced by the National Centre of Information (CNI), and repression, particularly the number of disappearances, abated.[24]

Immediately after the coup the *junta* had no clear economic plans and by the end of 1974 the economy was in a worse state than it had been before the coup. During this time, Pinochet became associated with the 'Chicago boys' (a group of American trained economists advocating free market principles) who brought him into alliance with some of the most prominent capitalist groups in Chile (Philip, 1985:311). Their objective was to transform the entire economic structure with the aim of 'integrating Chile directly into the world capitalist economy and to eliminate the "distortions" caused by government control and intervention' (Philip, 1985:311). The results of the 'shock treatment' policy first implemented in April 1975 was to cause huge recession, however by 1976 there was a moderate recovery, and during the years 1978-1980 Chile experienced something of a boom period (Philip, 1985:313).

In 1980, a new 'authoritarian constitution' was drafted by Pinochet's advisors that paved the way to an eventual return to representative rule whilst enshrining the political and economic principles of the regime (Linz and Stepan, 1996:206). The transitional arrangements consisted of a plebiscite to be held in 1988 to decide on whether the presidential nominee selected by the military *junta* should be allowed to rule as 'elected' president for eight more years (Linz and Stepan, 1996:206). However, this was dependent on the acceptance of the Constitution and the system of 'protected democracy' its provisions embedded.

One of the main themes of the new constitution was the 'considerable autonomy' accorded to the military (Fitch, 1998:45). Within the Constitution's provisions was the creation of an eight-member National Security Council (NSC) made up of the Commanders-in-Chief of the four armed services, the President of the Supreme Court, the controller of Public Administration, the President of the

[23] Decree Law 2.191 (*Ley de Amnistía*), 18 April 1978.
[24] Central Nacional de Informaciones.

Senate, and the President of the Republic himself. The NSC, whose main purpose was to 'advise' the President, was given an open-ended mandate as 'guarantors of the institutional order' and could respond to any issue that in its judgement 'gravely threaten[ed] the institutional order or compromise[d] national security' (Fitch, 1998:154). Additionally, the President's power to remove its members was severely curtailed by the creation of a 'un-removability prerogative' (*inamovilidad*) for the Commanders-in-Chief of the armed forces, leaving them in their post until March 1998 (Linz and Stepan, 1996:208).

The Senate was also affected by the adoption of a system whereby nine of the 36 senators would be designated instead of elected. Four of these were chosen from the former heads of the four branches of the armed forces, three from the Supreme Court, and two would be appointed by the president (of which one had to be a former university president and the other a former minister of state). As any constitutional amendment would require a two-thirds majority in both congressional houses the inclusion of 'pro-Pinochet' senators would clearly create an effective veto on constitutional reform. Should any reform be approved at congressional level, it would then have to pass before the newly created Constitutional Court before they were promulgated. Out of the Constitutional Court's seven members, two were chosen by the military-dominated NSC, three by the members of the Supreme Court (the majority of whom had been personally appointed by Pinochet), one from the Senate (with its designated senators) and finally, one by the president.

Combined, the provisions of the Constitution meant that any incoming government would be severely constrained in its ability to set out and implement its policies without the consent of the outgoing regime. The Constitution thus institutionalised the regime's concept of a 'protected democracy', changing the 'juridical and ideological foundations of the political system' (Barahona de Brito, 1997:99). In early 1981, it was presented before the population for ratification and (in what has been widely regarded as a 'flawed' vote) was accepted by the majority of the people, thereby setting the timeline for the eventual transition to 'representative rule' (Linz and Stepan, 1996:206).

During the rest of 1981, Pinochet's economic policy began to run into difficulties, and there was a drastic fall in GDP (Philip, 1985:318). Eventually, amid an economic crash, social and political protest was renewed (Philip, 1985:319). However, unlike in other South American countries this did not spell the end for the regime. Disagreement amongst the opposition parties failed to produce any clear alternatives and Pinochet was able to endure due to the military's loyalty and the institutionalisation of his rule. This permitted him a second chance at reforming the economy, which gradually began to recover.

Although never again reaching the pre-1978 levels, between 1980 and 1983 repression re-emerged with a number of selective disappearances, and the military War Councils began to function again despite the lack of a declared 'state of siege'. Between 1983 and 1986 expulsions and the use of concentration camps dominated and from 1986 repression declined as exiles returned amid liberalisation and preparation for the transfer of power.

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The unprecedented levels of repression and violence carried out during military rule in both Argentina and Chile meant that the human rights issue would be high on the agenda for any incoming democratic government. Having so far explored Argentina and Chile's experience of military rule, it is now necessary to move on to examine how both countries fared during the process of democratic transition. Before doing so however, it is useful to first look more broadly at the internal dynamics of the transition process. This allows us to explore in more general terms the relationship between political conditions set at transition and the possibility of holding human rights prosecutions within newly democratised regimes.

THE PROCESS OF DEMOCRATIC TRANSITION

As part of what Huntington (1991) has termed the 'third wave', during the 1980s and 1990s, democratic transitions were initiated throughout most of Latin America, including in Argentina and Chile. In many of these countries, substantial numbers of people, particularly those originally in favour of military intervention, either denied that human rights atrocities had occurred (claiming

the stories to be an invention) or maintained that they had been a necessary evil during the war against subversion (Human Rights Watch, 2001). Others, however, including victims and families of victims (often members of human rights organisations), supported by sections of the international community, were united in calling for justice. Certain acts committed by individuals were seen as being so heinous and unacceptable for a human being to invoke upon another as to be considered crimes against humanity, their commission unjustifiable even in times of war. However, in South America, and indeed elsewhere, administering justice over these crimes during and after the process of democratic transition (referred to as *transitional justice*) proved highly problematic. Trials were seen not simply as a means to prosecute individuals, but as a way to judge and effectively 'control' the past.

Human rights trials, in other words, are likely to be an emotive and highly charged issue that places a tremendous strain on the process of democratization. The extent to which advocates of justice can secure progress on human rights prosecutions depends very much on the type of transition, which in turn depends on the type of prior authoritarian regime and its characteristics.

Comparative analysis of transitions from authoritarian rule has led to the delineation of a number of 'transition types'. One ideal-typical transition, termed '*pactada-reforma'* (Linz and Stepan, 1996) or 'transformation' (Huntington, 1991), occurs when the authoritarian regime takes the initiative and plays the decisive role in ending the regime, changing it into a democratic system (Linz and Stepan, 1996:57; Huntington, 1991:124). Within this essentially top-down model, the outgoing regime is able to retain a strong position throughout the transitional process and dictate both its pace and depth. The second form, referred to as 'replacement' (Huntington 1991) or 'breakdown/collapse' (Linz and Stepan, 1996), results from the collapse, breakdown, or overthrow of the non-democratic regime. The outgoing regime has either little, or no, control over the transitional process and its ability to impose any conditions on the incoming government is severely limited.

Between these two poles, Huntington (1991:152) identifies what he terms a 'transplacement' (an amalgamation of a 'transformation' and a 'replacement') whereby 'dominant groups in both [the authoritarian] government and opposition' recognise that they are 'incapable of unilaterally determining the nature of the future political system'. Negotiations are characterised by a greater degree of mutual dependency.

In their seminal work, Linz and Stepan (1996:55) argue that the preceding type and characteristics of the non-democratic regime have 'profound implications' for the transitional process. They identify several forms of non-democratic regime and discuss the implications of each for the transitional process. The focus here is on military regimes, which take one of two distinct forms: hierarchically led and non-hierarchically led military rule. Because of an absence of internal divisions, 'the more hierarchically led the military, the less they are forced to extricate themselves'. In this sense, hierarchy implies unity; the higher the level of institutional unity at transition the better placed the military is in resisting the demands of the opposition and negotiating withdrawal on its own terms (Linz and Stepan, 1996:67). Because the military remains as an institution following transition it is better able to enforce transitional settlements, possibly pressurising the incoming government to desist from conducting policies it opposes.

Conversely, a non-hierarchically led military regime (for example in Greece, where the coup had been led by a group of colonels) would be unable to rely on the guaranteed support of the military-as-institution, and would therefore have less power at, and following, transition. This is particularly so concerning human rights prosecutions, where 'the chances that the military-as-institution will tolerate punishment and trials of members of the outgoing non-democratic government are significantly greater if the group being punished is not seen to be the military institution itself, but a group within the military which had violated hierarchical norms' (Linz and Stepan, 1996:68).

Also important for the balance of power at transition is the regime's level of support within civil society. O'Donnell and Schmitter (1986:16) use a regime's

economic performance as a proxy for support, claiming that a 'high economic conjuncture could transfer the regime's effectiveness into popular support for the regime during transition'. However, Linz and Stepan (1996:78) warn against the use of economic indicators in understanding popular support for the regime, pointing out that a booming economy might equally prolong the life of a non-democratic regime or alternatively take away one of the principal reasons for its existence (to stabilise the economy). Nevertheless, they do agree that 'consecutive years of negative growth lessen the chance of either a non-democratic or democratic regime surviving' (Linz and Stepan, 1996:80). Although we cannot categorically state the effects of economic success, failure/crisis would seem likely to precipitate the end of any regime and weaken its position within negotiations.

There are other sources of regime (non) support beyond its economic performance. For example, a defeat in war would be a clear humiliation for an authoritarian, especially military, regime, often leading to the loss of its legitimacy amongst much of the population. Moreover, whilst many authoritarian regimes 'practice dictatorship and repression in the present' they often promise democracy and freedom in the future (O'Donnell and Schmitter, 1986:15). This creates a long-term dilemma. Whilst support might be achieved in the short term by citing security or performance, authoritarian regimes often lack a long-term legitimating formula with which to sustain their rule. One way around this problem is by institutionalisation and the creation of a legal position that justifies the continued existence of the military regime. A regime that faced transition for one reason or another, but which had managed to institutionalise itself and its principles on some sort of legal basis, might be able to extricate itself via negotiations (albeit not in an ideal bargaining position). Had it not undergone a process of institutionalisation, the regime might face immediate collapse and omission from any political bargaining. In particular, the establishment of a new constitution during the regime, or the legislation of certain laws that allowed non-democratic elements to remain, would clearly strengthen the position of the outgoing regime during transitional negotiations.

In such a context, concessions could be secured in order to insulate particular arenas from democratic pressures. This is especially the case concerning human rights prosecutions, where amnesty laws that exonerate perpetrators might be retained as the price of transition. In fact, the prior degree of repression used and the extent of human rights atrocities committed would also affect the level of support at transition. Whilst during authoritarian rule news of such crimes might be suppressed, towards and during transition, increased public knowledge might lead to a further loss of legitimacy.

Finally, Przeworkski (1986:52) comments that it is not legitimacy (support) *per se*, but the 'presence or absence of preferable alternatives and their level of legitimacy as compared with that of the current system' that is particularly important. The domination of moderates over radicals and, importantly, the extent to which the opposition is united, contribute to the opposition's legitimacy and therefore its negotiating strength.

Placing the issue of human rights into this context, we can see (again in ideal-typical terms) that a hierarchically led military regime enjoying a high-to-moderate degree of legitimacy would most likely withdraw from government on its own terms through a 'pacted' transition where it could negotiate guarantees safeguarding itself from human rights prosecutions. On the other side of the spectrum, a non-hierarchically led military regime that has little or no perceived legitimacy, if it does not collapse outright, would be unable to enter into negotiations safeguarding itself from future prosecutions.

Based on these scenarios we can understand why relatively few countries in South America were able to place former military leaders on trial following transition. Most countries' experience of military rule was of hierarchically led militaries, and few could be said to have 'collapsed'. Having thus discerned how different transitional conditions will dictate the extent that newly established democratic governments will be able to bring accused perpetrators to trial, it is now possible to place this into context by briefly examining the conditions of transition in Argentina and Chile.

Democratic Transition in Argentina

At transition in Argentina, the configuration of power relations was clearly in favour of the democratic opposition, represented by the lose coalition *Multipartidaria*. The combination of a disastrous war in the Malvinas in 1982, an economic crisis at home, and the need for a quick exit strategy, meant that the military could not secure a negotiated pact of withdrawal safeguarding its future interests (Linz and Stepan, 1996:193). However, Linz and Stepan (1996:192) warn against categorising the Argentine transition as a collapse, citing the fact that elections were announced in July 1982, held in October 1983, and the newly elected president was only inaugurated in December 1983: as they put it, 'eighteen months do not a collapse make'. In fact, the war resulted from the regime's lack institutional unity and the loss of legitimacy and not vice-versa, although defeat undoubtedly exacerbated both. Although military rule had been hierarchical in nature, even before the failure in the Malvinas war disunity between the branches of the armed forces had threatened the disintegration of the ruling *junta* (Mcguire, 1995:185).

In power, the military had shown itself to be wholly incompetent at managing the economy and had also failed to institutionalise its position. There was never an attempt to invoke a constitutional or legislative justification for its intervention and no plans had been laid for constitutional reform and the eventual restoration of democracy (or at least electoral representation). The regime had only ever been justified in terms of the war against subversion and there had never been an attempt to 'erect a framework of virtual legality around the repression' (Pereira, 2001:567). In fact, according to Linz and Stepan the military government had been more of an 'authoritarian situation' than an institutional 'regime'. Seen as a transitional *de facto* power, when defeat in war precipitated the regime's end, the military was never in a position to impose constraining conditions on the incoming government (Linz and Stepan, 1996:193). Therefore, when Raul Alfonsín of the Radical Party (UCR) defeated the Peronists (PJ) and won the presidential election and entered into office on 10

December 1983, it was in what has been described as 'the only un-pacted and the most classically free transition' in Latin America (Linz and Stepan, 1996:193).[25]

Democratic Transition in Chile

In Chile, in October 1988, according to the provisions of the Constitution, General Pinochet was presented to the population as the military *junta*'s choice for president. The opposition parties of the political centre and left (excluding the Communist Party) united for the first time within a broad coalition known as the *Concertación de Partidos Políticos por la Democracia* and actively campaigned for a 'No' vote; the parties of the right actively campaigned for General Pinochet (Barahona de Brito, 1997:100). The newfound unity of the opposition parties proved effective and the coalition took 54 per cent of the vote, defeating the 44 per cent gained by Pinochet (Linz and Stepan, 1996:206; Barahona de Brito, 1997:98). Whilst the result demonstrated the high level of support Pinochet still enjoyed, the 'No' vote victory paved the way for full presidential elections in 1989 and the eventual transfer of power in March 1990 (Linz and Stepan, 1996:212).

A major condition of democratic transition and military withdrawal was the adoption of the 1980 constitution by any future government. Nevertheless, a series of negotiations between the military, the parties of the *Concertación* and the parties of the political right, yielded a reform package that removed some of its authoritarian provisions. The membership of the Senate was increased from 36 to 48 members, thereby reducing the relative weight of the designated senators. The NSC was reduced to an advisory role and the military's majority status was eliminated. Several international human rights agreements were incorporated into Chilean jurisprudence, and the quorum for amending the Constitution was lowered (Barahona de Brito, 1997:98; Hunter, 1997:457). These reforms were approved overwhelmingly by plebiscite in July 1989 (Linz and Stepan, 1996:207).

[25] The Radical Party is the *Unión Cívico Radical* (UCR). 'Peronists' is the commonly used name for the *Partido Justicialista* (PJ).

Additional Legal Obstacles

At the same time, Pinochet passed a series of laws, which in conjunction with the Constitution further curtailed the powers of the incoming government. These laws prevented the replacement of most of the federal bureaucracy, judges of the Supreme Court and Constitutional Court, and the armed forces, and thus ensured a continuing political bias in favour of the outgoing regime, making it almost impossible to investigate its past repressive activities (Angell, 1993:197-198).

Moreover, the Electoral Law created a quirky bi-nominal voting system that provided for two seats per district. The effect of the system was that a party (or alliance) commanding a little more than one third of the vote would receive one half of the seats (Hunter, 1997:456). While a winning vote needed 65 per cent to gain a seat, the runner-up would need only 33 per cent (Barahona de Brito, 1997:105). This voting system would therefore over-represent the minority vote allowing it to increase its numbers in both houses of the legislature. The system was devised under the assumption that the centre-left opposition would have a majority and that the right would have slightly more than one third of the vote (Hunter, 1997:456). The effect of this over-representation, combined with the designation of nine Senators, all but guaranteed an effective veto to the political right on most laws and certainly any constitutional amendments.

Through the Rosende Law of June 1989, Pinochet tried (with some success) to 'pack' the Supreme Court by granting a US$50,000 sum to all judges over the age of 75 who were willing to retire (Barahona de Brito, 1997:102).[26] Although only seven of the eleven eligible judges accepted the offer, the result of purging the court's members was that only three of the members of the Supreme Court had been in their position prior to the military coup; all the remainder had been subsequently hand-picked by General Pinochet (Matus, 1999:301). Whilst this clearly favoured Pinochet, as there was no official retirement date (membership lasted for life) Pinochet also ensured the maintenance of the court's bias for many years to come.

[26] He had already purged the courts prior to this date in order to ensure the maintenance of a supine judciary.

In December 1989, the *Concertación* candidate, Patrico Aylwin of the Christian Democrats (PDC) won the presidential election with 55 per cent of the vote.[27] Nevertheless, due to the bi-nominal electoral system, the right took 49 out of the 120 seats within the Chamber of Deputies and, more importantly, 16 out of the 38 elected seats within the Senate (Barahona de Brito, 1997:105). With the addition of the nine designated Senators, the right (or at least anti-*Concertación* parties) commanded a majority in the Senate and thereby retained a veto over future legislation and constitutional amendments.

Between the election and the final transfer of power in March 1990, Pinochet enacted a series of *leyes de amarre* (binding laws). The most important such law was the 'Organic Law of the Armed Forces', which granted greater autonomy to the military. The law (approved 12 days before President Aylwin's inauguration) stipulated that the president could no longer order military officers to retire and made the future nomination of major generals the exclusive prerogative of the Commander-in-Chief of the armed forces (Linz and Stepan, 1996:209). As this position would be retained by Pinochet himself until 1998, the law thus reinforced the dependence of all military officers vying for promotion on him personally, thus ensuring their loyalty (Linz and Stepan, 1996:208). The government's 'powers of the purse' were also weakened: the military budget had to remain at least at the 1989 level in addition to receiving ten per cent of the foreign exchange from the sale (by the state) of Chile's main export, copper (Linz and Stepan, 1996:209).

The Chilean transition to democracy was thus characterised by Pinochet's control over the whole process. The nature of Pinochet's personal rule ensured that he would enjoy total loyalty from the military as an institution; importantly, Pinochet had recognised the inherent conflict between the military-as-government and military-as-institution and therefore established a sharp separation between the two (Valenzuala, 1989:193). Once in government service, officers only took orders from their government superiors, either civilian or military (Valenzuela, 1989: 193). It was thus 'by serving both as president and

[27] The right-wing coalition (*Democracia y Progreso* was comprised of the *Renovación Nacional* (RN), the *Unión Democrática Independiente* (UDI) and some other minor parties.

Commander-in-Chief of the army' that Pinochet avoided the inherent tensions that develop in military regimes between officers occupying government positions and those serving in the institution itself (Valenzuela, 1989:193). In doing so, Pinochet was able to ensure the military's absolute loyalty, in what has been termed the '*verticalidad de comando*'. Additionally, Pinochet ensured that his regime was seen to be legitimate by a large proportion of the population in addition to the outside world. In declaring a state of siege, adopting the 1925 Constitution, and through the several plebiscites approving his presidential role and the establishment of the 1980 Constitution through which he institutionalised the political principles of the regime, at transition Pinochet was able to claim a certain degree of legitimacy awarding him a powerful position from which to negotiate the terms of transition. Although the opposition had finally united within the *Concertación*, the combination of Pinochet's support from the military, the business community and the right, and through the legitimisation and institutionalisation of his regime, Pinochet was able to dictate the conditions of transition. The armed forces were established as autonomous actors within a political system with prescribed advantage over the incoming coalition thus guaranteeing the continuation of Pinochet's constitution and his authoritarian style. The only way this situation could be amended would be through constitutional reform, which had been made almost impossible by the rules of the game that Pinochet had set. As such, there was little doubt that the political agenda of the future democratic government would be largely concerned with trying to amend the restrictions on its activities. According to Linz and Stepan (1996:206), the incoming democratic government would have to 'share power *de jure* with individuals and institutions whose bases were not democratic in origin'. As such, in stark contrast to Argentina, they deem the transition to democracy in Chile to be 'the most democratically disloyal transfer of power' in Latin America.

The conditions of transition in Chile were thus clearly unfavourable to human rights prosecutions. Similar factors allowed the military in Brazil to dominate the transitional process and to negotiate the retention of amnesty laws that prevented human rights prosecutions as part of the price of withdrawal (Linz and Stepan, 1996:168). In Uruguay, the military was in a less powerful position and although

it managed to secure concessions, failed to secure restrictions on prosecutions (although it has long been suspected that an agreement was reached with the democratic opposition not to prosecute) (Linz and Stepan, 1996:154). Only in Argentina, where the military had been defeated in war and had lost any sense of legitimacy, was the outgoing regime unable to secure its immunity from prosecutions. It would thus seem most likely that trials could take place in Argentina and Uruguay. However, in both countries amnesty laws were eventually legislated by the civilian governments.

In order to understand how radically different transition types in Argentina and Chile resulted in similar results for the possibility of human rights prosecutions, I now look in detail at transitional and post-transitional human rights policies in Argentina and then Chile. These provide a basis for later research by identifying the nature of obstacles faced by both governments and human rights activists in pursuing policies of justice and allow us to discern why after several years of attempts, something of a line was drawn through the possibility of further human rights trials.

TRANSITIONAL AND POST-TRANSITIONAL HUMAN RIGHTS POLICY IN ARGENTINA: 1983-1990

Human Rights Policy under Alfonsín

Following the transfer of power, the human rights issue immediately posed a challenge to the newly elected Argentine government. 'Mounting outrage' against the military for its mishandling of the war had grown alongside increasing calls for retribution and justice as more details of the policies of repression were released by the media (Burns, 2002:425). During the elections Alfonsín and the UCR had promised 'to investigate human rights violations and to bring to trial those who committed the worst excesses, regardless of their position of authority' (Nino, 1991:2623). One of the reasons the Peronists had been defeated was due to the discovery of a prior agreement with the military to prohibit any form of human rights prosecutions if they formed the next government. Philip comments (1985:269): 'Alfonsín's success was due to the electorate's perception that he was the candidate most likely to ensure a clean

break with the failures and defeats of the past. It was therefore essential that the new government keep its promises and justice was seen to be done'.

In order to implement these policies successfully while maintaining at least a working relationship with the military, Alfonsín felt it important to limit the scope of trials in some way (Nino, 1991:2645). The question was where to draw the line for criminal responsibility.

Alfonsín identified three levels of responsibility: those who gave orders; those who committed excesses in implementing the orders; and those who simply followed orders. Only the first two categories would be considered liable for prosecution (Mendez, 1997:37). This interpretation would allow more than just the *junta* members to be held responsible for their actions without the requirement that every individual involved with any 'criminal' act had to prove their belief in the legitimacy of the order (Nino, 1991:2635).

Honouring Alfonsín's election promises, the government revoked a military self-amnesty law which had been decreed only months prior to transition and which sought to absolve all military personnel from criminal responsibility for actions carried out as part of the 'Dirty War' (Barahona de Brito, 2001:121).[28] A new law made provision for the prosecutions of the nine members of the ruling military *juntas* for crimes committed during 'operations undertaken with the alleged motive of suppressing terrorism'.[29] In an attempt to pacify military resistance, the members of the final post-war *junta* were excluded from prosecution having overseen the transition to democracy and had not been widely associated with the worst of the atrocities. Additionally, the *junta* members would be prosecuted by the Supreme Council of the Armed Forces (CONSUFA), giving the military justice system the 'first shot' at judging its peers.[30] This would allow the military an opportunity to cleanse itself of its own

[28] *Ley* 22.924, *Autoaministía,* 23 March 1983. This was annulled through *Ley* 23.040, 22 December 1983.
[29] *Ley* 23.049, 9 February 1984. This included taking the country into war over the Malvinas/Falklands.
[30] *Consejo Suprema de las Fuerzas Armadas.*

tainted image and permit a certain amount of reconciliation to take place with the civilian government (Barahona de Brito, 2001:121).

Although it seemed as if the government's intentions to limit the scope of trials had been assured, these were dashed by a last-minute senatorial amendment. This permitted the civilian courts to act in the case of delay or negligence by the military tribunal after six months, and that 'atrocious and abhorrent acts' could not be excluded from prosecution - thereby creating a 'loophole for the widening of the prosecutions' (Human Rights Watch, 2001; Barahona de Brito, 2001:121). As Nino (1991:2526) points out, those seeking justice were keen to emphasise that 'every crime committed in this context might be deemed "abhorrent and atrocious"'. The result was that the government's attempts to limit accountability and eliminate the possibility of perhaps hundreds or even thousands of officers being placed on trial, failed at the outset.

In addition to announcing the trial of the *junta* members, another of the early initiatives of the government was to create the *Comisión Nacional para la Desaparición de Personas* (CONADEP). This presidential commission, made up of independent and respected citizens and chaired by the famous writer Ernesto Sábato, was granted full powers of investigation to record past abuses and discover the truth over military repression (Burns, 2002:428).[31] In the now famously titled *Nunca Más* report, the commission published its findings within a year. In total, it documented the disappearance of 8,963 people, confirmed the existence of 340 detention centres, and listed the names of 1,351 people who had cooperated with the military repression, namely doctors, judges and priests (CONADEP, 2003).

As the government had feared, the military regarded the report as one of 'extraordinary and wholesale condemnation' of the military as an institution (Huser, 2002:234). Nevertheless, upon publication, the commission's findings were used as the basis for prosecuting the former *junta* members. At the same time, the government agreed to establish an Under Secretariat for Human Rights

[31] Decree Law 187/83, promulgated 15 December. 1983. The Peronists abstained from sending congressmen to the CONADEP in an attempt to reduce its legitimacy.

with a mandate to continue with the work left unfinished by the commission (Barahona de Brito, 2001:121).[32]

Following the publication of *Nunca Más*, attention re-focused on the trial of the *junta* members. Progress within the military tribunal had been predictably slow. Following the expiry of the allocated time-period plus an extension, the CONSUFA refused to prosecute, issuing a statement claming that it saw nothing legally reprehensible in the methods used by the *junta*s during the war against subversion (Burns, 2002:431). In line with the senatorial amendment mentioned earlier, jurisdiction of the proceedings was then transferred to the civilian Federal Court of Appeals (*Cámara Federal de Apelaciones*) (Human Rights Watch, 2001).[33] Between 22 April and 10 December 1985, Argentina's 'trial of the century', known officially as 'Case 13' (*Causa* 13), was held under the auspices of Judge Julio César Strassera (Burns, 2001:431; García, 1995:259). The nine *junta* members were charged with committing various crimes including murder, torture, unlawful detention, housebreaking and falsification of public documents (Burns, 2001:432). During the oral proceedings, the tribunal heard the testimony of 833 people and produced three tonnes of documents and 900 hours of tapes (Barahona de Brito, 2001:122). The final verdict and sentencing of the accused was transmitted live over radio and television (Barahona de Brito, 2001:122). Former president and head of the first military *junta,* General Jorge Videla, and Admiral Emilio Massera, former commander of the navy, were both sentenced to life imprisonment; General Roberto Viola was sentenced to 17 years; Admiral Armando Lambruschini to eight years and Brigadier Orlando Agosti to four and a half years (García, 1995:261). The other four *junta* members were all absolved (Barahona de Brito, 2001:122).

In the midst of the *junta* trial, in November 1985, another trial had commenced under military jurisdiction against 16 officers charged with political and military

[32] Barahona de Brito notes that since the publication of *Nunca Más*, the Under Secretariat for Human Rights has confirmed about 3,000 new cases bringing the official number up to 12,000, although many human rights groups believe the real number to be closer to 30,000 (Barahona de Brito, 2001:121, fn.2).

[33] Following transition the Argentine judiciary had been purged of the regime's most ardent supporters and Alfonsín personally appointed all five of the Supreme Court judges (Larkins, 1998:fn.31). As such, the majority of the senior judges were in favour of the trials. Throughout the thesis the *Cámara Federal del Apelaciones* is referred to as the *Cámara Federal.*

misconduct in the Malvinas war (Huser, 2002:101). Following the verdict in the first trial, and despite being absolved of culpability, the members of the military *junta* that took Argentina to war all remained under arrest to face charges in this second case. In May 1986, the military tribunal sentenced General Galtieri, Admiral Anaya, and Brigadier Dozo (all *junta* members), to 12, 14, and eight years imprisonment, respectively (Huser, 2002:102).

The condemnation by the CONSUFA of the action of its former leaders reflected the military's lack of dissent in the matter of accountability over the conduct of the Malvinas War. On the other hand, the refusal of the CONSUFA to act concerning the increasing number of human rights cases now on its hands, demonstrated the military's continued opposition to those prosecutions. The numerous cases against area and unit commanders and military officers in charge of operations in which criminal acts allegedly took place, which had been waiting the outcome of the first trial, now passed to the civilian courts (Nino, 1991:2634). Additionally, within the context of the senatorial amendment concerning 'atrocious and abhorrent' acts, the *Cámara Federal* recommended that other officers could be tried on such a basis, 'further widening the universe of "prosecutables"' (Barahona de Brito, 2001:122). By August 1984, human rights organisations had already presented over 2,000 cases to the courts and, by the end of 1984, CONADEP had provided an additional 1,087, making over 3,000 cases, at least 650 of which involved officers still on active duty (Barahona de Brito, 2001:122).

The First Amnesty Law

Delays of months and years for these prosecutions to begin produced more and more unrest in the military rank and file (Nino, 1991:2627). In April 1986, army prosecutor Brigadier-General Hector Canale warned that 'the growing number of prosecutions is harming the morale of the ranks, and generating the possibility of projecting an image of collective trial against members of the armed forces' (Burns, 2002:439). In response, the government called on the military courts to use a broad interpretation of due obedience and to speed up remaining cases so they would avoid being transferred to civilian courts. The controversial action of the government provoked civil uproar and led to a number of resignations within

the judiciary and the executive (Human Rights Watch, 2001). Amidst protest marches, within which human rights organisations such as the *Madres de la Plaza de Mayo* openly denounced government actions, the government was accused of delivering a 'double message'.

Whilst 'officers on active duty were told that the government was taking steps to ease their plight,' the public was being told that 'there was no change in the government's intention to assert the rule of law and to prosecute the crimes of the "Dirty War"' (Americas Watch, 1987:64). Nevertheless, adhering to the government's 'instructions', the CONSUFA hastily acquitted two notorious human rights violators: Alfredo Astiz, an undercover agent who had operated from the infamous detention centre ESMA; and Luciano Menéndez, former commander of the Third Army Corps (Human Rights Watch, 2001).[34] By June 1986, the civilian courts had taken on the majority of the cases formerly under military jurisdiction. In December 1986, the Supreme Court confirmed the convictions of the former *junta* members and an estimated 6,000 cases remained pending within the courts (Barahona de Brito, 2001:122). In the same month several other high-level prosecutions resulted in convictions.

As the military sabres rattled, with increasing numbers of military officers speaking out against the government (including a declaration that the military were still the final arbitrators in the country's politics), Alfonsín responded by again trying to impose limitations (Burns, 2002:446). On 24 December 1986, the first of Argentina's Amnesty Laws, *Ley* 23.492, *Punto Final,* was promulgated in an attempt to bring a swift end to the human rights trials (Human Rights Watch, 2001). The law gave a 60-day deadline to present cases to the courts, after which no new charges could be filed, and it required the CONSUFA to submit cases to the Federal Appeals Courts within 48 hours for a decision to be made on whether to press charges. The attempt at limitations, however, was counter-productive: 60,000 people took to the streets in protest against the measures and human rights groups increased the pace of their work and filed cases against hundreds of armed forces staff, including many still on active duty (Barahona de Brito,

[34] *Escuela Mecánica de la Armada* (ESMA): Navy Mechanics School.

2001:123). The law had been passed near to the traditional judicial break no doubt in an attempt to reduce even more the time available for cases to be submitted. Nevertheless, many of those in the legal profession, including judges, forwent holidays in order to process the maximum number of cases (Barahona de Brito, 2001:125). The result was that by the February deadline, more than 300 officers, including more than 40 generals and eight admirals, were facing charges, although many others, on whom information was incomplete, escaped justice (Human Rights Watch, 2001).

Reforming the Military Institution

The aim of the Alfonsín administration had been to turn the institution into 'an apolitical military removed as a contestant for authority' (Huser, 2002:121). The main component of the administration's reforms focused on cuts in military expenditure and manpower. Upon entering office, the essential premise that 'fewer military resources would translate into fewer military political resources' became government policy (Hunter, 1997:464). However, cuts were also motivated (and justified) by economic goals. Alfonsín, having inherited a 'crisis-ridden economy', was keen to enact austerity measures and the military was the obvious target (Hunter, 1997:465).

Defence spending during the military regime had predictably reached an all time high. In 1980, the military budget (not including the Ministry of Defence) was 29.2 per cent of the total government expenditure, or 4.3 per cent of GDP. The 1984 budget under the new democratic administration was drastically cut by up to 40 per cent in terms of GDP from that of 1983 to only 2.8 per cent.[35] Despite protests from the military, these cuts continued throughout Alfonsín's presidential term of office. Hunter (1997:464) cites a reduction in defence spending from 32.3 per cent of public expenditure in 1982 to only 18.4 per cent in 1990. The consequences were that there were no funds to pay for equipment maintenance. Reportedly at one point, up to 90 per cent of the military's tanks were out of operation due to maintenance deficiencies (Huser, 2002:76).

[35] Adalberto Rodriguez Giavarini, *Las Fuerzas Armadas y el uso de los recursos económicos*, Annexe 4 (cited in Huser, 2002:76).

In addition to the budgetary cuts, there was also a drastic reduction in the numbers of personnel. During military rule, the Argentine armed forces had been proportionally one of the largest in the developing world, made up of substantial numbers of professional soldiers and conscripts (Burns, 2002:442). Following transition, the number of conscripts fell from 63,000 in 1984 (most of whom were released before they had completed their full year), to 35,000 in 1985 (Huser, 2002:80). The total number of military personnel almost halved from 120,000 in 1983, to a low point of 70,000 in 1987. The result was that many of the military outfits were seriously undermanned, which reduced the operational capability of the military.

Particular efforts were made to eliminate the autonomy of the 'all powerful' Commanders-in-Chief of the various branches of the armed forces and to bring them under the control of the civilian Ministry of Defence (Burns, 2002:442). Alfonsín's first steps were to scrap the military *junta* and invoke his 'constitutional right to be the sole commander of the armed forces' (Burns, 2002:443). Following the example of post-Franco Spain, the government replaced the former high commanders of the *junta* with the Joint Chiefs of Staff.[36] It was believed that joint planning and concentrating the strategy and doctrine functions in the Joint Staff would reduce the autonomous political power of the various branches and strengthen vertical loyalty (Huser, 2002:58). In addition, decision making over important areas, such as the military budget, arms production and national defence policy were transferred to the civilian-led Ministry of Defence (Hunter, 1997:464).

Reorganisation also meant giving the military a new mission that would increase its commitment and subordination to the democratic system. However, the Alfonsín administration had a much clearer sense of what it did not want than of what it did (Huser, 2002:70). The aim was to remove the military from involvement with any notion of internal security and reverse the National Security Doctrine that had led to the military's involvement with the 'Dirty War'. Following many delays and disputes, a National Defence Law (*Ley de*

[36] Hunter notes that this was considered a downgrade in importance, from commander to chief of Staff (Hunter, 1997:464).

Defensa Nacional) was finally promulgated in 1988 that set out the role of the military (Hunter, 1997:464). The law separated external defence from internal defence, which became largely the prerogative of the police and border patrols, and the military was banned from planning scenarios for internal conflict and from using military intelligence for domestic purposes.

Whilst the government's aims had been comprehensive enough, the initiatives put in place by the Alfonsín administration 'did less to depoliticise the military than it did to reduce its political effectiveness by shrinking its political resources' (Huser, 2002:121). Whilst military expenditure, manpower, and equipment were substantially reduced, attempts to restructure the military and give it a new mission ultimately failed. Part of the reason behind the failure was the lack of funds. Without the funding to train new civilian staff to make the Joint Chief of Staff system workable, service autonomy continued unabated. Likewise, the government wanted to instil a change in military attitude focusing on the professionalism of the military and its removal from the political scene through education. However, little change could be implemented because funding did not follow (Huser, 2002:89). By the time the National Defence Law came into being, civil-military relations had already deteriorated. As such, the provisions for generating and implementing new military policies were delayed indefinitely (Huser, 2002:68). The reforms thus antagonised the military and reinforced 'perceptions that the military was being punished' to the detriment of the government's wider reform plans (Huser, 2002:121). Combined with the prospect of burgeoning human rights trials, hostility towards the government within the rank and file of the military increased.

The Second Amnesty Law

The failure to quell this discontent was clearly demonstrated when the first of a series of long-feared military uprisings occurred during the Easter holiday. On 15 April 1987, army intelligence officer Major Ernesto Barreiro failed to appear before a court to answer charges against him concerning crimes committed at the La Perla concentration camp (Huser, 2002:124). After taking refuge in the garrison of the 14th Infantry Regiment at Córdoba, his comrades in arms refused to give him up. This initial defiance of the government and the army high

command became more serious on 17 April, when Colonel Aldo Rico, commander of the 18th Infantry Regiment in San Javier, Misiones Province, revealed that he had taken over the Army Infantry School at Campo de Mayo just outside of Buenos Aires (Huser, 2002:125). The painted-face rebels (or *carapintadas)* demanded a 'political solution to the trials' and the removal of the army's high command for having 'subordinated the interests of the institution to Alfonsín's political convenience' (Torre and de Riz, 1993:355). Despite an order to end the military revolt, no military unit obeyed. After several days and a massive civilian protest in which some 400,000 people gathered in the Plaza de Mayo to show their support for democracy, Alfonsín went to the rebel stronghold and convinced them to lay down their arms.

The uprising had finally demonstrated the severity of the problem and the failure to subordinate the military to civilian control. In response to the discovery that other officers were planning to resist court appearances and judicial detentions, the government decided to bow to military pressure and legislate in favour of impunity. On 16 May 1987, the Chamber of Deputies passed a bill creating the second of Argentina's Amnesty Laws, *Ley* 23.521, *Obediencia Debida*, which was finally promulgated on 4 June (Human Rights Watch, 2001).

The law set out the parameters of due obedience by defining which military ranks held decision-making capacities and excluded all others who merely followed orders, and thereby granted automatic immunity to all ranks of the armed forces and police below that of colonel (Human Rights Watch, 2001). The law also annulled Item 30, the senatorial amendment that had excluded 'atrocious and abhorrent' acts committed by all other military ranks. A further amendment extended immunity to higher-ranking officers unless it was not legally established within 30 days after the law [was] sanctioned, that they had decision making powers or participated in generating orders' (Huser, 2002:126).[37] Despite an appeal by the human rights organisations, the Supreme Court confirmed the law's constitutionality on 23 December 1987 (Human Rights Watch, 2001).

[37] Posts excluded from the Amnesty Law were Commander-in-Chief; chief of zone; chief of sub-zone; chief of security, or police force, or prison director (see Article 1, *Ley* 23.521).

The effect of the law was to exonerate hundreds of military and police officers that were accused of participating directly in torture and murder, as well as others who had run clandestine detention centres (Human Rights Watch, 2001). In addition to revoking the prison sentences of several of those already convicted, the law dramatically reduced the number of military officers on trial to 62, only six of who were still on active duty (Huser, 2002:127).

Despite the law's effectiveness in limiting human rights trials, the concessions of the government failed to bring a halt to the military uprisings. The second of the military uprisings occurred in January 1988 and once again the instigator was Colonel Rico (Huser, 2002:113). On 17 January, the commander of the 4th Infantry Regiment in Monte Caseros, declared support for Rico and his ideas, now collectively termed *Operación Dignidad.*

Although the uprising was linked to the impending arrest of Rico, a number of issues that had underpinned the first rebellion remained. The junior officers that had fought in both the 'Dirty War' and the Malvinas conflict felt betrayed by the top military hierarchy who they felt to be compromised through their dealings with the civilian leadership. Although there had been a vast reduction in the number of human rights trials, for the military there had been no vindication of its position and the convictions concerning the Malvinas War remained intact. Also, as the number of prosecutions concerning human rights atrocities had fallen, the number of prosecutions regarding responsibility and involvement within the first military uprising had increased, thus further provoking anger within the ranks. Despite the continuation of these grievances, the second rebellion lacked cohesion and was put down with relative ease by the army without bloodshed (Huser, 2003).

Nevertheless, in December of the same year, another uprising occurred in Villa Martelli (Nino, 1991:2638). The rebels demanded the resignation of the head of the army, the extension of the *Obediencia Debida* law to all except the *junta* members, the suspension of all trials for violations of human rights, amnesty for the rebels of previous uprisings, a better budget, and a promise that only Colonel

Seineldin be held accountable and tried in military court for this latest rebellion (Huser, 2002:117). The government refused to negotiate and the rebels surrendered several days later. Meanwhile, an attack on an army barracks by a left-wing extremist group reawakened memories concerning armed insurgency in the years prior to the *Proceso*. This was used by the military to further justify its role during the 'Dirty War' and cast 'aspersions on the weak pacifism of the Alfonsín government' thereby undermining its position (Torre and de Riz, 1993:358).

From Alfonsín to Menem

With the economy in chaos due to the hyperinflation that exploded from February 1989 and the political costs of failing to curb military power, the UCR lost the presidential election of May 1989 (Burns, 2002:484). The Peronist candidate, Carlos Menem, received 49 per cent of the vote compared to 37 per cent for the Radical's candidate, Eduardo Angeloz (Torre and de Riz, 1993:360). Although his presidential term ran until December, Alfonsín resigned several months early realising that only a new administration could combat the economic and political problems that now gripped Argentina.

Menem thus took control of the government in July 1989 with a Peronist majority in both houses of congress (Torre and de Riz, 1993:362). To impose the drastic economic reforms he had in mind, Menem needed to ease civil-military tensions (Hunter, 1997:466). Anxious to attract foreign capital and restore investor confidence, Menem adopted a more conciliatory approach to the military than his predecessor (Linz and Stepan, 1996:201; Hunter, 1997:464). However, Menem was unwilling to increase the military's political autonomy and was unable to increase the size of its budget. It was thus the human rights issue that would be at the forefront of Menem's attempts to achieve reconciliation with the military.

The Peronists had long intimated to the military that, had they been in power, human rights trials would be brought to an end. During his inauguration, Menem had reportedly commented that he 'hated to see even birds in cages' (Huser, 2002:125). Therefore few were surprised when on 8 October 1989, Menem

issued a substantial number of pardons through decree laws 1002 to 1005 (Huser, 2002:126). The pardons concerned 39 military officers who had been charged with committing human rights crimes; the three *junta* members who had been convicted for their part in the Malvinas War; all of those who had taken part in the military uprisings as well as 57 former leftist guerillas (many of whom remained fugitives from justice).

The policy of appeasing the military, effectively bringing it 'on side', seemed to have worked when a later military rebellion in December 1989 was crushed by the armed forces in the name of military discipline. The revolt, which focused on low pay and the lack of troops rather than on political issues, lasted only 24 hours, during which Menem declared a state of siege. Armed with 'extraordinary' constitutional powers, Menem ordered his army chief of staff to 'completely extinguish' the rebels (Huser, 2002:128). The resulting armed combat led to 14 casualties and over 55 wounded. At no point had Menem been seen to consider negotiation as an exit strategy and he had given no promises, rebuffing all attempts at dialogue. Unlike under Alfonsín, loyal troops had showed no reluctance to carry out Menem's orders. Less than a year later, on 29 December 1990, President Menem, in an attempt to clear the way for national reconciliation, issued a new round of pardons extending to all of those remaining in prison.

The combination of the two Amnesty Laws and the two sets of presidential pardons by Menem brought an end to the chapter on human rights trials and seemingly brought the military under civilian control, albeit at the price of human rights justice. This enabled Menem to concentrate on implementing his drastic economic reforms and sustain the severe budgetary cuts in military spending.

* * *

In summary, despite its weakened position at the beginning of the transitional process, several years of human rights trials and unpopular institutional reforms created great hostility and resentment within the rank and file of the military. Overtime, hard-line factions within the military began to gain support leading to the series of armed uprisings against both the government and their military

superiors by whom they felt betrayed. In order to rein in these factions, concessions became vital and the human rights issue became a political bargaining tool.

The government had tried and ultimately failed to reform the military whilst attempting to bring to justice those responsible for murder, kidnapping and torture. Upon Menem's victory and the Peronist succession to power, it seemed as if the military were finally brought under civilian leadership at the cost of ending all human rights trials and the pardoning of all those already convicted. Accepting impunity would be the price for 'democracy' and, perhaps more importantly, 'stability' within which the process of reconciliation could occur. Although some, particularly the human rights organisations, regarded the actions of both Alfonsín and Menem as capitulation to military aggression, in the eyes of many, the government's actions were morally indefensible but essential to secure longer-term goals.

TRANSITIONAL AND POST-TRANSITIONAL HUMAN RIGHTS POLICY IN CHILE: 1990-1996

Following democratic transition in Chile, much of the political agenda of the newly elected government would be taken up with trying remove the authoritarian enclaves left over from Pinochet's regime. However, in order for the *Concertación* to remove these authoritarian elements it would have to play by the very rules they created. As such, the centre-left coalition government would have to work with the political right in order to do away with the authoritarian elements that were the very source of its (the political right's) power. As the political right remained staunch allies of Pinochet and the military, for democracy to work on any level, cooperation with the military (or at least the avoidance of confrontation) was vital. However, the government also need to satisfy the calls for justice over the many human rights atrocities committed during Pinochet's regime. The issue, by its very nature, would threaten the possibility of cordiality. As with Argentina, a middle strategy was required that would settle the demand for justice yet permit the development of a working

relationship with the political right and fall short of provoking a military backlash precipitating a return to authoritarianism.[38]

Unlike Argentina, in Chile there already existed legal constraints prescribing the limits of justice by way of the 1978 Amnesty Law. *Ley* 2.191, *'Ley de Amnistía'*, exonerated those acting as 'authors, accomplices and accessories of criminal acts committed as part of the 'State of Siege' between 11 September 1973 and 10 March 1978. Any future legislative attempt to abrogate the law would be likely to fail for the reasons already outlined. Although this only covered crimes committed before 1978, the judicial system, especially the Supreme Court, was dominated by supporters of Pinochet's regime and these were unlikely to pursue human rights cases with much enthusiasm.[39] Combined with requests from the military for jurisdiction over particular cases, it seemed unlikely that justice could be achieved in any form.[40]

The Rettig Commission

Despite these obstacles, in his inaugural speech President Aylwin reaffirmed his commitment 'to search for truth, justice, and reconciliation' by proclaiming it as one of three key tasks to be undertaken by the transitionary government (Loveman and Lira, 2002:35; Barahona de Brito, 1997:152).[41] During political negotiations prior to handover the emphasis had gradually shifted towards truth (rather than justice) as many proposals (particularly to abrogate the 1978 Amnesty Law) met with vitriolic opposition from the military (Barahona de Brito, 1997:104). Accordingly, Aylwin announced that justice would be achieved '*en la medida de lo posible*' (in so far as it was possible), stipulating that only individuals could be prosecuted and that this would be through ordinary

[38] Linz and Stepan (1996) point out that the fact that Pinochet remained Commander-in-Chief of the army and the chiefs of the other branches of the armed forces and other high-ranking officials (many of whom were associated with acts of repression) were confirmed in their position until 1998 only exacerbated the problem.

[39] In addition to the Rosende Law, mentioned earlier, it must also be remembered that, unlike in Argentina, the judiciary remained largely unchanged following democratic transition. The same judges who had failed to protect individuals throughout the regime were now responsible for prosecuting their repressors.

[40] The responsibility for deciding on military jurisdiction lay with the specific court. This could be appealed eventually to the Supreme Court.

[41] During the ceremony held at the National Stadium, a renowned torture centre during the early parts of the regime, Aylwin also promised to reform the political system and to pay the social debt.

courts rather than institutional trials as in Argentina (Barahona de Brito, 1997:104). As such, although the 1978 Amnesty Law remained intact, throughout the country individual complaints were filed with the courts and judges were assigned to investigate the allegations.

On 25 April 1990, the government set up the *Comisión de Verdad y Reconciliación* to investigate and report on the official truth of the past.[42] Aylwin ensured that the Commission would have a pluralist character, choosing members from wide-ranging political backgrounds including marked supporters of Pinochet and his regime, although both the UDI and some RN members refused to participate (Loveman and Lira, 2002:81). The Commission would collect information and record details about human rights crimes, although (as a concession to the right) the remit of investigation excluded the thousands of cases of torture and forced exile, focusing solely on crimes resulting in death; the identity of those implicated would also not be made public (Barahona de Brito, 1997:156). The government was 'at pains to separate the aims of the Commission from the judicial activities of the courts' being a vehicle for a 'political and moral, but not judicial justice' (Barahona de Brito, 1997:157). The government had learnt from their Argentine neighbours that being associated too closely with human rights trials could easily provoke military hostility. The collection of this information therefore was envisaged as an end in itself rather than as the means to later trials, although it would clearly be of invaluable use to the ongoing investigations.

Whilst the Commission conducted its investigations, initiatives from both the executive and the legislature to come to an agreement over constitutional changes that would also secure the release of the remaining political prisoners failed. The first of these, the *Leyes de Cumplido* (named after the Minister of Justice, Francisco Cumplido), sought to reform legislation concerning the autonomy of the military and to ensure the release of the remaining political prisoners detained under Pinochet (Loveman and Lira, 2002:62). Some of the proposed reforms would also facilitate the possibility of human rights trials, such

[42] Referred to as the Rettig Commission after its president, Raúl Rettig.

as placing politically motivated crimes under the jurisdiction of the civilian justice system and the removal of the military Auditor General from the membership of the Supreme Court (Barahona de Brito, 1997:132, 168-169). Negotiations between the *Concertación* and the RN based on reciprocal concessions eventually collapsed due to irreconcilable disagreements (Barahona de Brito, 1997:170). Although some of the reforms were eventually approved in 1991, Senatorial amendments resulted in the exclusion of most of the provisions concerning the political prisoners and human rights trials (Barahona de Brito, 1997:171).

In a second attempt at legislation, termed the *Acuerdo-Marco,* agreement was reached between the PDC and other centre parties of the *Concertación* and the RN that would 'permit an effective national reconciliation [...] as well as seeking the truth and the application of justice in cases of human rights violations' (Barahona de Brito, 1997:170).[43] In return for the release of the remaining political prisoners, there would be an overall reduction in the length of sentences for human rights crimes committed during the military regime. Additionally, crimes which after the reduction held sentences of less than 61 days would be exempt from prosecution (Barahona de Brito, 1997:170; Loveman and Lira, 2002:43). The agreement was opposed by the President, who 'would not contemplate [the prisoners] liberation at the expense of impunity for human rights violators' (especially before the Rettig Commission had published its findings) and the Socialists who along with human rights groups, claimed that the *Acuerdo* was a 'hidden amnesty' for certain crimes especially those involving disappearance (Loveman and Lira, 2002:45).

During the period of negotiation, the discovery of a mass grave containing 20 bodies bearing all the signs of execution in Pisagua helped to add weight to the argument of those opposed to the *Acuerdo-Marco* (Loveman and Lira, 2002:48). As the nation watched the removal of the easily identifiable bodies, calls were made for the resignation of General Pinochet who bore ultimate responsibility for the crimes (Loveman and Lira, 2002:47). The sensation created by the media,

[43] Deputy Jorge Molina, cited in Barahona de Brito (1999:170).

in addition to the discovery of further mass graves, forced the political right to condemn the killings and call for an investigation into the deaths. The clear evidence of systematic killings made a mockery of the notion that human rights violations had been 'excesses' on the part of individuals, and thereby made the proposals to reduce future penal sentences unacceptable (Loveman and Lira, 2002:48).

During this time the Rettig Commission had been busy investigating past human rights crimes. After the nine months allotted for investigations, the Rettig Commission sent its report to President Aylwin; a month later, on 4 March 1991, in a sombre launch, Aylwin revealed the findings of the report to the nation (Loveman and Lira, 2002:27).[44] The report identified 2,279 cases of political execution and disappearances occurring between 1973 and 1990, of these 641 remained unconfirmed due to insufficient information (Loveman and Lira, 2002:83). The report also listed 641 victims who had died as a consequence of (left-wing) 'terrorism' (Barahona de Brito, 1997:160). The Commission also made a number of recommendations, including introducing compensation for the victims and victims' relatives and the creation of a *Corporación de Reparación y Reconciliación* ('Reparation and Conciliation Corporation') that would continue the work left unfinished by the Rettig Commission (Loveman and Lira, 2002:83). Finally, the report recommended a new law that would declare the presumed death of the disappeared in order to regularise their legal status (Barahona de Brito, 1997:160).

The Commission's findings were criticised on both sides of the political spectrum. Those seeking justice complained that the report did not go far enough, that the remit of the Commission had been too narrow, that there had been no investigation into the practice of torture (of which there are an estimated 15,000 cases), or the numerous cases of forced exile (Barahona de Brito, 1997:160, Burbach, 2003:83). Additionally, the report was criticised for failing to identify the names of those responsible for the crimes and for not advocating future trials (Burbach, 2003:83). On the other side, whilst the political right had

[44] Barahona de Brito comments that the relatively short time period had been an attempt to limit the impact of potential conflict to the first year of democratic rule (1997:157).

been forced, partially by the discovery of mass graves, to accept the Commission's findings, it criticised the fact that the report failed to highlight the 'internal war deliberately waged' by the *Unidad Popular* (UP) coalition government of President Allende (Barahona de Brito, 1997:162). This was emphasised by the military who, although found to be 'institutionally responsible' for the deaths, still blamed the UP government and refused to apologise for the crimes which all branches maintained occurred during a 'state of siege' (Barahona de Brito, 1997:160-166).

Following the report the government acted upon the Commission's recommendations, creating the *Comisión Inter-Ministerial de Subsecretarios Sobre Medidas de Reparación,* which, with the human rights organisations, drafted a law regarding reparations for the victims and their relatives. The 'Corporation for Reparation and Reconciliation' was created by *Ley* 19.123 establishing the 'inalienable right' for relatives to know the fate of the disappeared and was given a mandate of 90 days to complete the Commission's unfinished work (Barahona de Brito, 1997:174, Loveman and Lira, 2002:90). The government's attention then returned to the issue of justice.

The Aylwin Doctrine

Ever since the return to democratic rule, and in fact even before, individuals had been allowed to file criminal complaints with the courts. Although this had resulted in the opening of many initial investigations, the majority of these were threatened by the application of the Amnesty Law. As this would prevent further investigation, President Aylwin called upon judges to adopt a loose interpretation of the law in what has come to be termed the 'Aylwin Doctrine' (Amnesty International, 1996:8). The president recommended that amnesty should be applied to individuals rather than crimes and that an investigation should take place allowing the facts of the cases to be established (notably determining the fate of the disappeared and identifying those responsible) (Amnesty International, 1996:8). Having completed such investigations, amnesty could then be applied in the name of reconciliation, the truth of the crimes having been established. Because under Chilean law, legal precedent is not binding and each case is resolved on its own merits, the application of the Amnesty Law would be

entirely dependent upon the interpretation of the specific judge in charge of the investigation (Amnesty International, 1996:9). Accordingly, President Aylwin had already urged the then President of the Supreme Court, Luis Maldonado, to order the reopening of cases in which the Amnesty Law had already been applied (Amnesty International, 1996:7). Following the Rettig Commission's report, he reasserted his view, stating: 'I hope they (the courts) duly exercise their function and carry out an exhaustive investigation, to which in my view, the 1978 Amnesty Law is no obstacle' (Amnesty International, 1996:8).

However, compliance was at best inconsistent. In response to the President's request the Supreme Court 'unanimously determined' that the application of the Amnesty Law was 'constitutional' and therefore 'precluded [an] investigation into the facts' (Barahona de Brito, 1997:176). Other less senior judges, however, were happy to adopt Aylwin's interpretation. The result was that whilst a lower court might reject amnesty, upon appeal to the Supreme Court it might be applied and the case closed; likewise, its application at a lower level could similarly be overturned on appeal (Amnesty International, 1996:8).

Despite these inconsistencies, many cases (several hundred) remained open and progressed slowly throughout the early 1990s. When an investigation threatened to implicate military officials, a request for the case to be transferred to a military court would be made. Often the Supreme Court ruled in favour of military jurisdiction and, once transferred, cases were 'systematically closed' through the application of the Amnesty Law (Amnesty International, 1996:7).[45] Cases not covered by the Amnesty Law were not exempt from the problem; following transference to a military court the case would became stagnated within a judicial quagmire or closed due to a 'lack' of evidence (Human Rights Watch 1999). As the obstacles began to mount, in December 1992 a 'constitutional accusation'[46] was brought by the Chamber of Deputies against three members of the Supreme Court and the Military Auditor General, Fernando Torres Silva for the 'gross

[45] Barahona de Brito cites as examples the decisions in the Pisagua case in 1990; the Chihio case in 1991; and another involving the 1986 murder of four communists and MIR activists (Barahona de Brito, 1997:176).
[46] This phrase refers to an impeachment process.

abandonment of duties' (Barahona de Brito, 1997:177).[47] In January 1993, with the support of the RN, the Senate agreed to impeach Judge Hernán Cereceda (the others were exonerated) (Barahona de Brito, 1997:177).

Perhaps as a result of the impeachment, during the first half of 1993 there were signs that some judges were beginning to adhere more consistently to the Aylwin Doctrine (Amnesty International, 1996:8; Barahona de Brito, 1997:184). Barahona de Brito (1997:178,184) cites the advances in the Soria and Chanfreau cases and another involving two brothers who disappeared in 1974. However, this relative success was bound to provoke consternation within the ranks of the military; unlike previous cases, those cited above involved military rather than police (*Carabineros*) officers. If success in these cases (adhering to the Aylwin Doctrine) became an example to be followed by others, there would soon be many military officers trailing through the courts.

Civil-Military Relations

Tensions in civil-military relations were exacerbated by the reopening of the investigation into the 'Pinocheques' scandal. In 1990, a congressional investigation had linked General Pinochet to fraudulent multi-million dollar defence contracts between the army and international arms dealers (Barahona de Brito, 1997:179). The case had been dropped due to the resulting conflict between the government and the military (Loveman and Lira, 2002:107). By May 1993, the combined discontent over these issues, which the military viewed as an affront on the integrity of the institution, provoked a public show of strength designed to intimidate the government (Weeks, 2000:72; Wilde, 1999:486-487).

In what has become termed the *Boinazo*, on 28 May 1993, while Aylwin was abroad, the most senior army officers in the military, dressed in combat uniform (usually reserved for operations), met in the armed forces building across from

[47] The cause of the accusation was reportedly for transferring a case of disappearance (Chanfreau case) to the military courts despite an earlier verdict to the contrary (Barahona de Brito, 1997:177, 184).

the presidential palace to discuss the 'situation'.[48] They were guarded by a company of soldiers deployed in front of the building again dressed in combat uniform and armed with automatic rifles and bazookas (Fuentes, 2000:124; Weeks, 2000:73). After the meeting, a state of alert was declared by the army, which was to last for the next five days. All officers remained in their barracks and tanks were seen on the streets of Santiago (Fuentes, 2000:124). There followed a series of meetings between the military and representatives of the government where grievances were discussed and solutions negotiated (Weeks, 2000:73).

Upon his return, Aylwin severely reprimanded Pinochet and reminded him that his actions bordered on the unconstitutional (Barahona de Brito, 1997:181). Nevertheless, the military's action seemed to have had the desired effect. Judge Alejandro Solis investigating the Pinocheques affair soon declared the case to be outside his jurisdiction (Weeks, 2000:74). Concerning human rights, a commission made up of military and civilian members was formed to determine exactly how many human rights cases were filed with the courts, and soon after a series of proposals were put forward to speed up the conclusion of those remaining (Barahona de Brito, 1997:181).[49]

A number of solutions were proposed by the various parties, some involving a further amnesty law, others allowing select 'emblematic' cases to progress. However, although these pleased those on the right, the Socialists (PS), the Party for Democracy (PPD), and some Christian Democrats (PDC) rejected them (Barahona de Brito, 1997:181). Finally, the government presented draft legislation (known as the Aylwin Bill) 'for new procedures for the investigation of all cases that might be covered by the 1978 Amnesty Law' (Barahona de Brito, 1997:181; Amnesty International, 1996:8). The proposals involved appointing special *Ministros en Visita* (visiting judges) to investigate the cases for a two-year period where evidence concerning the fate of the disappeared

[48] *Boinazo* is a reference to the beret, worn by the troops guarding the officers.
[49] Barahona de Brito (1997:181) cites the fact that according to the military there were over 1000 cases with the courts, whereas the government maintained there were only 230. The difference is explained by the military's insistence in counting each individual involved within a case, as a case in itself.

could be submitted in secret (Amnesty International, 1996:8). However, as with the other proposals, the law met with opposition on both sides; although most of the articles were approved by a combined PDC-RN-UDI vote, the article concerning secrecy was rejected by all (Barahona de Brito, 1997:182). The left were particularly opposed to the notion that jurisdiction could remain with the military; however to change this would require a constitutional amendment (Loveman and Lira, 2002:110). Over time, the PDC, not wishing to be seen to be too near to the right as presidential elections drew closer, began to back away from the agreement (Barahona de Brito, 1997:183). Finally, after the PS made a political u-turn and announced that they were opposed to any form of legislation over the issue, and with only weeks to go before the presidential elections, the bill was withdrawn indefinitely; justice would remain the exclusive prerogative of the judiciary (Barahona de Brito, 1997:183).

Despite the inability to form an agreement, the *Boinazo* still had an effect. Amnesty International reports that a noticeable 'hardening' in Supreme Court rulings 'transferring jurisdiction to military courts, and confirming the application of the Amnesty Law was noted' (Amnesty International, 1996:8). Barahona de Brito supports this, stating that following the *Boinazo* the trend to apply the Aylwin Doctrine was 'reversed as military courts claimed and won jurisdiction over many cases' and that in most the Supreme Court confirmed the application of the Amnesty Law on appeal (Barahona de Brito, 1997:184). It seemed that the military had been successful in creating sufficient pressure to force the government, the judiciary, or perhaps both, to reassess the limits of justice. Nevertheless, as long as cases were still open they would remain a potential source of conflict, thereby preventing any true reconciliation.

From Aylwin to Frei

On 11 December 1993, Eduardo Frei of the Christian Democrats (PDC) won the presidential election with 58 per cent of the vote and gained a narrow majority in both chambers of Congress; 70-50 in the House of Deputies and 20-18 in the Senate. Upon taking office in March 1994, initial government statements indicated that the human rights issue would be less of a priority for the new government, which desired to promote cooperation with the military thereby

reinforcing civilian leadership (Fuentes, 2000:126, Barahona de Brito, 1997:185). However, almost immediately Frei was faced with a crisis over the very same issue.

In March 1994, 16 former *Carabineros* officials were convicted for murder in the Degollados case (Wilde, 1999:487).[50] Although the case was not covered by the Amnesty Law and did not involve any high-ranking military officers, the verdict was celebrated as a 'breach of the wall of impunity' as it was the first case to convict numerous officials for human rights atrocities, issuing sentences commensurate with the gravity of the crimes (Barahona de Brito, 1997:146-147).[51] As a result of the case, the then director of the *Carabineros*, General Rodolfo Stange, was accused of orchestrating a cover-up operation and was charged with the obstruction of justice (Amnesty International, 1996:11, Wilde, 1999:487). Faced with his chief of police accused of complicity with human rights atrocities, Frei had little choice but to ask for his resignation (he could not order it due to the 'Organic Law of Armed Forces'); Stange refused (Wilde, 1999:487-488). The impasse that followed generated 'considerable tension' between the civilian government and the military and demonstrated the 'nominal' amount of control the government retained over the armed forces (Amnesty International, 1996:11, Barahona de Brito, 1997:185). The courts eventually dropped the charges and in October 1995 Stange announced his 'voluntary' resignation thereby closing the matter (Barahona de Brito, 1997:185). Once again, conflict between the military and the government had been resolved through concessions over human rights; the price once again had been justice. However, before this matter had been settled, President Frei had another crisis to contend with.

On 30 May 1995 the Supreme Court upheld the earlier convictions of Manuel Contreras and Pedro Espinoza for their role in the assassination of Orlando Letelier and Ronni Moffit in Washington D.C., 1976 (Barahona de Brito,

[50] *Degollados* means slit throat, the case is also referred to as the 'case of the three professionals'.
[51] Quote from Human Rights Watch 1994, cited in Barahona de Brito, 1997:185.

2001:147).[52] An investigation and trial in the US had ended in 1978 with the conviction of Michael Townley (an American who had been extradited from Chile after considerable pressure) and two others, both Cuban nationals (Wilson, 1999:944).[53] Both Contreras and Espinoza had been implicated by Townley and, despite Chile refusing their extradition, the US succeeded in excluding the crime from the 1978 Amnesty Law (Wilson, 1999:944-945).

In Chile, the case had been officially opened in 1991 under Supreme Court Judge Alfredo Bañados, and in 1993 he had found the two defendants guilty (Amnesty International, 1996:8). Upon the Supreme Court's confirmation of the ruling, both officers refused to enter prison. With the assistance of a 'large army contingent' Contreras was moved to the south of the country (where he was admitted into a military hospital claiming to be too ill to enter prison) and Espinoza took refuge in the army's telecommunications headquarters (Wilde, 1999:488, Weeks, 2000:75). Although President Frei was keen to stress that the convictions were against two individuals who broke the law rather than the military as an institution, military discontent was clear (Weeks, 2000:75).

Following discussions between the military and the Defence Minister, Edmundo Pérez Yoma, on 19 June 1995, Espinoza finally entered into Punta Peuco, a prison designed specifically to hold military officials found guilty of human rights crimes (Weeks, 2000:75). Despite a ruling from the Concepción Appeals Court that he was fit enough, Contreras refused to do likewise. The 'considerable military protest and insubordination' began to threaten the stability of the government; Espinoza's incarceration had 'put an end to the notion that no officer would ever be judged by civilians' (as Pinochet had always asserted) and the military were keen to demonstrate their disapproval (Amnesty International, 1996:9, Weeks, 2000:75).

[52] On 31 September 1976 a car bomb exploded along Embassy Row in Washington D.C., which killed both Orlando Letelier (former Defence Minister under President Allende) and his aide Ronni Karpen Moffit. The Court confirmed sentences of seven and six years respectively.
[53] Townley, who was later found to be a CIA agent, received 10 years in prison and then entered into the witness protection programme for implicating Contreras and Espinoza with the crime (Wilson, 1999:944).

In late July over 1,000 officers gathered outside of Punta Peuco prison both to show their solidarity with Espinoza and Contreras and to express their anger over continuing human rights trials (Weeks, 2000:75-76). In a clear move to placate the military, President Frei announced the end of the Pinocheques case (which had reopened since 1993) and agreed that the prisoners in Punta Peuco would be guarded by military troops (Weeks, 2000:76). Following further bargaining over an increase in army salaries, Contreras finally entered the prison over four months after the Supreme Court's ruling to begin serving his sentence (Amnesty International, 1996:9).

The incarceration of two high-ranking military officers, in particular that of Contreras, who was notorious for his repressive exploits, was seen by many as an achievement for justice. However, it had come at a high price. The whole saga had once again shown that the government had to share power *de facto* with Pinochet and the military in order to rule. It was clear that Pinochet considered the Letelier case an exception and would not permit a repetition. In effect, he had made Contreras and Espinoza scapegoats for the atrocities of an entire regime in return for 'definitive resolution of pending human rights trials' (Fuentes, 2000:129). From the government's point of view, the Letelier case demonstrated that democratic transition was far from complete and that future reconciliation and consolidation rested on the ability to finally bring an end to the constant source of provocation between the military and the government.

During the period of conflict over the Letelier case, several legislative initiatives had been put forward. The first of these, proffered by Senators of the UDI and the RN, sought the definitive closure of all cases that had been temporarily suspended; the closure within 90 days of all cases covered by the Amnesty Law; and, finally, the restriction of investigations into the disappeared solely to the location of their remains, with informants granted anonymity (Amnesty International, 1996:3). This was deemed unacceptable by much of the *Concertación* as well as by human rights groups who saw the proposal as a thinly veiled '*punto final*' law.

In August 1995, the government again linked the human rights issue with further reducing the 'authoritarian enclaves' left by Pinochet and proposed three laws. Firstly, changes to the 'Organic Law of the Armed Forces' would permit the President to choose and dismiss the Commanders-in-Chief of the various branches of the Armed Force. The second law proposed changes to the Constitution which would see the system of designated senators disappear along with the bi-nominal voting system, and the composition of the National Security Council would be altered to reflect an increased civilian presence and only the President would have the powers to invoke a meeting (Loveman and Lira, 2002:148; Barahona de Brito,1997:186). In return for these reforms, the government proposed that all human rights cases would be immediately transferred to the civilian courts and special judges would be appointed to investigate cases of disappearance for up to two years. Any information submitted to the courts would remain anonymous and the judge would not be allowed to prosecute those implicated with the crimes. Where the fate of the disappeared had not been determined within the two-year period, the case would be permitted to remain open, although it would no longer be under the exclusive jurisdiction of the investigating judge (Amnesty International, 1996:3-4).

The proposals were strongly opposed by the right. The UDI, supported by the military, were in outright opposition to all of the Constitutional amendments that sought to remove the military as institutional guarantors of the integrity of the nation and any settlement on the human rights issue short of a '*punto final*' (Amnesty International, 1996:3). The RN, however, were willing to negotiate over the proposals. Following an agreement with the government, a revised proposal for the legislation on the judicial proceedings in human rights cases was presented (Loveman and Lira, 2002:154, Amnesty International, 1996:4).

The 'Figueroa-Otero proposal' (named after the Minister of the Interior, Carlos Figueroa, and the leader of the RN, Miguel Otero) referred only to cases covered by the Amnesty Law and would have created fewer 'judges of exclusive dedication' than the government's proposal.[54] These would only work on cases

[54] This refers to judges who are assigned exclusively to investigate one case or episode.

of disappearance for a one-year, renewable period. All prosecutions related to such cases would be closed and once again, those submitting information would remain anonymous (Amnesty International, 1996:4).[55]

However, this time it was the left of the coalition, especially the PS, which was in opposition to the agreement. Once again, agreement had been reached between the RN and the PDC, whilst being opposed by either the more extreme right-wing UDI, or those of the left, the PS. Although serious negotiation took place between the parties on all sides, in answer to the right, the government announced that it would withdraw the Figueroa-Otero proposal unless its other constitutional amendments were approved. This, however, risked a split in the *Concertación* as those that opposed the concessions on human rights threatened to leave the governing coalition (Amnesty International, 1996:4). Finally, by early 1996, as had happened with all previous legislative proposals concerning the human rights issue and constitutional reform, the negotiations broke down and the proposals were withdrawn (Barahona de Brito, 1997:186; Wilde, 1999:488). Once again, the irreconcilable differences between the various political actors meant that no agreement could be reached over either political reform or the human rights issue.

* * *

A clear pattern can be seen that essentially brings us full circle. Since initial transition in 1990, the advancement of human rights cases has been dependent on the political situation. As soon as cases progressed to the point of threatening civil-military relations through the military's opposition, proposals to bring a legislative end to the issue (some by the executive and others by the legislature) have been presented. In this sense, the human rights issue was often treated by both governments of the *Concertación* (although to a lesser extent under Aylwin) as a bargaining tool in order to extract concessions over constitutional reform.

Despite the emergence of a middle ground between the PDC and the more moderate RN of the right, due to the irreconcilable differences between the UDI, supported by the military on the one side, and the PS and other minor left-wing

[55] For a fuller account of the proposals see Amnesty International (1996).

parties supported by the human rights groups on the other, each series of proposals failed. Loveman and Lira (2002:166) comment that the problem was essentially one of how to achieve a political settlement and reconciliation when fundamental agreement over the basic themes was absent. This process can be seen with both the *Boinazo* and the failed Aylwin law, and the Letelier case and the failed series of negotiations that followed. The result was that although cases were allowed to remain the exclusive prerogative of the judiciary, they were effectively prevented from advancing due to the inherent constraints imposed at transition. The last display of military discontent was only resolved with the understanding from the army that 'handing over Contreras represented the final chapter in human rights prosecutions' (Weeks, 2000:77). However, in reality, due to the differences within the political spectrum, the government was unable to reach a satisfactory agreement with the political opposition that would have secured this.

By mid 1996 therefore, the human rights issue entered into a state of limbo; it seemed that no other cases would be able to advance due to the military's opposition, whilst all attempts to hasten the end of pending cases had failed. As such, the Letelier Case and the failure to secure a political settlement represent a watershed in the human rights issue (Barahona de Brito, 1997:186). It is for this reason that many commentators have suggested that the later reinvigoration of the issue and the subsequent advancement of cases has only been possible due to external political forces (namely transnational justice) that have interceded to break the cycle of impunity imposed by the political system in Chile (Barahona de Brito, 2001:44; Human Rights Watch, 1999).

THE EXTENT OF POST-TRANSITIONAL JUSTICE IN ARGENTINA AND CHILE

We have seen that in Argentina and Chile although the military-as-government had come to an end with transition, the military-as-institution has remained intact (Linz and Stepan, 1996:68). It is for this reason that regardless of whether an amnesty law or other legal obstacle has been imposed or not, fragile democracies may not be able to survive the destabilising effects of politically charged trials. A

newly elected government may lack the power to bring the military to account without risking the possibility of a military backlash and a reversion to authoritarianism, or at least provoke its own overthrow by sectors that are ill disposed to respect human rights (Orentlicher, 1991:2546).

Ultimately for Argentina, Chile and many other countries throughout Latin America, governments' policies towards past human rights crimes have been limited by the need to facilitate cordial civil-military relations even when the conditions of transition initially seemed favourable to bringing the accused to trial. This need has led many to suggest that truth and reconciliation should be the overall objectives of the policies regarding past human rights violations and that, by abandoning prosecutions, other forms of justice, such as vindicating the victims and compensating their families, could thus be achieved more fully (Zalaquett, 1992:1428). Such policies have been heralded as a success in South Africa where amnesty laws gave immunity to those aiding investigations of human rights violations facilitating truth rather than justice (Boraine, Levy and Scheffer, 1997:152-3). Especially following the military uprisings in Argentina, even some human rights advocates began to accept that foregoing justice was the undesirable but necessary price to pay to complete the transition to democracy, enabling reformers to concentrate on removing 'authoritarian enclaves' left over from the prior regime (Nino, 1991:2628). However, by failing to deal effectively with the complex and difficult issue of human rights, favouring impunity over justice, incoming 'democratic' governments have arguably failed to establish the supremacy of, and respect for, the rule of law, the consequences of which, may be detrimental for the consolidation process.

DEMOCRATIC CONSOLIDATION AND THE RULE OF LAW

We have seen that the ability to bring perpetrators of human rights abuses to trial is contingent on the particular political and legal obstacles encountered at the point of transition. In some cases these factors have proven more conducive to prosecutions than in others. In all cases, however, at least some obstacles existed, particularly the threat of further military intervention, which hung like the sword of Damocles over these nascent democracies.

Such a context compounded the problems of democratic consolidation. Negotiating a return to civilian rule, organised through a relatively free and fair election, is one thing; nurturing, spreading and embedding democratic beliefs and behaviours across all walks of political life, quite another. There is no pre-ordained, linear and uniform process that leads inexorably from liberalisation (within an authoritarian regime) to democratic transition to a consolidated democracy. Whereas transition tasks are often short-term and focused around the 'euphoria' of the first free and fair elections, consolidation tasks are long term and problematic. Some countries, such as Spain, managed to secure a relatively smooth two-stage transition, firstly to free elections, and secondly to a consolidated democracy. But the 'fortuitous combination of circumstances' faced in Spain and 'the exceptional quality of its transitional leadership' have not generally been replicated elsewhere (Linz and Stepan, 1996:5).

More often, the conditions dictated by transitional settlements have led to the creation of political systems that inhibit further consolidation (Sorensen, 1993:30). Legal and political constraints not only limit human rights trials, but also work more generally against the consolidation of democracy. Essentially, the transitional settlement sets the 'rules of the game' and the parameters within which political decision making can occur. Even where military regimes leave office under a cloud, it is by no means evident that incoming regimes have freedom of manoeuvre. Democracy needs to be continuously renewed and the struggle to consolidate democracy, especially following years of repressive authoritarian government, is often slow, contested, and subject to reverses.

As we have seen in Argentina and Chile, the ability to bring perpetrators of human rights abuses to trial, therefore, will depend not only on the legal and political obstacles faced at the point of transition, but on the dynamics of the consolidation process thereafter. By democratic consolidation we mean a situation in which democracy becomes constitutionally, attitudinally and behaviourally 'the only game in town' (Linz and Stepan, 1996:5). This requires much more than the holding of a first free and fair election (O'Donnell and Schmitter, 1986) or a 'two turnover test' (Huntington, 1991). The tasks facing

democratic reformers in general, and human rights campaigners in particular, in post-transitional contexts are multiple and complex and may pull in opposite directions.

In place of a linear and uni-dimensional view of democratic consolidation, Linz and Stepan (1996) identify five arenas that are characteristic of a consolidated democracy. These are: a 'free and lively civil society'; a 'relatively autonomous and valued political society'; the 'rule of law to ensure legal guarantees for citizens' freedoms and independent associational life'; a 'state bureaucracy that is usable by the new democratic government'; and 'an institutionalised economic society' (Linz and Stepan, 1996:7).

The first three of these arenas have particular resonance for questions of human rights trials. In a consolidated democracy, these arenas are mutually supportive and reinforcing, but in the process of democratic consolidation, democracy need not advance equally or uniformly across these arenas. Significant progress can be made in some areas while democracy limps along, or even regresses, in others. Dynamic interactions across these arenas can either facilitate, else stall, the consolidation process.

Concerning the relationship between civil and political society, Linz and Stepan (1996:10) state that 'intermediation between the state and civil society and the structuring of compromise' are 'legitimate and necessary tasks of political society'.[56] For democratic consolidation to occur, 'political society, informed, pressured, and periodically renewed by civil society, must somehow achieve a workable agreement on the myriad ways in which democratic power will be crafted and exercised' (Linz and Stepan, 1996:10). They claim that as a robust civil society can 'generate political alternatives' and 'monitor government and state,' it can help to complete transition and to 'consolidate and deepen democracy' (Linz and Stepan, 1996:9). 'Complementarity' between civil and

[56] Linz and Stepan (1996:7-8) define civil society as 'that arena of the polity where self-organising groups, movements, and individuals, relatively autonomous from the state, attempt to articulate values, create associations and solidarities, and advance their interests' and political society as: 'that arena in which the polity specifically arranges itself to contest the legitimate right to exercise control over public power and the state apparatus'.

political society is necessary for the successful consolidation of democracy (Linz and Stepan, 1996:8).

Because political activity was usually severely curtailed during authoritarian rule, human rights groups (usually protected by the church) were often the only permitted opposition to authoritarian rule. In many cases, this led former political actors (members of the suspended political parties for example) to associate themselves with these organisations, whose mission (seeking justice for human rights violations) replaced party activism as the locus of regime opposition (Barahona de Brito, 1997:114). Accordingly, 'civil society in many countries was rightly considered the celebrity of democratic resistance and transition' as discourse was constructed that emphasised 'civil society versus the [authoritarian] state' (Linz and Stepan, 1996:9).

Following transition, however, political actors may resume their earlier focus on party political activity and the contest for governmental power. To the extent that these actors abandon the previous mission (human rights justice) in favour of a settlement and political reform, and especially if they are perceived to be appeasing the former dictators, elements of civil society may become disillusioned and isolated from their political society counterparts. Whilst the scale of the problem might vary in each country, it would be particularly relevant where the human rights movement had played an important role in the organised opposition to the prior regime and where atrocities had been particularly widespread. Whilst this problem would not necessarily prohibit the development of a free and lively civil society *per se*, it is clear that the 'complementarity' with political society would be difficult to achieve (to the detriment of overall democratic consolidation), as the demands of one (vociferous and potentially significant) section of civil society remain unheard.

Moreover, any abandonment of human rights justice could have implications for the rule of law by embedding impunity and demonstrating distortions in the legal framework. The interaction between civil and political society is, therefore, central to democratic consolidation; and the attitude, behaviour and policies of governments, legislatures and parties will have a bearing on the pursuit (or

neglect) of human rights justice. This could be manifest in many ways, for example through the establishment of truth commissions; sponsoring constitutional reforms that make trials more likely; supporting or blocking the judiciary; the use of presidential decrees and pardons; and the willingness of parties to cooperate and support policies conducive to justice (in line with the demands of active human rights groups).

Specifically concerning the rule of law, Linz and Stepan (1996:10) state that 'a rule of law, embodied in a spirit of constitutionalism, is an indispensable condition' for a consolidated democracy and that this 'entails a relatively strong consensus over the constitution and especially a commitment to "self-binding" procedures of governance that require exceptional majorities to change'.[57] The rule of law also requires a 'clear hierarchy of laws, interpreted by an independent judicial system and supported by a strong legal culture in civil society'. Not only does the law secure the constitution, it underpins the whole essence of civil and political society. Democratic societies would be a virtual impossibility if there didn't exist guarantees from the law, and civilians, military, and authorities alike respected such guarantees. Huntington (1996:213) captures the essence of this position:

> Democracy is based on law, and the point must be made that neither high officials nor military or police officers are above the law ... [P]rosecution is essential to establish the viability of the democratic system. If the military and police establishments can prevent prosecution through political influence or the threat of a coup, democracy does not really exist in the country, and the struggle to establish democracy must go on.

Most human rights groups similarly take as a central premise of their work the notion that impunity for human rights crimes committed by past dictatorships threatens the rule of law, leading to a 'disillusionment with justice'. The absence of respect for the law has a 'corrosive effect on the legitimacy of successive

[57] There has been a recent increase in interest in the rule of law under democratic regimes in Latin America. Most accounts point to the weak penetration of the rule of law and especially the extent to which vast swathes of the population live a life that is 'materially poor and legally poor' (the phrase is O'Donnell's). The question of impunity and human rights trials is only one dimension, albeit a very significant one, of the rule of law. See, for example, Mendez, O'Donnell and Sergio (eds) (1999); Domingo and Sieder (eds) (2002); and the special edition of the *Journal of Latin American Studies* (2004).

governments and the credibility of democratic institutions', the consequences of which can be devastating for the 'quality' of democracy (Human Rights Watch, 2001). Mendez argues that the rule of law is vital to prevent the 'blackmail [of] legitimate leaders conditioning their way of rule'. To avoid such a scenario, democratic principles 'must be based from the start on an affirmation of the rule of law and on the simple notion that in a democracy there are no privileges, much less in criminal cases, for those who wear a uniform or happen to be powerful' (Mendez, 2000:135).

Many transitions from authoritarian rule witnessed attempts to 'pack' the judicial system (notably supreme courts, as we have seen in Chile) with individuals loyal to the outgoing regime. When constitutional amendments and the abrogation of laws (put in place by the former regime) must be granted judicial approval, this 'bias' has often come into play. Specifically it has allowed amnesty laws that prevent the prosecution of members of the military regime to remain intact and, more generally, has prevented the type of judicial independence that might be conducive to the progression of human rights trials from developing.

An absence of judicial independence entails serious implications for the rule of law and is again central to democratic consolidation. The extent to which the judiciary is independent and neutral (with the proviso that this is unlikely to be perfect in any country) will have an impact on the pursuit of human rights cases. A compromised judiciary is likely to be an obstacle to human rights trials.

Moreover, when the prior authoritarian regime has been military in nature, the subordination of the military becomes a relevant factor (Fitch, 1998). Democracy simply cannot be considered to be consolidated until the military is properly subordinated to civilian rule and committed to the rules of the democratic game. Control of budgets, appointments and operational issues are key weapons in the attempt to subordinate the military. If human rights trials are blocked out of fear of military opposition as in Argentina, or by the existence of prior legislation invoked by the military, the military remains unsubordinated to civilian control. Any tangible lack of democratic government authority over the military would

represent a further challenge to the establishment of the rule of law and is another key dimension of democratic consolidation.

The human rights issue, therefore, poses serious challenges for political and civil society (and their 'complementarity') in consolidating contexts and for the establishment of the rule of law. An absence of human rights trials can be seen as symptomatic of a lack of democratic consolidation. At the same time by demonstrating impunity, blocks on trials can also shape attitudes and behaviours in ways that further prevent the development of democracy. In this way, constraints on human right trials can be seen as both symptom and cause in a vicious cycle of democratic non-consolidation.

But this logic implies that virtuous circles are also possible: democratic advances in some arenas feed through into human rights trials which help to shift attitudes and behaviours in ways that are conducive to further democratization. Seen from this perspective, the recent advances in prosecutions in Argentina and Chile, described at the beginning of this chapter, are not only important in themselves but for what they might tell us about the strengthening of the democratic regimes in these countries. Such advances are all the more striking given the impasse that had been reached by the mid 1990s. How, then, might we explain case progression and which factors do we need to take into account?

Chapter 2: Theoretical Framework

In the previous chapter, I posed the question, why has the number of human rights prosecutions in Latin America recently soared? I explored the historical and political context of human rights atrocities occurring under military rule and examined the attempts to bring the perpetrators to justice. At and during the process of democratic transition, political conditions more often than not prevented human rights trials. I then argued that recent advances are indicative of improvements to the political situation and linked progress in human rights prosecutions to the process of democratic consolidation. The advent of human rights prosecutions is thus an important phenomenon meriting analysis both in its own right and for what its cause, or causes, might be able to tell us about the internal dynamics of the democratic consolidation process.

It is now important to establish a theoretical framework that enables us to study how human rights cases have advanced at the same time as allowing us to explore the associated links with, and implications for, the consolidation process. To do so I explore various abstract explanations for a shift in domestic norm behaviour concerning human rights, focusing on an ideational approach that lays emphasis on the role of transnational advocacy networks operating as agents of change within processes of norm diffusion. I then review conceptual models that examine how interaction processes between domestic and transnational dimensions affect domestic political change. Placing these conceptual models into context, I then explore more specific explanations proffered by the literature that focus on how human rights prosecutions have increased. This literature stresses the role of transnational justice and the Pinochet Case within a norm diffusion process induced by transnational advocacy networks, but also highlights the importance of alternative domestic political factors. By identifying and exploring a number of limitations in our present understanding of how prosecutions have advanced, I locate the research and develop a strategy accordingly. Before doing so however, it is useful to first explore the nature and origin of human rights prosecutions in more detail.

THE NATURE AND ORIGIN OF HUMAN RIGHTS PROSECUTIONS

In the context of this study, human rights prosecutions are an attempt to punish individuals who have committed gross violations of human rights at the national level.[1] Human rights prosecutions are therefore essentially a national issue. States are the principal violators of human rights as well as their guarantors, and are thus responsible for the implementation of human rights practices and punishment for their violation. However, human rights as 'a set of principled ideas about the treatment to which all individuals are entitled by virtue of being human,' are by their very nature internationalist (Schmitz and Sikkink, 2002:517). Human rights prosecutions at the national level usually take their legal basis from principles and procedures established within international law. Exactly how each country incorporates these principles into its national law will depend on its particular legal system. As a basic guide, within a monist legal system, international law can often be directly enforced after the treaty is ratified and incorporated into the state's constitution, although this may be subject to specified conditions of acceptance and approval; within a dualist system, further national legislation is required to implement the principles and contents of treaties. Regardless of the specific national legal system, it is clear that human rights prosecutions blur the distinctions between national (domestic) and international levels of politics and law.

Nevertheless, prior to the First World War human rights were almost universally seen as the remit of the state. Despite the anti-slavery movement, and other references to a minimum standard of civilised behaviour, there was not even a 'weak declaratory' international agreement over the existence, or substance, of human rights (Donnelly, 1986:614). It was not until the aftermath of World War II that human rights began to be considered a legitimate international concern. The discovery of Nazi and Japanese war atrocities and the subsequent trials at Nuremberg and Tokyo set a new precedent for individual criminal responsibility and accountability for war crimes and crimes against humanity (Robertson, 2000:206; Barahona de Brito, González-Enríquez and Aguilar, 2001:3). Since

[1] As opposed to war crimes.

that time, the principles of fundamental human rights have been enshrined within the framework of international law through the ratification of numerous treaties and declarations, such as the United Nations (UN) Charter (1945); the Universal Declaration of Human Rights (1948); the UN Genocide Convention (1948); the UN International Covenant on Civil and Political Rights (1966); and the UN Convention against Torture and other Cruel Inhuman Treatment or Punishment (1984). Not only did these establish the inalienable rights of individuals but they specifically called for punishment for the violation of such rights.

Particularly since the end of the Cold War, discourse and behaviour by many governments and international organisations has tended to be more supportive of the human rights agenda, albeit with some notable exceptions. This has underpinned new international agreements such as the UN Declaration on the Protection of All Persons from Enforced Disappearance (1992) and the creation of UN International Criminal Tribunals in 1993 and 1995 to administer justice over human rights crimes committed in the former Yugoslavia and Rwanda respectively. According to Henrard (1999:602), the creation of these tribunals conveyed the message that the 'era of impunity for egregious human rights violations [was] terminated'. More recently, the signing of the Treaty of Rome in 1998 and its subsequent ratification by the required number of states, has led to the creation of the International Criminal Court (ICC) with jurisdiction over international human rights crimes.[2]

The signing and ratification of international treaties calling for the prosecution of human rights violators helped to consolidate the position of international human rights law (Lutz and Sikkink, 2001:2). This has been reflected through a growing jurisprudence within international and intra-national courts and commissions over the non-applicability of domestic amnesties as an obstacle to prosecution. The UN Human Rights Committee (UNHRC) and the Inter-American Court of Human Rights (IACHR) have both determined on successive occasions that domestic amnesties (a frequent means of preventing trials particularly in Latin America) cannot be invoked as an obstacle to a state meeting its international

[2] This court does not have retroactive powers and therefore lacks the jurisdiction to prosecute for the crimes covered by this research.

duties and obligations (created by treaty ratification) to prosecute gross human rights violations.[3]

Human rights norms and treaties form what has commonly referred to as an 'international human rights regime' (Krasner, 1982, 1993, Donnelly, 1986). Krasner (1982:185) defines an international regime as, 'principles, norms, rules and decision making procedures around which actor expectations converge in a given issue-area'. Keohane and Nye expand that it consists of 'governing arrangements that affect relationships of interdependence,' or more precisely, 'networks of rules, norms, and procedures that regularise behaviour and control its effects' (Keohane and Nye, 1977:19).

Unlike other forms of international cooperation, such as those involving trade, environmental or security policy, international human rights institutions are there to hold governments accountable for purely internal activities. They seek to regulate domestic behaviour of governments towards their own citizens. However, an international human rights regime is not generally enforced by interstate action. Rather a human rights regime empowers individuals to bring law suits to challenge the domestic activities of their own government (Moravcsik, 2000:217). Independent courts and commissions attached to such regimes often respond to individual claims by judging that the application of domestic rules or legislation violates the international commitments and obligations of a given state. This is so even where such legislation has been enacted and enforced through procedures consistent with the domestic rule of law (Moravcsik, 2000:217-218).

Despite the clear condemnations of impunity by international bodies, in the absence of mechanisms of international enforcement, during the 1990s Latin American states (amongst others) largely ignored rulings and recommendations

[3]As examples see: 'Concluding Observations of the Human Rights Committee: Peru, 1996', United Nations document CCPR/C/79/Add.67, paragraphs 9 and 10; 'Concluding Observations of the Human Rights Committee: Republic of Croatia, 4 April 2001', United Nations document, CCPR/CO/71/HRV, paragraph 11; Inter-American Court of Human Rights, Judgment of 14 March 2001, *Case of Barrios Altos (Chumbipuma Aguirre and others vs. Peru)*, paragraph 41; Inter-American Commission on Human Rights, Report N° 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 50. All cited in Amnesty International (2001b).

concerning human rights prosecutions on the basis of territorial sovereignty, claiming that justice remains the prerogative of the national legal system. More pertinently, given the limits and constraints imposed by the political conditions of transition even if national governments had wished to comply with international law, the potential threat posed by the military constrained their choices.

The recent advent of human rights prosecutions outlined in Chapter 1 is indicative of a dramatic shift, albeit overtime, of political behaviour. A transference of norm behaviour, from not prosecuting to prosecuting past human rights crimes has taken place. Domestic human rights prosecutions (as opposed to international prosecutions such as the tribunals mentioned above) are the result of a process whereby the 'rules, norms and procedures' of an international human rights regime have been enforced at the domestic (or national) level through its law. How then can we explain this change in behaviour from one that ignores international duties and obligations to one that sees the adoption of international human rights norms, regarding prosecutions, within domestic legal systems?

THEORETICAL EXPLANATIONS FOR A SHIFT IN DOMESTIC HUMAN RIGHTS NORM BEHAVIOUR

The phenomenon of human rights prosecutions in Latin America clearly has both domestic and international dimensions. Within the discipline of international relations there is a growing body of literature that recognises a 'profound' interaction between domestic and international politics (Gourevitch, 2002; Keohane and Milner, 1996; Putnam, 1988). It is thus useful to examine the various explanations that international relations theory posits for the creation and adoption of international human rights norms.

A substantial literature focuses on the role of ideas, transnational networks and coalitions in international politics and their impact on domestic state behaviour (Risse-Kappen, 1995; Keck and Sikkink, 1998; Risse, Ropp, and Sikkink, 1999, Khagram, Riker, and Sikkink, 2002). This 'ideational' (or constructivist)

approach suggests that the recent increase in the number of human rights prosecutions in Latin America is the result of 'transnational justice networks' working at both the national and international level to pressurise domestic governments to embrace international human rights norms and allow prosecutions to take place (Lutz and Sikkink, 2001; Sikkink, 2004). This approach has been adopted by those who see the Pinochet Case as having a major impact on human rights prosecutions throughout the region and has come to represent a significant view within conventional wisdom. Before exploring this approach in detail, I first critique alternative theoretical explanations for the changes in domestic human rights behaviour.[4]

Realism

The first main alternative is the realist approach, associated with Krasner that focuses on power and distribution; international regimes are created to promote the interest of particular actors. To the realist, state sovereignty is the central organising principle of international relations. As 'all governments seek to maintain full domestic sovereignty wherever possible,' all governments are 'uniformly sceptical of external constraints' (Moravcsik, 2000:221). A human rights regime (and its associated norms) necessarily limits the scope of authority which a state can exercise over individuals and thereby places a constraint on the degree of sovereignty that it can exercise over its internal affairs. According to a realist approach, such limitations can only be explained in terms of coercion. The question of whether states adhere to human rights practices depends on the extent to which more powerful states in the international system are willing to enforce the principles and norms of the human rights regime (Krasner, 1993:141). Governments therefore only accept international obligations because they are compelled to do so by great powers, which externalise their ideology (Moravcsik, 2000:221). The establishment of a binding human rights regime thus requires 'a hegemonic group of great powers willing to coerce or induce recalcitrant states to accept, adjust to, and comply with international human rights norms' (Moravcsik, 2000:221). The greater the concentration of relative

[4] The three approaches, realist, liberal and ideational are cited by Lutz and Sikkink, (2001), Schmitz and Sikkink, (2002), Sikkink, (2004) and are also discussed by Moravcsik, (2000).

power capabilities, the greater the pressure on recalcitrant governments to adopt and implement the human rights norms.

Examining human rights between the Seventeenth and Twentieth centuries, Krasner finds that 'only when powerful states enforced principles and norms were international human rights regimes consequential' (Krasner, 1993:141). These findings have some applicability to more recent human rights practices. Despite the existence of international human rights treaties creating duties and obligations, national states have tended to guard their sovereign prerogatives. The most powerful states in the system have not been subject to much international pressure (as opposed to pariah states) and have been reluctant to officially accuse other states of human rights violations because of the danger that their own sovereign control would be undermined (Krasner, 1993:164). On the more positive side, international human rights norms have gained widespread acceptance when they have been embraced and espoused by the hegemon. US leadership was important for the setting up of the international tribunals for Rwanda and the former Yugoslavia (Lutz and Sikkink, 2001:6). And ultimately, as Krasner stresses, the present vision of what constitutes human rights is one associated with a Western liberal, capitalist, democratic, individualistic conception of the polity that reflects the economic, institutional and political power of the hegemonic Western powers (Krasner, 1993:164).

However, realism fails to explain why certain human rights initiatives have proceeded despite opposition from the hegemon. The International Criminal Court was set up as part of the Treaty of Rome (1998) in spite of US opposition. Realism also fails to explain why and when hegemonic states are willing to begin pursuing human rights norms when they did not do so before (Lutz and Sikkink, 2001:6). It thus cannot explain the rise in the number of human rights prosecutions in Latin America and elsewhere. Recognising that realism pays little attention to 'sub-state actors', Krasner himself admits that realism cannot address the consequences of domestic divisions, which can impact on the success of implementing human rights norms by creating transnational alliances (Krasner, 1993:141, 167).

(Republican) liberalism

In place of seeing the motivations behind the domestic implementation of human rights norms as a consequence of international coercion, republican liberalism views them as 'instrumental calculations about domestic politics' taken by the state in view of its own self-interest and preferences (Moravcsik, 2000:225). Traditional liberal international relations theory assumes that states act as rational actors in pursuit of self-interested preferences, though recognises that these may well change over time. There is a consistent focus on the variation in national preferences resulting from social pressures for particular material and ideational interests, as well as those represented by state institutions. Republican liberalism, a strand of liberal theory developed by Moravcsik (2000:226), 'assume[s] that states are self-interested and rational in their pursuit of (varying) underlying national interests, which reflect in turn variation in the nature of domestic social pressures and representative institutions'. It differs from the traditional perspective in that it stresses the impact of varying interests of domestic political institutions, rather than the variation in the economic interests of societal groups.

According to Moravcsik (2000:226), states accept binding human rights treaties as a means of political survival. Agreeing to international commitments is a self-interested means of 'locking-in' particular preferred domestic policies in the face of political uncertainty. In this sense, politicians are willing to delegate power to human rights regimes to constrain the behaviour of future national governments (Moravcsik, 2000:228). 'By alienating sovereignty to an international body – governments seek to establish reliable judicial constraints on future non-democratic governments or on democratically elected governments that may seek to subvert democracy from within' (Moravcsik, 2000:228). Essentially therefore, human rights norms are expressions of the self-interest of democratic governments forcing future administrations to play by their own pre-established set of rules. Locking-in democratic rule through the enforcement of human rights is a means of preventing any political retrogression or backsliding into tyranny.

The decision to accept binding international commitments depends on what Moravcsik terms the implicit 'sovereignty cost'. Assuming that governments

prefer to maintain short-term discretion to shape policy, they are 'inherently sceptical of delegation to independent judges or officials' (Moravcsik, 2000:227). A rational decision to delegate to an independent body or set of rules therefore requires that 'restricting government discretion' is less important than 'reducing domestic political uncertainty' (*ibid*). For this reason, Moravcsik argues that the strongest support for international human rights regimes should come from recently established and potentially unstable democracies rather than established democracies. Only where democracy is established but non-democratic groups (such as the military, communists, etc.) pose real threats to its future is the reduction of political uncertainty likely to outweigh the inconvenience of supranational adjudication.

While Moravcsik's examination of the establishment of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) supports his argument, republican liberalism does has some credence in explaining the establishment of a human rights regime in Latin America. During and immediately after the 'democratic wave' that hit Latin America during the 1980s there was a clear strengthening of commitment to human rights as the newly democratising countries rapidly ratified international and regional human rights treaties (Lutz and Sikkink, 2001:7). As an example, following democratic transition the newly installed Argentine government quickly signed and ratified a host of international and regional treaties on human rights. Although Lutz and Sikkink argue that such ratifications (in Argentina and elsewhere) were also intended to 'signal the countries' newly re-established democratic identity and their re-entry into the community of democratic states', it would seem that at the time the sovereignty cost of adjudication to an independent body outweighed the cost of political uncertainty still posed by the existence of a military uncommitted to democratic principle (Lutz and Sikkink, 2001:7). The theory is further endorsed through Moravcsik's argument that republican liberalism also explains the consistent unwillingness of the US to accept multilateral constraints on its domestic human rights practices under the Inter-American and UN systems as well as its refusal to ratify the Treaty of Rome and endorse the setting up of the International Criminal Court. The inherent sovereignty cost to the US, an

established, self-confident democracy, was not offset by the domestic benefits (Moravcsik, 2000:244).

We might, therefore, accept the notion that states ratify international human rights treaties as a means of political survival. However, republican liberalism fails to explain the later advent of human rights prosecutions. Such prosecutions in circumstances as described in the previous chapter can be seen as a threat to political stability and cannot therefore be the result of the same rational, self-interested decision making process that aims to facilitate a government's political survival. In this sense the advent of human rights prosecutions cannot be viewed alongside the establishment of a human rights regime. The prosecution of human rights violations after a considerable period of inaction is representative of an evolutionary process within the human rights regime. Republican liberal theory might be useful in explaining why such regimes were established, but as Moravcsik himself states, 'the determinants of the evolution of human rights regimes are unlikely to be identical to the determinants of their founding and are therefore unlikely to be explained by republican liberal theory' (Moravcsik, 2000:246). He accepts that new demands reflect new opportunities for representation of social interests once a state has joined a regime, and suggests that liberal theory would stress changes in social ideas and interests as a way of explaining them (*ibid*). This emphasises the importance of changing societal ideas and interests, which republican liberalism alone cannot explain.

Having explored the alternative explanations for a shift in domestic human rights norm behaviour, both the realist and liberal approaches have been shown to be limited in explaining the recent advent of human rights prosecutions in Latin America. In part the reason for this, as pointed out by Krasner, is that both approaches do not take into consideration the role played by sub-state actors. Realism only concerns the actions of states and does not consider the role of domestic divisions; liberalism, based upon the changing preferences of the state, cannot explain how societal ideas and interests change affecting the implementation of human rights norms. I thus now return to consider in detail the ideational explanation for a shift in domestic human rights norm behaviour in order to develop a theoretical framework for research. I then review literature

dealing more specifically with the rise in number of prosecutions in Latin America, before finally formulating a research strategy.

IDEATIONAL EXPLANATION FOR A SHIFT IN DOMESTIC HUMAN RIGHTS NORM BEHAVIOUR

Where liberalism fails, an ideational approach better explains how societal ideas and interests change. Ideational theory is based upon the transformative value of ideas. It suggests that the origins of international norms lie not solely in pre-existing state or societal interests but in strongly held principled ideas, effectively about right and wrong (Lutz and Sikkink, 2001:5). The essence of an idealistic explanation for the emergence and domestic enforcement of a human rights regime, propounded by Risse and Sikkink et al, lies in the prominence of idealistic or altruistic motivations for spreading liberal values. Governments accept binding international human rights norms because they are swayed by the overpowering ideological and normative appeal of the values that underlie them (Moravcsik, 2000:223). The ideational approach thus stresses the transformative power of normative moral discourse; the 'principled' altruistic and moral motives of actors have persuasive powers in themselves. As there is increasing agreement within the international arena over the appropriateness of behaviour concerning human rights, there is pressure placed upon other states to conform creating the notion of civilised and uncivilised states; those inside and outside the club as it were. It is these ideas that intervene between material power-related factors on the one hand and state interests and preferences on the other (Risse-Kappen, 1994:186). Changes in state behaviour can thus be explained by changing ideas of appropriateness and legitimate statehood. This change in normative behaviour has been referred to as a 'norms cascade', where support for a particular norm gathers slowly until it reaches a 'tipping point' (Finnemore and Sikkink, 1998). Adoption by other members of the international community gathers in pace and leads to a cascading effect (Schmitz and Sikkink, 2002:523).

The process of forcing norm-violating governments to internalise international norms, accepting and ultimately adopting them, can be understood as a process of socialisation. In the area of human rights, persuasion and socialisation often

involve tactics such as shaming and denunciations, changing minds by isolating or embarrassing the target. It often involves more than just reasoning with opponents, such as pressures, arm twisting, and sanctions. A clear example is the international campaign against apartheid in South Africa.[5] Risse and Sikkink (1999:5) explore how the processes relate to each other and identify three processes of socialisation that usually take place simultaneously: 1) Processes of adaptation and strategic bargaining; 2) Processes of moral consciousness-raising, 'shaming', argumentation, dialogue, and persuasion; and 3) Process of institutionalisation and habitualisation. They suggest that socialisation processes start when actors adapt their behaviour in accordance with the norm for initially instrumental reasons. Governments want to remain in power, while domestic non-governmental organisations (NGOs) seek the most effective means to rally the opposition. The more they (governments) 'talk the talk' however, the more they entangle themselves in a moral discourse which they cannot escape in the long run. The more they start to justify their actions (i.e. in the name of a war against subversion or terrorism) the more others will start challenging their arguments and the validity claims inherent in them. They become entangled in arguments and the logic of argumentative rationality slowly but surely takes over.

This non-statist perspective stresses the importance of non-state actors as distinct 'agents of change' (Schmitz and Sikkink, 2002:523). Building on previous works (Risse-Kappen, 1994, 1995, Keck and Sikkick, 1998) Risse and Sikkink (1999) elaborate the conditions under which principled ideas and international pressure affect domestic change, presenting a causal argument about the effects of 'transnational advocacy networks' in processes of norm diffusion (Keck and Sikkink, 1998). The diffusion of international norms in the human rights area depends on the establishment and the sustainability of networks among domestic and transnational actors who circumvent repressive state authorities and manage to link up with international regimes to alert Western public opinion and Western governments. These 'transnational advocacy networks' serve three purposes. Firstly, they put norm-violating states on the international agenda in terms of

[5] An example would be the refusal of international sports bodies to allow teams from South Africa to partake in competitions.

moral consciousness-raising. Secondly, they empower and legitimate the claims of domestic opposition groups against norm-violating governments, and by publicising such violations, can help to protect groups from further repression. They are thus crucial in mobilising domestic opposition, social movements, and NGOs in 'target' countries (i.e. the country of the norm-violating government). Finally, advocacy networks challenge norm-violating governments by creating a transnational structure pressuring regimes simultaneously 'from above' (international arena) and 'from below' (domestic arena) (Risse and Sikkink, 1999:5, Brysk 1993). The more these pressures can be sustained, the more likely the norm-violating state will adopt behaviour consistent with the new norm.

In 'Activists Beyond Borders', Keck and Sikkink (1998) developed a model of interaction based on an ideational approach that could explain domestic changes in human rights practices termed the 'boomerang effect'. Faced with repression and blockage at home, non-state actors would seek out non-state allies in the international arena to bring pressure to bear from above on their own government to carry out domestic political change (Keck and Sikkink, 1998, Sikkink, 2004:7). These linkages would eventually develop into a transnational advocacy network that could 'pressure target actors to adopt new polices [and] monitor compliance with international standards' thereby maximising its leverage over the target of their actions (Keck and Sikkink, 1998:3).

The emergence of a transnational advocacy network and the utilisation of argumentative processes are not sufficient, however, to socialise states into norm-abiding practices. Human rights norms can only be regarded as internalised in domestic practices, when actors comply with them irrespective of individual beliefs about their validity (Risse and Sikkink, 1999:16). As stated, initially actors might adhere to norms in response to external pressure for purely instrumental reasons. However, national governments might then change their rhetoric, gradually accept the validity of international human rights norms, and start engaging in an argumentative process with their opponents, both domestically and abroad. Ultimately, the more governments accept the validity of the norms and the more they engage in a dialogue about norm implementation, the more they are likely to institutionalise human rights in

domestic practices. As human rights norms become institutionalised in this sense, implemented independently from the moral consciousness of actors, compliance becomes depersonalised and simply 'taken for granted' thus marking the final stage in the socialisation process (Risse and Sikkink, 1999:17).

Expanding upon the boomerang model, Risse and Sikkink (1999) developed a more dynamic five phase conceptualisation of the effects that domestic-transnational linkages have on domestic political change; several throws of the boomerang as it were. It builds upon the boomerang pattern of influence by incorporating simultaneous activities at four levels into one framework:

- the international-transnational interactions among transnationally operating international NGOs, international human rights regimes and organisations, and Western states;
- the domestic society in the norm-violating state;
- the links between the societal opposition and the transnational networks;
- the national government of the norm violating state;

As a causal model it 'attempts to explain the variation in the extent to which national governments move along the path toward[s] improvement of human rights conditions.' It thus serves to operationalise the theoretical framework of norm implementation/socialisation by specifying 'the causal mechanisms by which international norms affect domestic structural change' (Risse and Sikkink, 1999:19).

The first phase within the spiral model is a state's actions of 'repression and the activation of a network' to oppose it (Risse and Sikkink, 1999:22) Following the raising of international public attention through a transnational advocacy network using moral shaming and persuasion tactics the process enters into Phase 2, 'denial' by the norm violating state. This concerns the denial of the validity of the human rights norm, although a counter argument citing state sovereignty is often deployed (22-24). Phase 3 occurs where the state begins to make tactical concessions in the face of pressure both from above, the international sphere, and below, the domestic arena. These concessions allow domestic groups increased space to mobilise and increase pressure upon the government. At this stage the government is no longer in control of the domestic situation forcing it into a position where it begins to 'talk the human rights talk'.

This inherently leads the government, now unable to defend its behaviour due to its tacit acceptance of the validity of the human rights norm, to become trapped in its own rhetoric (25-28). Phase 4, 'prescriptive status', occurs when the actors involved regularly refer to the human rights norm to describe and comment on their own behaviour and that of others. The validity claims of the norm are no longer controversial, although the government's behaviour might still be considered as norm violating. Institutionalisation of the norms into domestic law and ensuing domestic practices begins in this phase (29-31). The final phase is 'rule consistent behaviour', where international human rights norms are fully institutionalised domestically and norm compliance becomes a habitual practice of actors and is enforced by the rule of law (31-33). During this phase we may see the 'two-level game' described by Putnam (1988), in which domestic leaders who believe in the international human rights norms take power but may lack strength vis-à-vis their domestic opponents to implement those norms (Risse and Sikkink, 1999:33).

Borrowing terms from social movement theory, Sikkink et al, stresses that both the boomerang and spiral models can be thought of as models of the interaction between 'domestic opportunity structures' and 'international opportunity structures' (Keck and Sikkink, 1998; Risse and Sikkink, 1999; Khagram, Riker, and Sikkink, 2002). According to social movement theory, the features of 'political opportunity structures' within which social movements operate, affect their chance of success (Tarrow, 1998; Kitschelt, 1986). Political opportunity structures are 'those consistent dimensions of the political environment that provide incentives for or constraints on people undertaking collective action' (Khagram, Riker and Sikkink, 2002; Tarrow, 1998). The phrases 'open' and 'closed' opportunity structures generally refer to how porous they are to social organisations. Where domestic political opportunity structures are 'open' human rights activists are more likely to be successful in pushing for domestic change. An authoritarian regime would certainly represent a 'closed' domestic opportunity structure for human rights groups, whereas a fully fledged liberal democracy should represent an 'open' opportunity structure.

At the international level, international norms can be seen as particular examples of political opportunities (Khagram, Riker, and Sikkink, 2002:17). As an example, as an international human rights norm on torture is created, endorsed by treaty ratification, and perhaps implemented in various legal cases around the world, a political opportunity regarding human rights and torture is created at the international level. The international opportunity structure becomes open to those blocked on the domestic front, perhaps facing repression under an authoritarian regime.[6] However, the international opportunity structure will not displace a domestic political opportunity structure, but will rather interact with it (Khagram, Riker, and Sikkink, 2002:18). The boomerang and spiral models seek to understand and explain the dynamic interaction between an international opportunity structure and the domestic structure. Blockage in the domestic society sends domestic social movement actors into the international or transnational arena (Khagram, Riker, and Sikkink, 2002:19). The combination of a 'closed' domestic opportunity structure and an 'open' international structure thus initiates the boomerang and the spiral models of interaction. The spiral model goes a step further than the boomerang model as it examines the relationship between transnational networks and domestic structural change, leading to create a more 'open' domestic opportunity structure, within which norm internalisation can take place.

Both the boomerang and spiral models focus predominately on human rights change in authoritarian regimes and thus assume the final phase of the socialisation process to be when the previously norm violating government stops violating the human rights norms and becomes respectful in its actions towards those norms. Nevertheless, as already argued the recent prosecutions can be seen as an evolutionary process within the original human rights regime. In this sense bringing perpetrators of past human rights crimes to justice can be seen as a continuation of the internalisation of the human rights norm. As we have seen, in the last decade human rights have not only become protected under the various international treaties but the punishment for their violation has come to be seen

[6] Sikkink et al. note that the perceived degree of openness at the international level is relative rather than absolute. What might appear as open to a social movement facing repression at home may not be as open as other country's domestic opportunity structures (Khagram, Riker, and Sikkink, 2002:19).

as an international human rights norm. Where realist and liberal approaches have failed to account for this evolutionary process, ideational theory has gained increasing acceptance. The spread of transformative ideas and the development of transnational advocacy networks can be used to explain both the development of an international human rights regime as well as its evolution in the form of more recent prosecutions.

The relationship between the internalisation of human rights norms and more recent human rights prosecutions has been specifically recognised by Lutz and Sikkink (2000, 2001). They argue that a surge of foreign judicial proceedings concerning human rights violations in Latin America (of which that concerning Pinochet is the most renowned) was the result of a 'transnational justice network'. They assert that this network was part of the broader human rights network working in the context of the 'broad shift in international norms towards greater protection for human rights' (Lutz and Sikkink, 2001:3). They put forward the notion that 'increased regional consensus concerning an interconnected bundle of human rights norms [has become] reinforced by diverse legal and non-legal practices fashioned to implement and ensure compliance with them' (Lutz and Sikkink, 2001:3). Focusing on the link between a norms cascade and the international and regional action to effect compliance with the recognition of the legitimacy of human rights norms, they suggest that a 'justice cascade' has occurred in the context of the larger human rights norms cascade (Lutz and Sikkink, 2001:4). The process of norm creation and internalisation are thus inter-linked with the more recent prosecutions, which can thus be seen as an indication of evolution of the original human rights norm.

Lutz and Sikkink (2001:4) contend that this justice cascade has been operationalised through a series of 'norm-affirming events' focusing particularly on what has come to be known as 'transnational justice'. This relates to foreign judicial proceedings based on the principles of international human rights law.[7] Legal proceedings are initiated in foreign domestic courts using a mixture of domestic and international law to claim jurisdiction and prosecute those accused

[7] Foreign in this sense is to mean outside of the country where the human rights violations were committed.

of committing human rights violations. Throughout the 1980s and 1990s, judicial proceedings were initiated in a number of countries, predominantly in Europe, whose nationals had in some way been involved with human rights crimes (Roht-Arriaza, 2001:47). The majority of these early cases concerned crimes committed in Latin America (more specifically Argentina, Chile, and later Guatemala). However, these examples were soon followed by others filing cases against many former dictators and those accused of human rights abuses worldwide (including Habré Hissene of Chad and Henry Kissenger). After lawsuits had been filed and the court accepted jurisdiction, an investigation would be opened to determine the facts of the case. Often the government and the courts in the country where the crimes had been committed would refuse requests for judicial cooperation citing a lack of jurisdiction. During the 1990s for example, the Argentine government refused to allow an Italian investigating judge to hear witnesses testify in Argentina on the basis that the cases had already been tried in Argentina and were covered by the Amnesty Laws in force there (Redress, 1999:33).

As the defendant was not usually present in the accusing country, an international arrest warrant would be issued. However, the fundamental obstacle to justice remained - unless the government of the accused agreed to arrest and extradite those charged, the case could not proceed. Regarding these trials as an infringement of national sovereignty that interfered with the political settlements reached at transition, requests for extraditions, as with judicial assistance, were routinely ignored. Other than holding a trial *in absentia,* a provision found in relatively few countries' legal codes, foreign proceedings would effectively grind to a halt.[8] Although justice had not been attainable, the outstanding international arrest warrant would prevent the accused ever leaving their country of refuge.

There was therefore little realistic chance of achieving justice through transnational cases; the main objective of initiating proceedings was for their political impact. Lutz and Sikkink (2001:4) claim that transnational proceedings have had the effect of putting pressure from above on the state where the human

[8] Legal codes in both France and Italy permit trial *in absentia.*

rights abuses occurred to reopen or allow prosecutions to take place. They therefore argue that the boomerang pattern developed by Keck and Sikkink (1998) is clearly evident. Faced with a closed domestic opportunity structure regarding human rights prosecutions in their own country (created by the conditions of democratic transition), human rights activists exploited the relatively open international structure regarding human rights norms and international law, and have used other countries' legal systems, where domestic structures are open compared to their own, to initiate legal proceedings. Under the 'light of international scrutiny', the national government is shown to be in violation of its international responsibilities and obligations to uphold international treaties and prosecute human rights violations. Lutz and Sikkink (2001) thus assert that supported by the international community, transnational proceedings have exerted moral leverage upon the national government, pressurising it to alter its domestic policies, in this case rather than ending repression, to permit human rights trials. This in turn, they argue, has led to create space and eventually open the domestic opportunity structure in the original country where the crimes occurred, ultimately allowing prosecutions to go ahead.

Accordingly, the process whereby transnational networks, cooperating with domestic NGOs, have worked to establish and internalise human rights norms, is the same one by which first foreign, or transnational, and then domestic, judicial proceedings have occurred. The same model of interaction, shaming, persuading, and ultimately internalising the new or evolved norm concerning justice, is arguably evident. Once the justice norm becomes accepted, domestic prosecutions should follow. It is for this reason that the ideationally based models of interaction developed by Risse and Sikkink et al have been used as a basis to explain the recent advances in prosecutions in Latin America.

There are a significant number of works that cite the importance of this interaction process in facilitating human rights prosecutions. These view the advent of human rights prosecutions as evidence of a norm internalisation process, induced by principled issue networks operating on the domestic and transnational levels. The surge of foreign proceedings within Europe concerning

human rights crimes committed in Latin America are a part of the strategy adopted by such networks. Accordingly, transnational justice, as an expression of transformative moral discourse, has been successful in pressurising domestic governments in Latin America to allow prosecutions to take place.

However, while not disputing the existence of this interaction process, a number of questions immediately suggest themselves. In Chapter 1 we saw that human rights trials were prevented in Argentina and Chile (as with other countries) by the necessity to maintain cordial civil-military relations following transition processes and that other political and legal barriers had been put into place. Even in Argentina, where transitional conditions initially favoured prosecutions, political realities meant that trials were eventually brought to a halt in the name of political stability. In what way then, have transnational proceedings been able to affect the domestic political arena in order to change this situation so radically and how have they enabled domestic advocates of trials to overcome the political and legal obstacles to trials? In the language of the social theorist, how has the process of transnational justice been able to open domestic opportunity structures sufficiently to allow domestic social movements to be successful in pushing for trials? In Chapter 1, we established that the ability to bring perpetrators of human rights abuses to trial depends not only on the legal and political obstacles faced at the point of transition, but on the dynamics of the consolidation process thereafter. This invites the question, have the dynamics of the consolidation process led to changes within political and legal arenas that have affected the ability of domestic human rights activists to be successful in pushing for trials? More succinctly, have other domestic political factors played a role in opening domestic opportunity structures, and if so which ones?

Neither the boomerang or spiral models, developed through examining interaction processes within authoritarian regimes, take into account the changing nature of the domestic political arena. Although the spiral model focuses on interactions between international, transnational and domestic levels, in assuming the existence of a causal relation between these, it excludes other domestic political factors. As stated above, within a democratizing state the dynamics of the consolidation process might well lead to changes that affect the

ability to hold human rights prosecutions. As part of this process, political and/or legal obstacles that previously prevented trials might have diminished in importance or disappeared all together. In fact, more recently there has been recognition within literature specifically trying to explain the advent of prosecutions that domestic political factors have played an important role. But before examining these in more detail, it is first helpful to explore the nature of domestic opportunity structures concerning the ability to hold human rights prosecutions.

We have already seen that political opportunity structures are defined as 'those consistent dimensions of the political environment that provide incentives for or constraints on people undertaking collective action' (Khagram, Riker and Sikkink, 2002; Tarrow, 1998). In trying to define domestic opportunity structures concerning human rights trials in Argentina and Chile, it is useful to return to the previous chapter where I identified the key obstacles (or constraints) to trials. These were namely legal obstacles, in the form of amnesty laws in both countries and political obstacles in the form of a coercive military institution opposed to trials; possible bias in the judiciary, where the majority of judges, as in Chile, have been appointed by the former military regime; and finally a government fearful of the de-stabilising effects of trials or wholly opposed to them. Positive changes more conducive to trials within these key areas would reduce the 'constraints' and 'provide incentives' for human rights activists to undertake collective legal action, thereby substantiating 'openings' within domestic opportunity structures where in turn domestic human rights activists are more likely to be successful in pushing for prosecutions. As these domestic opportunity structures do not exist in a vacuum but are necessarily dependent of domestic, as well as international, political and societal change. How then can we determine whether a development within a human rights prosecution case is due to the impact from transnational proceedings or down to other unrelated domestic factors?

In attempting to answer these questions and formulate a research strategy with which to examine the advent of human rights prosecutions, it is useful to look to more specific explanations of recent prosecutions. While the conventional

wisdom remains that transnational processes have had an important effect on regional human rights prosecutions, as referred to above, there have been an increasing number of works that now recognise the importance of other political factors.

REVIEW OF THE LITERATURE EXPLAINING HUMAN RIGHTS PROSECUTIONS IN LATIN AMERICA

Specific explanations for the rise in human rights prosecutions in Latin America focus on the impact of judicial proceedings opened in Spain in 1996. Unlike previous (individual) cases in other countries, in Spain criminal charges were levied against regime leaders for their complicity and ultimate responsibility for the international crimes of genocide, crimes against humanity, terrorism and torture (Wilson, 1999:933-934).[9] As such, the political motive in filing the cases, to pressurise governments (in this case Argentine and Chilean) to permit domestic prosecutions, was clear from the outset. According to Wilson (1999:933), 'the organisers of the litigation decided that, whatever the outcome of any Spanish trial, the investigation of the crimes would give victims a unique and historically unprecedented opportunity to tell their stories to the world'.

Whilst the investigations into the charges levied would thus create a certain amount of political pressure upon domestic governments to revisit the human rights issue, this was soon outstripped by the 1998 arrest and detention of General Pinochet in Britain. This 'landmark event' in international law, 'was the beginning of an odyssey that brought worldwide attention to Chile' and 'inspired renewed debate on the legacy of authoritarian regimes in Latin America and elsewhere' (Park, 2001:127). Robertson (2000:374-375) expands: 'the Pinochet Case was momentous because (for the first time) sovereign immunity was not allowed to become sovereign impunity' and, as such, the case 'became the first and paradigm test of international human rights law'. Known as the 'Pinochet Precedent', the subsequent events, particularly the successive decisions in the House of Lords ruling that Pinochet could be tried for human rights atrocities,

[9] An example of an 'individual case' would be that involving the Argentine Captain Alfredo Astiz in France. See Chapter 4 for more details of the case.

the extradition proceedings filed against him, and his eventual return to Chile in 2000 on 'health' grounds, have been seen as having a substantial impact on the development of human rights cases throughout Latin America.

Focusing on how transnational proceedings and the detention of Pinochet reinvigorated domestic searches for truth and justice, Brody (2001:25) claims that it 'unleashed [...] a renewed debate in Chile about the legacy of the military government and rekindled [...] hopes of justice for Pinochet's thousands of victims'. A recent Human Rights Watch Report on Chile supports this view, stating that 'Pinochet's prosecution abroad changed the legal and political landscape in Chile', and that 'a new, more outspoken and challenging debate on human rights began to occupy the Chilean media' (Human Rights Watch, 2003c). One particularly important repercussion was that the Chilean government, as part of their diplomatic strategy to persuade the British government to release Pinochet, 'promised to bring Pinochet to justice in Chile'. Human Rights Watch assert that 'this commitment, which had been so notably lacking before Pinochet's arrest, gave fresh hope to the victims and spurred on the courts to take their duty to protect human rights more seriously' (Human Rights Watch, 2003c).

Such a change in governmental behaviour seemingly fits in with Phase 3 of Risse and Sikkink's spiral model. In the face of international and domestic pressure, the Chilean government was forced to make tactical concessions which would inadvertently create further space in the domestic arena to push for domestic trials. However, as discussed above, it doesn't help to explain how governments might overcome military and other political opposition to trials or how legal obstacles have been overcome.

This particular concession can be seen as one of a series of other measures taken by the Chilean government in the face of pressure from above and below. Agreeing that 'Pinochet's arrest was a very powerful catalyst, perhaps the most powerful possible, for Chile's past to be brought once more into the open', Davis (2000:20) refers to 'the opening up for the first time of a dialogue (the so-called *Mesa de Diálogo*) between military representatives and human rights lawyers'.

She claims that although its legitimacy was reduced by the failure of relatives' organisations to participate, the *Diálogo* 'was nevertheless an important milestone in the struggle to gain an admission from the military that egregious crimes did, in fact, take place, as well as to gain information about the fate of victims'.

Davis also identifies an effect on the judiciary, claiming that during the period of Pinochet's detention 'the pace of judicial reform and of prosecutions of human rights violations [in Chile] increased greatly'. Following Pinochet's return to Chile 'the pace of judicial proceedings continued to quicken' as the government 'moved quickly to show that it [had] the political will to tackle the many and serious obstacles to ending military impunity' (Davis, 2000:19-20). Again these measures might be seen as an example of the spiral model described earlier. During Phase 4, the validity claims of the norm, in this case to place those accused of human rights violations on trial, are no longer controversial, although not necessarily adhered to and measures are taken to institutionalise the norm, in this case through judicial reform. Yet once again, there is no explanation of why the military, opposing trials, would accept prosecutions nor whether any changes had occurred to alter the balance within the previously Pinochet packed judiciary.

Brody (2001:25) recognises further processes of institutionalisation, stating that the 'reinvigorated Chilean courts' began responding to legal rulings made by their transnational counterparts and a more pro human rights legal doctrine permitting cases to advance started to emerge. Lutz and Sikkink (2001:5) also highlight the link between transnational and national legal doctrines, arguing that the 'decision of the British House of Lords that Spain had jurisdiction to try him [Pinochet] for human rights abuses had the effect of opening judicial space for the human rights trials now underway in Chile'. Accordingly, 'previously timid Chilean judges began looking for chinks in the dictator's legal armour' as cases against Pinochet (in Chile) 'jumped to dozens, then hundreds' (Brody, 2001:25). Ultimately, progress within one of these cases led to the removal of Pinochet's senatorial immunity and his indictment for crimes associated with the

disappearance of 75 people, a development that Brody stresses 'would have been simply inconceivable two years ago' (prior to his arrest in London).

Concerning the impact of the Pinochet case in other countries, Brody claims that it 'inspired victims of abuse in country after country, particularly in Latin America, to challenge the transitional arrangements of five and ten years ago' (Brody, 2001:25). Clearly, however, the impact of his arrest would be less marked than in Chile. For other countries, the effect of the Pinochet arrest must be placed alongside the impact of other transnational cases. Whilst there has to date been no specific transnational cases concerning Uruguay or Brazil, transnational cases concerning Argentina have been cited as playing an important role in the development of domestic cases. According to Amnesty International, the 'repeated refusals' of the executive to honour requests for extradition from countries including France, Germany, Sweden, Italy and Spain, are 'likely to have been seen in Argentina as an embarrassment and to have put pressure on the authorities to investigate' (Amnesty International, 2001a). In addition, Amnesty states that the arrest of General Pinochet is 'likely to have inspired the authorities to act, particularly since he was being investigated for crimes in Argentina, as well as in Chile', claiming that 'in the nearly three years since his arrest [...] there has been a dramatic increase in domestic criminal investigations in Argentina'. Furthermore, Wilson (1999:40) argues that developments at the transnational level have had the effect of spurring on domestic human rights groups and courts, claiming that recent advances in several cases concerning the abduction of children in Argentina 'would not have been pursued without the impetus created by the Spanish prosecutions'.

The transnational effect in Argentina is also emphasised by Sikkink (2004:33), who cites examples of what she terms 'insider-outsider coalitions' that bring together domestic and transnational actors in the pursuit of justice. According to this argument, domestic organisations will concentrate their attention on the domestic political arena. However activists who have learned how to use international institutions in earlier boomerang phases (such as those publicising human rights atrocities during authoritarian rule) keep this avenue open in case of need (Sikkink, 2004:30). Accordingly, although domestic human rights

organisations had 'done all of the preliminary legal and political work' to secure the arrest of former *junta* leader General Videla, they 'still needed some help from their international allies [for] a final push' to place Videla in jail. She thus argues that pressure from France on the Argentine government to extradite Alfredo Astiz to face charges concerning the murder of two French nuns, had a direct link to his (General Videla's) arrest in 1998 within an Argentine case concerning the abduction of children. Sikkink states that 'just a few hours' before a meeting between the then presidents of France and Argentina, Chirac and Menem, 'Judge Marquevich decided to detain Videla'. As such, 'in his meeting with the French press, instead of facing criticism, Menem was greeted as a human rights hero'. Noting that Judge Marquevich 'was not known for his commitment to human rights, but for his intense loyalty to President Menem, who had appointed him', Sikkink (2004:33) states that 'there is strong reason to believe that Judge Marquevich was responding to Menem's political agenda in his trip to France when he ordered the detention'. As a second example she argues that the 'timing of [former admiral] Massera's arrest [in Argentina] suggests that the decision [...] was apparently a pre-emptive measure in response to Spanish international arrest warrants for Argentina military officers' (Sikkink, 2004:34). In order to 'fend off political pressures to extradite many officers', the Argentine government 'apparently decided to place under preventative arrest a few high profile, but now politically marginalised officers, like Videla and Massera'.

Alongside the political impact, others have seen groundbreaking legal decisions within Spanish proceedings as an additional factor facilitating the development of Argentine domestic cases. A Human Rights Watch report states that although the government had ignored extradition requests from abroad, 'among trial court judges [both national and transnational] cooperation and cross-fertilisation in the application of human rights doctrine and jurisprudence has become increasingly common' (Human Rights Watch, 2001). In support of this, the report cites the arguments used by Judge Marquevich, in the Videla case, which applied for the first time in Argentina 'doctrines used by Spanish judge Baltasar Garzón in his indictment of Argentine officials for genocide and terrorism'.

Roht-Arriaza (2003:196) agrees that 'Argentine/Chilean cases in Spain acted as significant catalysts for the local judiciary', citing the importance of what she terms the 'Garzón effect'. After considering as 'legitimate' the investigation and 'legal theories espoused' by the Spanish judge, she argues that 'local judges then felt more comfortable using similar theories, and may well have considered themselves in a better position than a far-off Spanish judge to take up these matters while the eyes of the world were watching'. She claims specifically that 'the Spanish court's finding that the amnesty laws of Chile and Argentina were inapplicable because they violated international law has helped domestic trial judges in those countries bolster the legal argumentation to invalidate those laws' (Roht-Arriaza, 2003:210). In support of this, she cites the decision by Argentine Judge Cavallo to invalidate the Amnesty Laws within a case concerning child abduction, claiming that his ruling 'cites extensively from Judge Garzón's *autos*' (rulings).

Moreover, Roht-Arriaza (2003:197) identifies a procedural impact on Argentine cases, stating that 'witnesses came forward in the Spanish investigation who had never testified or filed complaints in Argentina out of fear'. Whilst this might have led to the discovery of new evidence that could have assisted the progression of domestic cases, she claims specifically that it led to a reinvigoration of investigations in Argentina. As such, while 'the Spanish case was not the sole 'cause' of renewed interest in child-snatching charges' it was 'one major factor in reinvigorating investigations into the practice'.

There is also, however, an increased emphasis on non-transnational factors in her account which are more difficult to equate with the models of interaction described earlier. In particular, Roht-Arriaza dismisses a 'simple cause-and-effect result of the filing of the case in Spain, or the detention of Pinochet' (Roht-Arriaza, 2003:195). Whilst she recognises that developments in human rights cases 'clearly signal a change in the attitude of the judiciary as well as a renewed enthusiasm by lawyers and activists', she cautiously adds that in addition to the impact of transnational cases 'many other factors no doubt intervened'. Of these, Roht-Arriaza mentions constitutional and judicial reform, the deteriorating image of successive administrations, and a further generational

change within the judiciary and military as well as the coming of age of many of the children of the disappeared, as potentially relevant.

Whilst Roht-Arriaza does not go into detail, she does attempt to place the recent development of human rights cases into context. She identifies that one of the most important factors contributing to these developments, and one unrelated to transnational justice, was the 1995 confession of former navy captain Adolfo Scilingo over his participation with flights of death (*vuelos de muerte*) (Roht-Arriaza, 2003:194).[10] She argues that this 'caused a stir' that eventually led the Commander-in-Chief of the army to admit that 'the military had used unacceptable methods in fighting the "Dirty War"' (Roht-Arriaza, 2003:194-195). Since then, 'the Argentine courts have taken a more and more aggressive stance in favour of investigating and prosecuting past crimes' (Roht-Arriaza, 2003:195).

Concluding on the impact of transnational justice, Roht-Arriaza (2003:210) affirms that it has played a 'catalytic role in stimulating and accelerating judicial investigations in the "target" countries', stressing the political and moral support that transnational proceedings have given to the domestic arena. This has been achieved by 'reducing governments' ability to overtly oppose domestic prosecutions' and giving 'new vigour to local human rights movements and victims' associations' (Roht-Arriaza, 2003:210-211).

Similar factors are cited by other scholars. The contribution of Barahona de Brito (2001), examining the ongoing search for truth and justice in Argentina, Brazil, Chile, and Uruguay, is typical. She argues that transnational proceedings have 'helped to persuade [domestic human rights organisations] to continue to dedicate important political and institutional resources to the issue', but that a number of domestic factors have been particularly important in the 'struggle for justice' (Barahona de Brito, 2001:139).

[10] Flights of Death entailed throwing drugged prisoners from air-craft into the sea.

Concerning Argentina, the 'powerful human rights movement' that has 'remained active throughout' (receiving both domestic and international support) has been especially important (Barahona de Brito, 2001:137). The contribution of sectors within the legislature and the judiciary, as well as journalists, academics and other professional associations to the search for compensation, truth and justice is highlighted. She states that the 'courts have become key institutional players in the continued search for truth and justice, with some federal judges having adopted the cause of the relatives and pursued cases of past violations with great zeal'. This has enabled 'legal loopholes' concerning the Amnesty Laws to be exploited, allowing certain cases concerning the abduction of the children of the disappeared to progress. In support of this, she cites those involving the arrest of Videla, Massera and others, claiming that by mid 1999, over 32 officers were under investigation (Barahona de Brito, 2001:137).

Whilst one would expect such developments to cause political controversy, Barahona de Brito (2001:139) argues that 'developments within the military' and the 'concomitant change of attitude of the executive' has 'helped to promote the continued pursuit of justice and truth'. Concerning the first of these, Barahona de Brito agrees with Roht-Arriaza over the importance of a stream of confessions from former military officers, notably that of Adolfo Scilingo in 1995, that constituted a 'breaking of the ranks' leading to 'mutual accusations and mud-slinging among repressors'. This 'weakened the military', whose previous 'unity and the "pact of silence" had been a major source of strength'. The upshot was the 'first unambiguous institutional apology and rejection of Dirty War methods issued by a Latin American military' from the then Commander-in-Chief of the army, General Balza (Barahona de Brito, 2001:140). Naturally, this made it 'difficult for the military to defend past repressors'; accordingly, when Videla and others were arrested, Balza stated that as they were no longer active duty officers they were no concern of the institution, which in turn helped pave the way for 'greater executive flexibility regarding the issue'. Although President Menem initially defended the military's role in the war against subversion 'more energetically that the military itself', Barahona de Brito (2001:140) points out that following the series of arrests associated with the abduction of children, he

stated that 'he would not issue more pardons and that the problem was strictly a legal one'.

In the case of Chile, Barahona de Brito (2001:148) argues that 'it was not the good will of the executive that shifted the balance in favour of justice' but, as others have alleged, a change in the jurisprudence of the Supreme Court concerning cases of human rights. Explaining this, she refers to a number of judicial reforms and compositional changes, particularly a restructuring of the Supreme Court in 1998, that together 'shifted the balance further towards human rights'. Nevertheless, she also recognises that 'there were still some constraints operating' upon the judiciary after these changes, and that 'it seemed that by the beginning of 1998 the human rights issue was no longer alive' (Barahona de Brito, 2001:149). This was changed by the 'unpredictable injection of *fortuna*' in the form of transnational justice and the arrest and detention of General Pinochet. From this time, Barahona de Brito (2001:150) claims that 'the [Chilean] courts began to show much greater willingness to try cases', citing the arrest of five generals and approximately 30 active duty and retired officers during 1998-1999: '[s]purred on by the work of Spanish prosecutors', in January 1998 a Court of Appeals judge 'accepted a criminal complaint of genocide against Pinochet by the communist party'. This was the first time that a court in Chile had accepted direct charges against Pinochet.

Following Pinochet's detention, 'the government made efforts to pursue a new settlement with regard to the human rights issue' (Barahona de Brito, 2001:150). The *Mesa de Diálogo* is again cited. The actions of the military also changed, with many noting that for the first time the 'pact of silence was broken' as officers began making confessions 'in the manner of their more unruly Argentine counterparts'. Summarising the effects of Pinochet's arrest and detention in Britain, Barahona de Brito (2001:150) states that 'after a long silence, everyone in Chile was again thinking out loud about past human rights violations and their significance for democracy'.

These two cases are contrasted with the lack of progress in Brazil and Uruguay. As such, it appears that the countries where the development of human rights

cases is most pronounced are those that have also been the direct target of transnational proceedings. This would seemingly confirm the models of interaction espousing the importance of norm diffusion through transnational justice. However, Barahona de Brito argues that, upon closer examination, the progress made in the search for truth and justice within these countries has been due to a combination of factors involving political change within the executive, judiciary and military. As such, the role of transnational justice, by facilitating what has been essentially a domestic process, is one of catalyst rather than cause.

A recent series of studies concerning Chile has also emphasised the role played by domestic factors. Effectively echoing the importance of domestic opportunity structures discussed earlier, Huneeus (2003:184) states that 'external factors can only have internal consequences when there are favourable conditions that allow the effects to spread through the political system'. He argues that the focus on the impact of transnational justice and Pinochet's arrest in Britain 'underestimates the importance of national factors in permitting Pinochet's trial in Chile'. In addition to citing the importance of the persistent work of the human rights organisations, the courage of individual judges, and the contribution of certain investigative journalists, he stresses the importance of 'the change that had taken place in the judicial system as a result of the *Concertación* government's policies during the 1990s' (Huneeus, 2003:185).[11] Nevertheless, he accepts that Pinochet's detention in Britain created 'favourable conditions for the development of an autonomous judiciary [...] more inclined to accept cases put by human rights lawyers' (Huneeus, 2003:188).

Bravo-López (2003:121) accepts that transnational justice in the form of the Pinochet case has had certain positive effects in Chile, notably that it 'put the issue of human rights on the political agenda of all parties and social organisations in Chile'. In order to 'justify the arguments advanced for Pinochet's release' from Britain, 'the more right-wing sectors were forced to admit that Pinochet could and should be judged in Chile'. However, he finds that a number of rulings issued by the Supreme Court 'establishing that human rights

[11] The *Concertación de Partidos Políticos por la Democracia* was a broad coalition of the political parties of the centre and left.

cases should be investigated' occurred '*prior* to the detention of the dictator' and thus could not be the linked to it.[12] Explaining these, he argues that 'from 1996 onwards, as a result of new laws, [...] the composition of the Supreme Court began to change, leading to a 'legal shift' within the judiciary more favourable to the progression of human rights cases'. He thus argues that the 'combination of factors made it feasible for Pinochet to be tried' and for other cases to advance in Chile (Bravo-López, 2003:122).

Angell (2003a:64-65) adopts a similar position, stating that 'democratic governments have seen, and helped to bring about, a gradual erosion of the Pinochet legacy' and that this 'erosion weakened the personal authority of Pinochet himself'. This process, he argues 'was far advanced by the time of his arrest in London' and, as such, it 'was not the precipitating factor in the decline of Pinochet and *pinochestismo*, but one additional if crucial step in a longer and deeper process'. Within this process, he cites the importance of a 'generational change', which has led to 'a gradual distancing of the military' from Pinochet's belief in its political role (Angell, 2003a:72-73). This, he claims, explains why the Pinochet case in Chile failed to provoke great unrest in the military.

Angell (2003a:78) also finds that the progression of human rights cases has been facilitated by a 'change in the attitude of the judiciary' due to a change in the composition of the Supreme Court, which began responding to domestic and international pressure. Although he recognises that this change began before Pinochet's detention, he argues that this judicial change was facilitated by the 'erstwhile unconditional supporters of Pinochet' distancing themselves from Pinochet and his legacy following his arrest and detention in Britain (Angell, 2003a:82).

Explanations that recognise the importance of domestic factors alongside transnational ones are synthesised and compared in a work by Pion-Berlin (2004). He focuses on the association between judicial events in Europe and those in Chile, and he critiques three positions: 'Europe-as-inconsequential',

[12] Original emphasis cited.

'Europe-as-cause', and 'Europe-as-catalyst'. Concerning the first of these, he argues that 'if the Chilean justices all along had the inclination to serve some form of justice on Pinochet, why did they not request that their government extradite Pinochet from London in order to stand trial?' (Pion-Berlin, 2004:492). He therefore questions the 'sudden sense of urgency' and 'flurry of legal action [that occurred following Pinochet's arrest] in sharp contrast to the interminable delays and setbacks of years past', stating that 'it seems too oddly coincidental'. Concerning 'Europe-as-cause', he finds evidence that 'change, however incremental and incomplete, was already underfoot in Chile' prior to Pinochet's arrest, citing the change in the composition of the Supreme Court and the importance of Pinochet stepping down as Commander-in-Chief (Pion-Berlin, 2004:498).

He concludes that 'Europe-as-catalyst' is the most persuasive argument: it 'aligns with the notion that the Pinochet case was decisive', supports the 'reasonable idea that such an important verdict must have redounded to the benefit of victims inside Chile,' and 'fits the premise that Chile was a nation in the throes of change' (Pion-Berlin, 2004:503). The Chilean judges were 'influenced by events in Europe', but 'indirectly and politically so'. Whilst the judiciary 'seemed to have little regard for the legal views of the Spanish and British magistrates, they could not ignore the political views and predicament of their own government, brought on by the Pinochet case'. Echoing Angell on the gradual erosion of the authoritarian legacy, he states that 'it seems likely that Chilean courts were on a slow pace toward justice, one which was considerably hastened through the initiatives of Spanish and British magistrates'. This was facilitated by the 'abandoning' of Pinochet by the political right and the military itself, 'which was plotting a new strategy of transparency [...] in an apparent bid to reduce [its] vulnerability to prosecution' (Pion-Berlin, 2004:504).

DEVELOPING A FRAMEWORK FOR ANALYSIS

The literature emphasises the role played by transnational justice supporting the ideational approach that a shift in domestic norm behaviour has taken place due to transnational advocacy networks working according to the models of

interaction developed by Risse and Sikkink, placing pressure on domestic governments from above and below. As national governments have reacted to both domestic and international pressure, domestic opportunity structures have become increasingly 'open', facilitating the possibility of human rights prosecutions. However, the literature identifies that independent domestic factors, including changing political allegiances and institutional changes within the military and the judiciary, have also played an important role within this process. Both the boomerang and the spiral models do not sufficiently allow for the impact of these independent variables on domestic opportunity structures that in turn affect the possibility that prosecutions can proceed. The spiral model is a conceptualisation of the effects that domestic-transnational linkages have on domestic political change surrounding a given area. Nevertheless, it cannot explain domestic political changes that are seemingly *unrelated* to those transnational linkages that then have their own *independent* causal effect on the openness of domestic opportunity structures and thus the success of implementing the norm; in this case permitting human rights prosecutions to proceed.

To some extent this is recognised by Sikkink (2004) in a later work. She admits that the boomerang and spiral models do not adequately conceptualise domestic 'political' and 'legal' opportunity structures, in part because they focus mainly on human rights change in authoritarian regimes (Sikkink, 2004:8). In answer to this she suggests drawing on work by Risse (1995, 2002:258) that argues that the impact of transnational actors on outcomes 'depends on the domestic structures of the policy to be affected and the extent to which transnational actors operate in an environment regulated by international institutions'. Although examining specifically the judicialisation of politics in Latin America, Sikkink's focus on the interaction of domestic and international legal and political processes is relevant to the interaction of transnational justice and domestic opportunity structures in advancing human rights prosecutions. She recognises that the notion of domestic structures has to be modified 'to reflect political and legal opportunity structures at both the domestic and international level' and stresses the importance of both regime type (newly democratic, democratic, or authoritarian) and the type of legal system (civil vs. common law systems, and

monist and dualist approaches to international law) (Sikkink, 2004:8). While I believe that this goes some way to helping us develop a framework with which to examine the advent of human rights prosecutions, the internal dynamics of the political and legal structures regarding human rights prosecutions needs further clarification.

Domestic Political Opportunity Structures

Building on the key areas identified earlier, it is possible to identify a number of principal actors that affect the domestic political opportunity structures surrounding the issue of human rights prosecutions within a democratizing regime (the focus of this study). From the works of Barahona de Brito, 2001; Angell, 2003a, Bravo-López, 2003; Hunneeus, 2003; Roht-Arriaza, 2003; Pion-Berlin, 2004) we can see that the actions, policies, and motivations of the military, the judiciary, government/political society, and the national and transnational human rights activists, all interact to affect the openness of domestic political opportunity structures. It is clear from Chapter 1 that the military at, during and after transition to democracy have represented a coercive force preventing prosecutions. However, the military's level of opposition and relative ability to prevent prosecutions should not be seen as necessarily constant. A change in military attitude may affect the position of the government and political society as a whole with regard to human rights prosecutions. Similarly, a changing judiciary might well affect both directly the ability to prosecute as well as indirectly, through its relationship with the government and political society. Inherent to both of these dimensions is the position of the government and political society which may well change according to the position of the military and the judiciary. The impact of transnational justice and the work of national and transnational coalitions interact with each sub-set of actors to affect the domestic opportunity structure surrounding the issue of human rights prosecutions. However, in order to understand this interactive process, it will be necessary to examine the role of any factors unrelated to transnational processes that by impacting upon the behaviour of these key actors have also helped to facilitate human rights prosecutions. Examples include those cited within the literature concerning changes in personnel in both the military and judiciary, although this might well extend to political society as a whole

(Barahona de Brito, 2001; Angell, 2003a, Bravo-López, 2003; Hunneeus, 2003; Roht-Arriaza, 2003; Pion-Berlin, 2004). Rather than being brought on by transnational processes, changes in institutional attitudes and actions may have been brought on by changes in personnel and are thus essentially unrelated to transnational processes. Changes within the military and the judiciary would not necessarily indicate progress towards trials (new judges would not necessarily be in favour of human rights prosecutions) but they may reinforce the notion of a changing domestic political arena, within which domestic opportunity structures are more open to human rights activist than previously.

Domestic Legal Opportunity Structures

Legal opportunity structures affecting the ability to prosecute human rights violators concerns whether cases are blocked by specific national legislation, usually in the form of amnesty laws, but there may well be a number of other legal obstacles inherent within the national system.[13] Secondly and related to the existence of legal obstacles, it is important to consider whether the country has a civil or common law system in place and whether it has a monist or dualist approach to international law. In Latin America all but a handful of countries have civil law systems in place although their approaches to international law vary.[14] So much so that Sikkink (2004:17) comments that it was 'not surprising' when domestic judges in monist civil law countries (thereby accepting the compulsory jurisdiction of the Inter-American Court of Human Rights) began to declare that amnesty laws were contrary to domestic and international law. In such a system it would be easier to create a legal argument based on international law that circumnavigated domestic legal obstacles than one in a dualist system, where further national legislation would be required to endorse the international treaty, covenant or declaration. Such a legal argument might well have been developed and/or incorporated within transnational proceedings thereby adding to its jurisprudential weight in a national context. However, there may also have been increasing use at the domestic level of similar arguments prior to the

[13] For example *nullum crimen nulla poena sine lege* – the notion that someone cannot be prosecuted for actions that were not considered a crime according to the law at the time. This has been used on a number of occasions in many countries regarding the crime of torture which at the time may not have been expressly recognised by national legislation.

[14] Barbados, Trinidad and Tobago, Antigua and Barbuda, Bahamas, Belize, Guyana, St. Lucia, St.Vincent and the Grenadines, St. Kitts and Nevis are the exceptions.

development of transnational proceedings. In order to examine how domestic legal opportunity structures have been opened, it will thus be important to analyse the development of jurisprudential arguments within domestic human rights prosecutions and discern the impact (if any) of transnational arguments in bypassing domestic legal obstacles to trials.

Having explored the constituent parts of domestic political and legal opportunity structures concerning the ability to hold domestic human rights prosecutions, we have moved some way to developing a strategy for research. So far I have argued that the most satisfying theoretical explanation for the advent of human rights prosecutions in Latin America is the ideational approach that views the prosecutions as evidence of a norm internalisation process induced by principled issue networks operating on the domestic and transnational levels under the guise of transnational justice. However, I have demonstrated that present conceptual models of interaction do not take independent domestic factors into account. As the ability to prosecute human rights crimes in a democratizing regime is dependent on the dynamics of the consolidation process, as well as the conditions of transition, I argue that it is important to develop a model of interaction that takes this changing domestic dynamic into account. The literature concerned specifically with explaining recent prosecutions both supports the role of transnational justice as well as identifying a number of unrelated independent domestic political factors. By evaluating the role of transnational processes alongside these independent domestic factors we would be able to understand how these two sets of variables have interacted to affect domestic political and legal opportunity structures within which, in turn, human rights activists have been more successful in pushing for trials. This would allow us to build upon the present models of interaction concerning domestic/transnational processes and enables us to explore the relationship between ongoing democratization, human rights, and transnational processes. I now move on to formulate a research strategy with which to achieve these objectives: To examine how transnational processes have interacted within independent factors to open domestic political and legal opportunity structures and explore the relationship with the ongoing process of democratic consolidation.

DEVELOPING A MULTI-CASE RESEARCH STRATEGY

My principal aim in conducting this research was to explain how and why human rights cases have progressed (and indeed continue to progress) so significantly in Argentina and Chile in recent years. The primary objective was to evaluate the impact of transnational justice on the advance of cases alongside independent domestic factors. I was confident that the null hypothesis – that transnational justice had no impact on case progression – would be rejected. Conversely, I also wished to challenge what we might call the the *deus ex machina* interpretation, which posited that transnational justice had more-or-less single-handedly caused case progression. A preliminary review of the evidence suggested that domestic factors were also at play and that there were likely to be complex interactions between domestic and transnational factors. Highlighting the importance of external factors on domestic opportunity structures, both political and legal, the literature seemingly challenged present causal models of interaction explaining case progression.

In pointing to the interaction of domestic and transnational factors, the most recent works present a more satisfying account of overall case progression. Nevertheless, these accounts are not fully satisfying. For one thing, they tend to adopt an illustrative and indicative approach to the case material. The difficulty with such a selective approach is that we can never be quite sure what has happened to 'inconvenient' case details. Secondly, the focus of the impact of transnational justice has tended to be predominantly on the 'political' impact, i.e. the 'spurring on' of governments and judges to take action. Clearly this is potentially a very significant factor but it is rather difficult to pin down precisely, even where elite interviews are utilised. Lacking tangible evidence, some accounts seem to rest on supposition and conjecture. While this aspect of transnational justice cannot be ignored, it needs to be complemented by analysis of the procedural impact, which is more tangible, and also recognises the importance of legal opportunity structures. Thirdly, a basic requirement of causation is temporal order: transnational justice cannot *cause* domestic case progression if it occurs after the domestic case has been reinvigorated or opened. This rule is not always strictly observed. Finally, the majority of studies focus

uniquely on Chile and the impact of the Pinochet Case, limiting the general applicability of the findings.

The literature provides, therefore, some very significant findings and insights, but it is also possible to identify gaps in our current understanding. These lacunae are largely associated with a lack of detailed and systematic analysis of the progression of particular cases. By contrast, the present study analyses methodically the progression of a carefully-selected sample of cases in order to test the conclusions emerging in the literature on the importance of both transnational and domestic factors. Moreover, in looking at cases in two countries, the present study provides a firmer platform for the generalisability of any shared conclusions and thereby permits further reflection on the theoretical underpinnings of case progression and on its relationship with the democratic consolidation process.

My focus in the detailed analysis of case progression is on the establishment of temporal order and the impact of transnational justice both politically and procedurally (i.e. through the sharing of evidence and the use of legal arguments). The purpose is to investigate the extent to which transnational justice has affected the progression of human rights cases by facilitating the removal of the political and legal obstacles created by transitional settlements and thereby opening domestic political and legal opportunity structures. Procedurally, the detailed case study approach allows us to identify the precise reasons why progression had been initially impeded (for example, the application of an amnesty law) and to determine how this situation had been reversed (for example, through the use of a new legal interpretation or new evidence). Evidence of a direct impact would strengthen the position of those that see transnational justice as the main determinant of outcomes.

The political impact of transnational justice, as already explained, is less tangible than the procedural impact. What we are initially able to determine, however, is the possibility of a transnational political impact. There are two issues involved here. The first is again temporal order: transnational justice has to occur first before actors can be persuaded by it to change their behaviour. If domestic cases

are progressing successfully before transnational cases are opened, there can be no transnational political impact on initial domestic case progression, although it may certainly help to sustain further progression. The second issue is that we need to be alert to the danger of confusing temporal order with causation that is of committing a *post hoc ergo propter hoc* fallacy. A change in the behaviour of the government, for example, may have been caused by something else entirely and we need to look for, and show that we can dismiss, alternative causes if we are to claim a political impact of transnational justice.

Such alternative causes consist of a number of those domestic factors highlighted in the literature review as possible influences on case progression. Indicative of domestic political change, the causes behind these factors may well have further implications for the process of democratic consolidation. I therefore consider three sets of factors within this study that constitute relevant domestic opportunity structures. Firstly, the military-as-institution and the extent of its subordination to civilian control; if changes were already taking place in the military that made it more willing to accept trials, prior to or alongside transnational cases, this would weaken the argument for the impact of transnational justice. Secondly, and in a similar vein, the judiciary may have been subject to changes more conducive to supporting trials regardless of the development of transnational justice. Thirdly, I include a set of variables that we might broadly term 'political society', by which I mean the attitudes and behaviour of government, parties and congress.[15] These actors may have become more supportive of human rights trials prior to transnational cases having an impact.

The research strategy thereby recognises the importance of both political and legal domestic opportunity structures. However, separating out causal factors is, in practice, very difficult. If the government changes tack, we cannot know for certain whether this is down to a desire to protect its international image because

[15] My use of 'political society' refers to a less specific definition than that used by Linz and Stepan (see footnote 2) although more precise than 'political environment' or 'political climate'. Primarily the term refers to government policy, although it recognises that policy often requires negotiation with political parties (or within a coalition) and Congress, the role of these additional actors is incorporated.

of transnational justice, or because the government is independently more inclined to support human rights prosecutions, or some combination of the two. But if we have evidence that change was afoot and becoming embedded prior to the critical period of transnational case activity that does at least allow us to conclude that the transnational impact is only one factor, albeit an important factor.

In order to widen the scope of the research, draw comparisons and expand on conclusions I opted to study two countries. Much of the literature specifically claims that transnational proceedings have had a positive causal effect on the progression of domestic human rights cases in Argentina and Chile and in both countries case progression has been rapid. Although there have been other human rights prosecutions in the region, notably in El Salvador and Guatemala, these have not been of the same scale as in Argentina and Chile, and do not present similar opportunities with which to examine the interaction between transnational and domestic political factors as causational factors. Furthermore, both countries experienced repressive military dictatorships at roughly the same period. Although there are key differences in the nature of military rule, particularly in the degree of regime institutionalisation, these two countries have often been used as the basis of comparative studies concerning human rights.[16] On the other hand, they are significantly different in terms of their transition type. If we were to reach common conclusions from such radically different democratic origins this would significantly underline the robustness of those conclusions. Additionally, although both countries have civil rather than common law systems, Argentina has a monist approach to international law whereas Chile has a dualist. This important distinction presents us with an opportunity to investigate how the impact of transnational processes might vary due to differences in each country's domestic legal system.

In summary, the research objective is to identify the causes underpinning the recent progression of multiple human rights cases in Argentina and Chile and, through an empirically-based, systematic comparative analysis, explain the

[16] See for example Roht-Arriaza (2001, 2003), Barahona de Brito de Brito (2001, 2003).

differences and similarities between each country, focusing on the impact of transnational justice alongside domestic factors. The research is comparative both within countries (in examining multiple cases) and between countries and thus provides a sound platform from which to further reflect on domestic/transnational models of interaction; their effect on the progression of human rights prosecutions; and the links with, and implications for, the process of democratic consolidation.

This research therefore aims to make a number of important contributions to knowledge in this area: it examines the impact of transnational justice alongside domestic factors and importantly explores how these have interacted to affect domestic political and legal opportunity structures within which domestic human rights activists have been more successful in pushing for trials. In examining domestic and transnational interaction, the research also sheds lights on the relationship between advances in human rights prosecutions and the consolidation process, as well as exploring the internal dynamics of that process, concerning domestic political changes within the military, judiciary and political society. In achieving these objectives the research also builds upon existing models of domestic/transnational interaction processes concerning both human rights and democratization. In adopting a systematic, multi-case strategy, selecting cases on the basis of clear criteria, it brings significant case detail to light and scrutinises the proceedings in depth; it is the only known study to have engaged with transnational proceedings across all those countries involved in such proceedings (most studies focus exclusively on the Spanish cases); and it draws explicit comparisons between two countries in order to help verify conclusions.

In order to achieve these aims, I designed a five-stage research strategy:

- *Stage 1: Identify the extent of recent developments within domestic human rights cases; establish criteria for case selection and select a sample; recreate the procedural history of the cases; undertake preliminary analysis.*
- *Stage 2. Identify the procedural development of transnational proceedings, cross-reference case details between domestic and transnational proceedings; preliminary analysis of the findings*
- *Stage 3. Design and conduct field research in Argentina and Chile.*
- *Stage 4. Analysis of the data, supplementary investigation into findings, assessment of role of transnational justice and domestic factors.*
- *Stage 5. Comparison of case studies, discussion of research findings*

The examination of the post-transitional development of human rights cases, presented in Chapter 1, allowed the identification of a 'cut-off' point where a line had effectively been drawn through the possibility of further or successful human rights trials. This provided a baseline from which to ascertain the extent of subsequent case developments within Stage 1. I was then able to create a typology for case selection and chose 14 cases for further study, six Argentine and eight Chilean. After recreating the procedural history of the cases, through analysis it was possible to discern the precise timing of, and reasons for, each case's advance. A summary of each case is presented in Chapter 3. Having completed the same process for transnational proceedings as part of Stage 2, it was possible to cross-reference the two sets of case details to establish the *potential* for transnational justice to have impacted on domestic case progression. The findings of this process are presented in Chapter 4.

The objective of Stage 3 was to ascertain the impact of transnational justice on domestic case progression as well as permitting an additional examination of the role of independent domestic variables. In completing Stage 4, it was possible to determine the role played by both transnational justice and domestic factors within the progression of the domestic cases. The detailed analysis of Argentina and Chile is contained in Chapters 5 and 6 respectively. After this final assessment, it was possible to compare the two sets of findings, reflect on the theoretical explanations, and explore the implications for democratic consolidation. These final comparisons, discussion and critical reflection are presented in Chapter 7. A fuller discussion of the methodology and sources is provided in Appendix 1.

Chapter 3: Human Rights Cases

In Chapter 1 we saw that in both Argentina and Chile, human rights prosecutions were either eventually forsaken (roughly seven years after transition) in the name of democratic stability or became stagnated within a political environment hardly conducive to justice. In Argentina, we saw that by 1990, all cases had been indefinitely closed; in Chile, although by 1996 cases remained open, justice seemed highly improbable - a line had been effectively drawn through the possibility of further or successful prosecutions. I have already established that substantial developments in prosecuting human rights crimes have occurred in both countries since these 'cut-off' points. These dates then form a baseline from which to examine the later progression of cases. By comparing the numbers prosecuted and convicted for their involvement with human rights atrocities at the relevant cut-off point, and again at the end of 2002, the extent of case development can be seen to be considerable.[17] As stated elsewhere, hundreds more cases have opened subsequently. This information is summarised in Table 3.1:

Table 3.1: Extent of development in human rights cases ('Cut-off' point to 2002)

	Argentina		**Chile**	
	Prosecuted	*Convicted*	*Prosecuted*	*Convicted*
'Cut-off' year	0	0	4	19 (inc. 16 *Police*)
2002	48+	0	120+	35 (inc. 17 *Police*)

The 'Cut-off' year is 1990 for Argentina, 1996 for Chile.
Source: Constructed by the Author from the sources in Appendix 1.

I gathered details on the majority (approximately 70 per cent) of these specific cases, from which I selected a sample for further study. Developing a typology for case selection, I opted to analyse cases that represented a widespread challenge to the status quo, i.e. procedural stagnation. These would present the stiffest test for the impact of transnational justice and strengthen the salience of any effect uncovered. I therefore sought to cover cases that either (i) challenged 'legal impunity' by circumnavigating or overruling amnesty laws and/or other

[17] 2002 was the year that this stage of the research was carried out.

legal obstacles or (ii) those that represented a 'political' challenge by involving the prosecution of a large number of military officials (more than ten) and/or high-ranking officers, such as generals and admirals.[18]

It was also important to study cases that had experienced a range of case histories. As such, the origin of the case's progression was applied as a criterion. I distinguished between cases that had been 'reopened' (having been previously closed); those that had become 'reinvigorated' through renewed case activity (defined as new court rulings permitting case progression, arrests, indictments, prosecutions, and trials) after more than two years of procedural stagnation; and those that 'opened' for the first time following a new lawsuit.

Additional criteria were to select cases involving a range of crimes, based upon whether or not they were covered by an amnesty law. Finally I included cases with a varying number of victims and accused. On the basis of the above criteria, fourteen cases were selected for further study, six Argentine and eight Chilean.

Table 3.2: Selected Argentine Cases, 1990-2003

	Case Label	Case Status	Covered by Amnesty Law?	Number of victims	Number of Generals, Admirals	Number Prosecuted
1	'Videla'	ReInv	No	5	1	1
2	'Vildoza'	ReInv	No	1	1	1
3	'Nicolaides'	Opened	No	400+	10	12
4	'Poblete'	Reopen	Yes	3	0	2
5	'Gomez'	Reopen	Yes	1	1	7
6	'Scagliusi'	Reopen	Yes	21	2	12

'ReInv = Reinvigorated.'
Source: Constructed by author from sources described in Appendix 1.

Of the Argentine cases selected, one was opened for the first time, three reopened, and two were reinvigorated. Of these, three were covered by the Amnesty Laws. Four cases involve fewer than ten victims and two involve many

[18] The process of creating a typology of cases and their selection is detailed more fully in Appendix 1.

more. One case involves ten high-ranking officers. The remainder involve a maximum of two officers. Finally, the cases involve a range of defendants, numbering from one to 12.

Table 3.3: Selected Chilean Cases, 1995-2003

	Case Label	Case Status	Covered by Amnesty Law?	Number of victims	Number of Generals, Admirals	Number Prosecuted
1	'Albania'	ReInv	No	15	2	27
2	'Jimenez'	ReInv	No	2	3	15
3	'Caravan of Death'	Opened	Yes	75	2	7
4	'Pisagua'	Opened	Yes	20	1	2
5	'Villa Grimaldi'	Opened	Yes	21	1	7
6	'La Moneda'	Opened	Yes	100+	2	20
7	'Prats'	Opened	No	2	2	7
8	'Soria'	Reopen	Yes	1	0	0

'ReInv = Reinvigorated.'
Source: Constructed by author from sources described in Appendix 1.

Of the Chilean cases selected, five opened for the first time, one reopened, and two were reinvigorated. Of the eight cases, three involved crimes excluded from the Amnesty Law. The cases demonstrate a range of victims (from one to over 100), involving a maximum of three high-ranking officers, as well as a varying number of defendants (up to 27). Both tables demonstrate a broad selection of case types.

Through the examination and analysis of primary and secondary sources it was possible to trace the development of the selected cases and explain how, in procedural terms, they had advanced from the time they were initially opened through to mid-2003 (when the field work for this thesis was completed). In this way, it was possible to discern the precise timing of, and reasons for, each case's advance. The dates that arrests were made was used to identify a broad 'period of crucial case activity' for each country. The following analysis shows that this ranges from 1998 to 2001 for Argentina and from 1998 to 2003 for Chile.[19] This

[19] See Appendix 1 for a fuller explanation of this process.

'period of crucial case activity' was then cross-referenced to the transnational proceedings. The transnational proceedings are dealt with in Chapter 4; in the remainder of this chapter, I outline the procedural development of the domestic cases.

PROCEDUAL HISTORY OF SELECTED ARGENTINE CASES[20]

Case 1: General Videla, and others[21]

The case is the amalgamation of four investigations into individual cases of child abduction where children, either babies or minors, were either born in, or abducted with their parents and taken to, specific detention centres. The children were then 'adopted' often by military families unable to have children of their own, with their names and identities changed.

Throughout the 1990s, Judge Roberto José Marquevich of the *Juzgado Federal No 1, Criminal y Correccional de San Isidro* made significant progress in several such cases, which are specifically excluded from the Amnesty Laws. For the most part, the location and identification of the children concerned provided sufficient evidence to charge the adoptive parents with kidnapping and illegal adoption (Abuelas de la Plaza de Mayo, 1999:17-22). However, mounting evidence gathered through several investigations led Marquevich to believe that the practice of child abduction had been organised and directed systematically by the high command of the Argentine military (Marquevich, 1998).[22]

On 9 June 1998, Judge Marquevich ordered the arrest of the former *junta* president and ex-army general, Jorge Rafael Videla (*Clarín*, 1998a). Videla refused to testify, claiming that he had already been tried and judged for the crimes of which he was being questioned (*cosa juzgada*)[23] within *Causa* 13 following democratic transition, and added that statutory limitations were

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[20] See Appendix 1 for details of sources and organisations cited in the text; see Appendix 2 for names of case victims and defendants.

[21] *Causa no. 1284/85: 'Videla, Jorge Rafael y Otros'.*

[22] Of the four cases examined by Marquevich, only two of the children, Mariana Islas and Carlos D'Elia Casco, had been located and identified prior to the 1998 rulings, in 1992 and 1995 respectively.

[23] This is a 'Double Jeopardy' provision.

applicable.[24] Marquevich rejected this defence, and on 14 July, using four cases he considered warranted the charges, Marquevich formally charged General Videla with responsibility for the associated crimes (Marquevich, 1998). Videla was allowed to remain under house arrest due to his age (*Clarín*, 1998b). The case was later amalgamated with Case 3 ('Nicolaides') of this study.

Case 2: Jorge Vildoza, and others[25]

This case concerns the specific abduction of Javier Penino Viñas, a child reportedly born in the ESMA detention centre after his parents Cecilia Marina Viñas and Hugo Reynaldo Penino were abducted on 13 July 1977 (Abuelas de la Plaza de Mayo, 1999:251). In September 1977, according to survivors' testimonies, Cecilia gave birth to a baby boy at the ESMA detention centre. Through their investigations, the *Abuelas* believed that the then operational chief of ESMA, Captain Jorge R. Vildoza, had appropriated the child and they opened a case in 1984. Realising that a blood test would prove his guilt, Vildoza fled, remaining a fugitive from justice to this day (*Abuelas* de la Plaza de Mayo, 1999:251).

During the 1990s, Judge Maria Servini de Cubría of the *Juzgado en lo Criminal y Correcional Federal No 1 de la Capital Federal* had been investigating the case (in addition to several other cases of child abduction) (*La Nación*, 1998b). In 1998, having read about the case on the Internet, Javier 'Vildoza' presented himself before Judge Servini de Cubría to determine whether or not he was the son of Cecilia Marina Viñas and Hugo Reynaldo Penino. In August 1998 tests confirmed that he was (Abuelas de la Plaza de Mayo, 2001).[26]

Judge Servini de Cubría heard witnesses' testimonies and the declarations of 11 doctors and ex-members of ESMA including from the ex-chief of the navy gynaecological hospital, Jorge Magnacco, who had benefited from the *Obediencia Debida* law, and Jorge Perrén. On 10 and 19 November Perrén declared before Servini de Cubría that, at the time of the child's birth, the then

[24] See Chapter 2 for more on *Causa 13*. According to the 'Penal Code', statutory limitations enter into force twenty years after the commission of the crime.
[25] Causa 124/84, 'Vildoza, Jorge Raúl y otras'.
[26] Javier's identity was returned to him on 10 December 1999.

chief of the navy Admiral Massera, was the highest authority and bore ultimate responsibility for the detention centre (*La Nación,* 1998b*)*. Although many witnesses had testified that they had seen births at ESMA, Javier was only the second child born there to recover their identity. It could now be categorically proven that births had occurred at ESMA and that at least in this case the child had been illegally appropriated by a naval family.

With this proof in hand (in addition to Perrén's testimony linking the detention centre to Massera) on 24 November 1998, Judge Servini de Cubría ordered the ex-admiral to appear before her. Massera denied any knowledge of clandestine births within detention centres but Judge Servini de Cubría dismissed his testimony, ordered his arrest and charged him with the crimes associated with child abduction (*La Nación*, 1998b; *Clarín*, 1998c). On 7 March 2002, the *Cámara Federal* rejected the appeal of Massera who remains under house arrest.

Case 3: Nicolaides, and others[27]

The case investigates the existence of a systematic plan of child abduction and clandestine adoption during the military regime, seeking to determine criminal responsibility for the overall operation. Proceedings were initiated following a lawsuit filed in December 1996, by the *Abuelas*, charging several retired military officers with overall responsibly for the operation (Abuelas de la Plaza de Mayo, 1996). The lawsuit was accepted, and in 1997 Judge Adolfo Bagnasco of the *Juzgado en lo Criminal y Correccional Federal de la Capital Federal No.7*, was assigned to investigate the allegations.

During his investigations, Judge Bagnasco heard numerous testimonies from witnesses and survivors and, in July 1998, travelled to both Switzerland and Spain in order to hear the declarations of a number of exiles living there (Mas, 1999:233; *La Nación, 1998a)*. However, as the case focused on the overall practice of child abduction and adoption rather the details of specific cases, much of the investigation concerned interpreting the information and evidence already gathered through the *Nunca Más* report and subsequent cases of child abduction.

[27] *Causa 10.326/96, 'Nicolaides y otros'.*

The sheer number of cases demonstrated the systematic nature of the operation, which due to its scale could only have been conducted with the knowledge of the military high command.

However, before Bagnasco could order any high-ranking officers to appear before him, General Videla was arrested and charged with overall responsibility for the systematic operation in the case under investigation by Judge Marquevich. As it was clear that Marquevich and Bagnasco were investigating the same crimes, on 25 November 1998, Marquevich relinquished jurisdiction allowing the cases to proceed as one under Bagnasco.

Bagansco initially focused on abductions from detention centres under naval control, notably ESMA, and on 7 December 1998, Admiral Massera, already under arrest in the case investigated by Judge Servini de Cubría, appeared before him. Massera refused to testify arguing that he had already been tried and absolved of the crimes and cited Bagnasco's lack of jurisdiction; he remained under house arrest (*La Nación*, 1998c). During the remainder of December and through January 1999, seven more retired officers, almost all of the highest military ranks, appeared before Bagnasco and were subsequently arrested (*La Nación*, 1998d; 1998e; *Clarín*, 1998d, 1999a, 1999b, 1999c). This included the last *de facto* president and the three members of the final military *junta* who, having appeared before Bagnasco, were charged with covering up the systematic operation.[28]

On 9 September 1999, the *Cámara Federal* rejected the appeals of three of those indicted, who had all argued that the Amnesty Laws and statutory limitations prevented prosecution in addition to compromising the principle of *cosa juzgada* (Human Rights Watch, 2001; Cámara Federal, 1999a, 1999b, 1999c). Judge Bagnasco then summarised his findings concerning his initial investigation later in September, issuing prosecution orders for eight of those indicted (Bagnasco, 1999a). He then began the investigation of child abduction from army controlled

[28] There had been orders to destroy all information pertaining to the Dirty War. The widening of the case's remit had been requested by the plaintiff lawyer, Alberto Pedroncini.

detention centres, particularly the Campo de Mayo, already partly investigated by Judge Marquevich.

Between December 1999 and August 2000, Bagnasco ordered the arrest of a further three officers, all of them generals (Bagnasco, 1999b, 2000). Following his arrest, General Santiago Riveros raised issues of jurisdictional competence of the civilian court, arguing that a military tribunal should judge these crimes. The Supreme Council of the Armed Forces (CONSUFA) then filed an official request for the case's jurisdiction, even though the courts had already rejected similar requests twice before in cases concerning these crimes (CELS, 2001). On 2 August 2000, the Supreme Court rejected the petition ruling that the cases should remain under civilian jurisdiction (CELS, 2001). The case was eventually transferred to Judge Urso, and in August 2003, the Supreme Court confirmed the rejection of Videla's appeal (Supreme Court, 2003). At the time the research stage was completed, it was expected that oral trials would commence shortly.

Case 4: Claudia Poblete[29]

The case concerns the illegal adoption of the child Claudia Poblete, following her abduction with her parents, José Poblete and Gertrudis Hlazik. The abduction of the family, all of whom remained disappeared,[30] had been documented in the CONADEP report and had been one of the cases used during the trials against the leaders of the military *junta* in 1986 (CONADEP, 2003:301-302; Human Rights Watch, 2001). Two policemen, Julio Simón and Juan Antonio Del Cerro operating under the names 'El Turco' and 'Colores' had been associated with the crimes, however they were later exonerated through the Amnesty Laws (Human Rights Watch, 2001).

Following extensive investigations, in 1998 the *Abuelas* located a girl they believed to be Claudia Poblete (Equipo Nizkor, 2001). She was registered as Mercedes Beatriz Landa, daughter of retired Lieutenant-Colonel Ceferino Landa and his wife Mercedes Moreira. The *Abuelas* filed a criminal lawsuit on 7 April

[29] *Caso Poblete* and *Causa 530: 'Landa, Ceferino y Moreira, Mercedes B.'*

[30] Throughout the thesis I follow the accepted use of 'disappear' as a transitive verb in this particular context.

1998, which was accepted, and Judge Cavallo of the fourth *Sala* of the *Juzgado Nacional en lo Criminal y Correccional Federal* was assigned to investigate. Following preliminary investigation, DNA testing ordered by the court proved that the girl was indeed Claudia Poblete (Tribunal Oral, 2001). On 25 February 2000, Cavallo annulled the inscription of the birth of Mercedes Landa as the daughter of the couple and ordered the adoptive parents' arrest (Cavallo, 2001). Oral proceedings began on 14 June 2001 and two weeks later Landa and his wife were both found guilty and were sentenced to nine and a half and five and a half years imprisonment respectively (Tribunal Oral, 2001).

The case would have ended there had other steps prior to this not been taken. On 7 July 2000, the case's public prosecutor, Horacio Comparatore, amplified the case's scope of criminal responsibility to include Claudia's abduction and then concealment in the El Olimpio detention centre until she was delivered to Landa (Cavallo, 2001). This produced the incongruous result that whilst the defendants could be charged with Claudia's abduction and detention until she was given to another family, they could not be charged with the abduction and later disappearance of her parents, who were taken at the same time (Human Rights Watch, 2001). Citing the absurdness of this anomaly, on 4 October 2000, the human rights organisation CELS filed a lawsuit with Judge Cavallo asking that the charges be raised to include criminal responsibility for the disappearance of Claudia's parents (Equipo Nizkor, 2001). In doing so, CELS were effectively asking Judge Cavallo to overrule the Amnesty Laws. Judge Cavallo nevertheless accepted the lawsuit and, in addition to charging the two policemen (Julio Simón and Juan Antonio Del Cerro) with the abduction, detention, and the concealment of Claudia's identity in November, opened a separate inquiry into the disappearance of Claudia Poblete's parents (Human Rights Watch, 2001; Cavallo, 2000, 2001).

On 6 March 2001, in a lengthy ruling, Judge Cavallo found that the Amnesty Laws were unconstitutional, null and void, and that the policemen could thus be charged with the forced disappearance of Claudia's parents; both Julian Simon and Juan Antonio del Cerro were later indicted and arrested for their participation with the crime (Cavallo, 2001). Cavallo's ruling was controversial as it

incorporated international law to rule that the crimes constituted crimes against humanity, which due to their imprescriptible nature under international law, overruled the Amnesty Laws. The Amnesty Laws were thus found to be unconstitutional as they prevented the state from fulfilling its international duties and obligations to prosecute crimes of this nature. Although both the ex-policemen appealed, Cavallo's ruling was upheld in November 2001 by the *Cámara Federal,* and in 2002 the Public Prosecutor, Nicholas Bercera, recommended that the Supreme Court do likewise (Cámara Federal, 2001a, 2001b; Becera, 2002a). At the time the research stage was completed, the final decision lay pending with the Supreme Court.

Case 5: Alfredo Astiz, and others (Conrado Gómez)[31]

The case concerns the disappearance of Conrado Gómez in 1977 and the subsequent theft of his property. The disappearance of Gómez had been documented in the *Nunca Más* report and the associated crimes later formed part of *Causa* 13 against the military *junta* (Cámara Federal, 2000). However, following the legislation of the Amnesty Laws, the case was suspended and, as stated in Chapter 1, those already convicted were eventually freed through the pardons of President Menem.

This situation remained until 1998 when, in an interview with the popular magazine *Tres Puntos*, the infamous naval captain, Alfredo Astiz, outraged the country by bragging that his training and experience made him the most qualified man in the country to arrange an assassination (Human Rights Watch, 2001; Cámara Federal, 1998). Numerous lawsuits were subsequently filed against him ranging from 'apology for a crime' through to genocide (Gómez, 1998). Believing that Astiz had been part of the group responsible for his father's disappearance, Frederico Gómez applied to have an investigation into the theft of his father's property opened (Bonadío, 2001). Although the theft of property was a crime excluded from the Amnesty Laws, on 20 August 1999, Judge Gustavo Literas of the *Juzgado Nacional en lo Criminal y Correccional Federal, Sala* No. 11, rejected the petition arguing that as the investigation would also involve his

[31] *Caso Gómez, Causa 7694/99: 'Astiz, Alfredo y otros'* .

father's disappearance, the Amnesty Laws were applicable (Human Rights Watch, 2001).

The plaintiffs appealed the decision, and on 4 May 2000, the *Cámara Federal de Apelaciones* ruled for the first time that the Amnesty Laws did not automatically rule out investigations (Cámara Federal, 2000). They found that each case must be dealt with on an individual case-by-case basis and although the proceedings may not end in convictions due to the Amnesty Laws, they found that this did not preclude an investigation (Human Rights Watch, 2001). Judge Literas objected to the decision but was overruled by the *Cámara Federal*; following his refusal to investigate, jurisdiction of the case was eventually transferred to Judge Claudio Bonadío of the *Juzgado Nacional en lo Criminal y Correccional Federal Sala* No. 12 (Bonadío, 2001).

Having heard numerous testimonies, on 17 August 2001, Bonadío ordered the arrest of several retired navy officials (CELS, 2002). On 1 October 2001, following the example of Judge Cavallo in the Poblete case, Judge Bonadío ruled the Amnesty Laws to be unconstitutional, null and void and formally prosecuted a total of seven former officers and officials (Bonadío, 2001). The ruling used a similar basis as Cavallo's, arguing that as the associated crimes were international crimes against humanity, the Amnesty Laws were invalid. This ruling was upheld on appeal by the *Cámara Federal* in December of the same year (Cámara Federal, 2001c). As with the Poblete Case, in 2002, the Prosecutor General recommended that the Supreme Court uphold the decision and rule the Amnesty Laws unconstitutional, null and void (Becera, 2002b). At the time the research stage was completed, the final decision still lay pending with the Supreme Court.

Case 6: Claudio Scagliusi and others[32]

The case investigates the disappearance of 20 Montoneros between 1980 and 1981. As these individuals disappeared whilst trying to enter Argentina from

[32] *Causa 6859/98: 'Scagliusi, Claudio Gustavo y otros'.*

several countries, including Brazil and Uruguay, the crime has been linked with 'Operation Condor'.

Although there had been some prior investigations it was only following the revelations of a retired sergeant during a television interview in October 1997 that any progress was made (Human Rights Watch, 2001). The sergeant claimed that one of the Montoneros victims had been buried in the military installation, Campo de Mayo; he also gave information relating to the disappearance of one of the other missing Montoneros. Amid controversy, a case was reopened under the auspices of Judge Claudio Bonadío (Cámara Federal, 2003a, 2003b).

Believing that an investigation required no prior decision on the applicability of the Amnesty Laws, Judge Bonadío began his enquiries. Additional evidence was supplied following the decision of the US State Department to declassify numerous intelligence documents pertaining to the 'Dirty War' in Argentina, particularly those concerning 'Operation Condor' (Osorio, 2002). The documents, many of which concerned Battalion 601, were finally released in late 2002.[33]

However, prior to this, on 10 July 2002 Bonadío had accrued sufficient evidence to order the arrest of the former *de facto* president General Leopoldo Galtieri along with 41 other military officers. On 12 September, Bonadío formally prosecuted 27 of these citing his earlier decision in the Gómez case that found the Amnesty Laws to be unconstitutional (*Europa Press*, 2002; Bonadío, 2002). This was the largest number of officers to be arrested and prosecuted *en masse* since the introduction of the Amnesty Laws; nevertheless the case continued to progress. In December 2002, former agent, Claudio Scagliusi, having already been indicted, was extradited from Spain where he had been under arrest since 27 August 2001. Following General Galtieri's death in mid January 2003, the *Cámara Federal* confirmed the prosecution of 13 of those named by Bonadío, importantly upholding his decision on the unconstitutionality of the Amnesty Laws. In April, the same court found that Bonadío lacked the necessary

[33] Battlion 601 was a military intelligence unit.

jurisdiction to investigate two of the disappearances and ordered the agent Scagliusi to be released (Cámara Federal, 2003a, 2003b). As with all other cases concerning the Amnesty Laws, at the time the research was completed, the final decision remained pending with the Supreme Court. Those prosecuted remained either in custody or under house arrest.

SUMMARY

In summary, Case 1: 'Videla', Case 2: 'Vildoza' and Case 4: 'Poblete' were all the product of individual investigations into child abduction, while Case 3: 'Nicolaides' was opened following a lawsuit filed at the end of 1996 concerning the systematic practice of child abduction. These cases were allowed to advance due to the exemption of crimes concerning the abduction and concealment of minors from the Amnesty Laws. Case 1: 'Videla' and Case 2: 'Vildoza', advanced following the identification of specific missing children and through further testimony from former military officers. The respective investigating judges declared that the practice of child abduction had been systematic and ordered the arrest of senior military officers for their overall responsibility for the criminal operation. In Case 3: 'Nicolaides', the damning evidence proving the existence of a systematic operation was the sheer number of children identified. In Case 4: 'Poblete', the identification of Claudia Poblete permitted the prosecution of her 'adoptive' parents and ultimately their abductors. The judge in this case ruled that the Amnesty Laws were invalid as they contravened international law and thus widened the scope of the case to include those responsible for the disappearance of the girl's parents. Case 5: 'Gómez' advanced due to a ruling by the *Cámara Federal* that the Amnesty Laws did not inhibit an investigation, and then by the investigating judge determining the Amnesty Laws to be invalid on the same basis as the earlier ruling by Cavallo. Finally, Case 6: 'Scagliusi' progressed following the revelations of a retired army sergeant and the assumption by the investigating judge (the same as in Case 5) that the Amnesty Laws did not prevent an investigation into the facts of the case.

Overall it would seem that cases advanced due to the identification of the missing children and the favourable rulings from the *Cámara Federal* and

several judges concerning the (non)applicability of the Amnesty Laws. When compared with the situation described in Chapter 1, although the rulings on the Amnesty Laws don't necessarily signify a political change in the judiciary, it does suggest a change in jurisprudence. Additionally, considering the previous violent protest from the military, that the cases have been able to progress as far as they have suggests that a change has occurred in the military.

CHILEAN CASES[34]

Case 1: Operación Albania[35]

The case concerns the killing over three days of 12 members of the *Frente Patriótico Manuel Rodríguez* (FPMR), a left-wing 'terrorist' organisation during the holiday of Corpus Christi in 1987. Although the military government claimed that the victims had been killed during a shoot out with the security forces of the *Central Nacional de Informaciones* (CNI), evidence from the initial investigation opened in the same year showed that they had been executed unarmed. Although the crimes were not covered by the Amnesty Law, progress under military jurisdiction was minimal, the case being temporarily suspended on several occasions between 1990 and 1996 (VS, 1997:11).[36] A breakthrough only occurred when, on 31 December 1997, the Supreme Court revoked the *sobreseimiento*[37] and modified the wording of the military court's summary in a way that effectively refuted the military's claim that a shootout had occurred (VS, 1997: 12).[38] Having reinvigorated the judicial investigation, the Supreme Court then called upon the military to provide information on active CNI personnel at the time (VS, 1997:12). However, effective progress within the case only occurred after March 1998, when the Supreme Court appointed civilian Judge Hugo Dolmestch, as *Ministro en Visita* to be in charge of the case (VS, 1998a:7; FASIC, 2002).[39]

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[34] See Appendix 3 for names of all case victims and defendants.
[35] *Causa Rol*: 950-87.
[36] *VS* refers to publications of the *Vicaría de Solidaridad.*
[37] Suspension of the case.
[38] The Court changed the word '*enfrentamiento*' (confrontation) to '*procedimiento antisubversivo'* (anti-subversive procedure), asserting that the victims had been 'captured'.
[39] A *Minstro en Visita* is a judge appointed for a certain period of time to investigate the case exclusively. This had been requested on numerous occasions by the plaintiffs and this time was supported by the *Consejo de la Defensa del Estado* (CDE) (a quasi-autonomous legal body representing the interests of the state) in January 1998 (VS, 1998a:7).

Following this new appointment, the case progressed quickly. The military soon complied with the Supreme Court's order and submitted the names of the CNI agents working at the time (VS, 1998a:7).[40] On 27 July 1998, only four months after being assigned to the case, five ex-agents were indicted as authors of unnecessary violence resulting in death and by the end of 1998, this number had risen to a total of nine (VS, 1998b:16; *La Tercera*, 2002). Although Dolmetsch was replaced in February 1999 by Judge Milton Juica,[41] several others became implicated with the crimes, including retired General Hugo Iván Salas Wenzel. By the end of 1999, a total of 18 military officials had been indicted within the case (VS, 1999a:14; VS, 1999b). Although in January 2000 a military tribunal ordered many of the charges to be dropped or reduced, in June the Supreme Court transferred jurisdiction to the civilian *Corte de Apelaciones,* thereby removing the military's opportunity to interfere further with the case (VS, 2000a:52; US State Dept., 2001).[42]

Under civilian jurisdiction, the case continued to advance. New discoveries were made over the workings of the CNI and the chain of command, which led to several more indictments and existing charges to be raised. All later confessed their involvement with the killings arguing that they had complied with the orders of superiors (VS, 2000a:53).[43] In April 2001, jurisdiction returned to Judge Dolmestch as Juica was promoted to the Supreme Court (VS, 2001a:52). Dolmestch then merged the case with several others under his remit that concerned a repressive backlash conducted by the CNI following an attempted assassination of General Pinochet in late 1986 (FASIC, 2002). In April 2002, formal accusations against those indicted were finally made and in July 2002, the *Corte de Apelaciones* decreed the prosecution of nine ex-military officials for the illegal detention and murder of seven of the victims (VS, 2002b:26). When the research stage was completed the case continued with 27 indictments, all of

[40] It had refused to do so on numerous previous occasions.
[41] At this time, the tenure of a civilian judge working within a Court Martial was rotated after a one-year period.
[42] This had been requested by the plaintiff and the CDE in November 1999. Judge Juica remained the investigating judge.
[43] They claimed that General Salas Wenzal had ordered that 'all those subjected to privation of liberty must be eliminated'.

which, with the exception of General Salas Wenzal, had confessed to their participation with the crimes.

Case 2: Jiménez and Alegría[44]

The case concerns the 1982 assassination of union leader Tucapel Jiménez Alfaro, following rumours that he was trying to organise a general strike (Ahumada et al, 1989:445).[45] The initial investigation, opened in the same year under Judge Sergio Valenzuela Platiño of the *Corte de Apelaciones de Santiago*, soon widened to include the death of carpenter Juan Alegría Mondaca, whose body had been later discovered alongside a 'suicide' note confessing to the murder of Jiménez. However, throughout the remaining years of military rule, neither case progressed significantly.

Between 1990 and 1996, limited progress led four ex-CNI agents to be implicated with the two murders before the investigation stage of proceedings was ended (VS, 1996a:24-25). Concerning the Alegría case, Judge Valenzuela revoked the charges against the four accused, citing insufficient evidence, and suspended proceedings indefinitely (VS, 1996b:10). This decision was overruled by the Supreme Court in December, and Judge Valenzuela was ordered to formulate charges against the accused. However, in November 1998, as in 1996, Valenzuela absolved those accused in the Alegría case and closed the Jiménez investigation with only one military officer having been indicted.

Nevertheless, during 1999 significant progress was made in the Jiménez case. In March, the *Corte de Apelaciones* requested that the investigation be reopened and that twelve officers, officials and civilians (in addition to the one already implicated), be indicted. Furthermore, in April the Supreme Court ordered Valenzuela to be replaced by Judge Sergio Muñoz Gajardo, the significance of which is shown by the subsequent rapid progression of the case (VS, 1999a:14). Having firstly complied with the recommended indictments of the *Corte de Apelaciones*, Judge Muñoz reiterated to the military a Supreme Court order

[44] *Causa Rol:* 1643–82.
[45] He was president of the *Asociación Nacional de Empleados Fiscales* (ANEF).

requesting the list of participants of the CNI and the DINE.[46] Between June 1999 and June 2000, Judge Muñoz ordered a total of 14 indictments in addition to the 13 already processed (although ten were later released without charge) (VS, 1999b:23-27; VS, 2000a:44-46). Ignoring threats and lawsuits from the military, in November 2000 Judge Muñoz indicted retired General Fernando Torres Silva (the military Prosecutor General) and General Humberto Ramírez Hald, who thus became the first active duty general to be indicted in a case concerning human rights violations (VS, 2000b:32-41). In April 2001, Judge Muñoz formulated accusations against 16 of those indicted, revoking charges against four others (VS, 2001a:46-49). He finally passed judgement in August, sentencing 12 of the accused and absolving four others (VS, 2001b:38-40). Following appeals, the case finally closed in June 2003, having resulted in ten convictions. The duration of the sentences, ranging from 800 days to eight years, were viewed as insultingly low by the plaintiffs, the family of Jiménez, and the human rights community in general (VS, 2003a:51-52).

During this time, in July 2000, the *Corte de Apelaciones* ruled on the Alegría case and overturned Valenzuela's 1998 judgement. Finding that Alegría had been murdered in an attempt to cover up the assassination of Jiménez, the court convicted all four of the accused CNI agents, administering sentences from ten years to life imprisonment (VS, 2000b:33-35). The case finally closed in 2001.

Case 3: 'Caravan of Death'[47]

Following the September 1973 coup, a band of military officers traversed the country by helicopter in what has come to be known as the 'Caravan of Death' (*Caravana de la Muerte*). Stopping off in several major towns and cities, the group conducted a series of War Councils that condemned to death numerous opponents of the regime (Escalante, 2000:10-12).[48]

During the 1980s a series of individual investigations were opened to determine the fate of those killed. These focused on locating, identifying, and returning the

[46] *Dirección de Inteligencia del Ejército* (DINE) was an army intelligence directorate, similar to the CNI that was established when the DINA was disbanded.
[47] *Causa Rol: 2182-98.*
[48] See Chapter 1 for a further explanation.

victims' remains to their families for final burial, although in many cases this was not possible and the victims remained missing. Although numerous testimonies and declarations concerning the *modus operandi* of the *Caravana* were heard, the investigations failed to determine criminal responsibility for the killings (Guzmán, 1999). As with other cases, the combination of military jurisdiction and the 1978 Amnesty Law led to the closure of most investigations by the mid 1990s. Although some cases remained technically open, their inability to progress meant that they were effectively stagnated within the judicial system.

In 1998, a new case was opened that for the first time investigated the crimes associated with the *Caravana* as a whole. This was the result of a lawsuit filed in January 1998 against General Pinochet alleging his personal responsibility for the killings.[49] The lawsuit was accepted and incorporated into *Causa Rol*: 2182-98 against General Pinochet under the auspices of Judge Juan Guzmán Tapia of the *Corte de Apelaciones de Santiago*. Whilst Guzmán initially focused on locating the bodies of the disappeared through a series of exhumations around the country, criminal lawsuits continued to be filed.[50]

On 8 June 1999, Judge Guzmán applied the Amnesty Law to 56 of the executions but refused to do so for the remaining 19 disappeared victims (VS, 1999a:8-10). Guzmán accepted the plaintiffs' argument that disappearance should be considered an ongoing crime until either the time of death could be determined or the victims' remains found. As such, the Amnesty Law, only covering crimes committed between 11 September 1973 and 10 March 1978, was inapplicable. Accordingly, he ordered the arrest and prosecution of five retired military officers, including one general, for their involvement with the 19 disappearances. Emboldened by this groundbreaking legal interpretation of the Amnesty Law, the plaintiffs appealed its application to the 56 executions. In July 1999, the Supreme Court also made a landmark ruling concerning the application of the Amnesty Law, finding that it could not be applied to any crime until all of the facts of the case had been established. It secondly found that neither the Amnesty Law nor statutory limitations were applicable to the ongoing crime of

[49] See Corte de Apelaciones de Santiago (1998a).
[50] Nine were filed between June 1998 and July 1999.

disappearance (VS, 1999b:13-16). On this basis, the *Corte de Apelaciones* approved charges against an additional officer in August 1999, but rejected five others who had already been absolved through the Amnesty Law.

Following General Pinochet's return to Chile after his detention in Britain, in March 2000, Judge Guzmán applied to have his senatorial immunity removed in order to permit his indictment within the case. Following much political and judicial wrangling, the removal of Pinochet's senatorial immunity (or *desafuero)*, was confirmed in July 2000, and he was ordered to undergo medical tests to establish his state of health (Human Rights Watch, 2003c). Having satisfied himself of Pinochet's fitness for prosecution, in September 2000 Judge Guzmán made history by indicting General Pinochet for his overall responsibility for the execution and/or disappearance of the 75 victims of the Caravan of Death. However, following a lengthy judicial battle during which Pinochet's defence lawyers continued to argue that he was unfit for trial, in July 2001 the *Corte de Apelaciones* voted to suspend the proceedings against him. Pinochet's escape from trial was confirmed by the Supreme Court a year later (Human Rights Watch, 2003c).

During this time, Judge Guzmán made a further indictment and increased charges against some of the existing defendants as well as revoking charges against one of the defendants, bringing the number charged within the case to seven (VS, 2000a:30-33; VS, 2000b:24-26; VS, 2001a:74; VS, 2001b:60). Nevertheless, as proceedings against Pinochet had been suspended and an extradition would be necessary for the arrest of another, the case effectively had only five defendants. Having completed the investigation into the northern part of the Caravan of Death, investigations concerning the relatively unknown southern part continued under Judge Guzmán (Human Rights Watch, 2003c). Judgement and sentences were pending at the time the research stage was completed.

Case 4: 'Pisagua'[51]

During military rule, it is believed that 147 prisoners were processed by War Councils at Pisagua detention centre. 26 of them were executed and others were shot in staged escape attempts known as *ley de fuga*. As the killings had been public knowledge, following the end of military rule an investigation was opened in order to locate and identify the bodies of the prisoners and return them to their families. In June 1990, the discovery of a mass grave containing 20 bodies bearing the signs of execution created controversy within Chilean society. Whilst most of the corpses corresponded to prisoners known to have been executed there, there were some incongruities. The bodies of ten executed prisoners remained missing, and those of six others, supposedly released, were found (Memoria y Justicia, 2003). A judicial investigation into the fate of the disappeared was opened under Judge Sanchez Marre. However, as military officers came to be implicated, jurisdiction of the case was successfully challenged and transferred to a military court where proceedings were ended in 1994 through the application of the Amnesty Law.[52]

Investigations into Pisagua were only reopened in August 1998, following a criminal lawsuit against General Pinochet.[53] The lawsuit was accepted by Judge Juan Guzmán, in addition to a further 12 filed between 1998 and 2000 and as with previous lawsuits against General Pinochet, they were incorporated into *Causa Rol*:2182-98 (FASIC, 2001). In April 2000 (five days after Pinochet's *desafuero*) Judge Guzmán indicted three officers, including one general and a former military prosecutor (who died months later), as authors of the 'qualified kidnapping' of the ten victims whose status remain 'disappeared' (VS, 2000a:33). As with his earlier decisions in the *Caravana* case, Guzmán argued that the Amnesty Law was inapplicable to the crimes involving disappearance, although he did apply it to the charges of murder, illicit association, and torture.

At the beginning of 2001, information concerning the fate of the disappeared was released by the military as part of the agreement reached in the *Mesa de Diálogo*.

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[51] *Causa Rol* 2182:98.
[52] This switch was confirmed by the Supreme Court in 1998.
[53] See Corte de Apelaciones de Santiago (1998b).

This revealed that the bodies of several of the disappeared within the Pisagua case had been thrown into the sea following their execution (VS, 2001a:16-21). This was confirmed by an anonymous source who also revealed the position of three bodies that had been exhumed from Pisagua and transferred elsewhere in 1979 (VS, 2001b:11-12). On 14 October 2002, jurisdiction of the case was transferred to Judge Daniel Calvo Flores of the *Corte de Apelaciones de Santiago* (VS, 2002b:32). Under Judge Calvo, investigations have continued and when the research stage was completed, it was expected that the case would conclude shortly.

Case 5: 'Villa Grimaldi'[54]

Villa Grimaldi was used as a detention and torture centre between 1973 and 1978 and it is estimated that over 5000 prisoners passed through its doors. Although individual investigations into the fate of the disappeared had been opened following democratic transition, as with other cases concerning pre-1978 crimes, the majority of these were closed through the application of the Amnesty Law.

A new case dealing with the crimes committed at Grimaldi as a whole only materialised following a new lawsuit filed against General Pinochet in August 1999.[55] As with the other cases, this lawsuit was accepted by Judge Guzmán and incorporated into *Causa Rol* 2.182-98. Additional lawsuits were filed throughout 2000 and early 2001, during which time Judge Guzmán conducted investigations into the workings of the detention centre, notably the involvement of the DINA (FASIC, 2001). In July 2001, Judge Guzmán ordered the prosecutions of three officers (including the infamous General Manuel Contreras), one sub-official, and one civilian, for the crimes concerning the disappearance of 11 prisoners and the execution of another (VS, 2001b:1-3, Memoria y Justicia, 2003). In September 2001, the *Corte de Apelaciones* cited statutory limitations for the crimes of illicit association and murder (concerning the executed prisoner), although the charges concerning the 11 disappeared were allowed to stand despite the previous invocation of the Amnesty Law for some of the cases (VS 2001b:3). In July 2002, Judge Guzmán issued indictments against seven former

[54] *Causa Rol* 2.182-98.
[55] See Corte de Apelaciones de Santiago (1999).

DINA agents (five of whom had already been prosecuted) for the disappearance of 23 people who were last seen in Villa Grimaldi (VS, 2002b:35-36). The case was then transferred, in October 2002, to Judge Alejandro Solís as part of a re-distribution of the cases investigated by Judge Guzmán (VS, 2002b:32).

During this time, the release of information through the *Mesa de Diálogo* had led to the appointment of several judges of 'exclusive dedication' to investigate the fate of 1,185 disappeared victims (VS, 2001b:26). The investigations of one of these judges, Judge María Inés Collin, had ultimately led her to Villa Grimaldi (VS, 2001b:15). In June 2002, Judge Collin dictated prosecution orders against two officers (including General Contreras), as authors of the disappearance of Miguel Ángel Sandoval Rodríguez, a MIR militant who had been detained at Grimaldi in 1975 and who subsequently disappeared (VS, 2002a:20). Following further investigations, and the rejection of the defendants' appeals, in October 2002, Judge Collins indicted a further three officers (VS, 2002b:48).

As it became clear that Judge Collin and Judge Solís were investigating the same crimes, the cases were combined under the jurisdiction of Judge Solís. In March 2003, he closed the Sandoval investigation and charged those already indicted with crimes concerning his disappearance. On 15 April 2003, Judge Solís broke new ground for being the first judge to convict anybody for the crimes associated with disappearance, dictating sentences ranging from five to 15 years (VS, 2003a:16-18). These sentences have since been confirmed by both the *Corte de Apelaciones* in January 2004, and the Supreme Court in November 2004 (VS, 2004a:43-45; Human Rights Watch, 2004a). At the time the research stage was completed, the wider investigation into Villa Grimaldi continued.

Case 6 'La Moneda'[56]

The case concerns the execution of over 20 members of the *Unidad Popular* (UP) government and other presidential aides, including several of Allende's personal guard, the *Grupo de Amigos del Presidente* (GAP). Following their arrest in the La Moneda presidential Palace during the coup of 11 September

[56] *Causa Rol* 2182:98.

1973, most were later executed. Following democratic transition, the events were investigated by the Rettig Commission and several bodies of the victims were found in *Patio 29* of the Santiago general cemetery. Individual investigations concerning the fate of those still missing were opened although, as with all other cases, the majority of these were soon closed through the combination of military jurisdiction and the application of the Amnesty Law.

As with Cases 3:'Caravan of Death', 4:'Pisagua' and 5:'Villa Grimaldi', a new investigation was instigated by new criminal lawsuits filed against General Pinochet. Following the identification of two of the bodies exhumed in 1991, two lawsuits were filed charging Pinochet with a range of crimes concerning the disappearance of several people detained in La Moneda following the coup (VS, 1999b:11). As previously, these were accepted by Judge Guzmán and incorporated into *Causa Rol*: 2.182-98. As several more lawsuits were filed during 2000 and 2001, Judge Guzmán conducted investigations, hearing the testimony of eyewitnesses and reconstructing events (FASIC, 2001).

In January 2001, the names of several of the disappeared involved in the case were included in the information released by the military as part of the agreement reached within the *Mesa de Diálogo* (VS, 2001a:16-29). The information revealed the location of several burial sites and listed those whose bodies had been thrown into the sea. Acting upon the orders of the Supreme Court, in December 2001, investigating judge Amanda Valdovinos exhumed the remains of eight GAP members from a burial site within the military base *Fuerte Arteaga* (VS, 2001b:22). Further excavations in 2002, however, revealed numerous bone fragments that corresponded to several victims who had reportedly been thrown into the sea (VS, 2002a:29-30). In her report to the Supreme Court in April 2002, Judge Valdovinos noted that there had also been clear signs of previous exhumation, a situation that the *Programa de Derechos Humanos del Ministerio del Interior* asked to be further investigated.[57] In October 2002, Judge Valdovinos' period of exclusive investigation came to an end and the gathered

[57] The *Programa de Derechos Humanos* had been created in 1996 by the Reparation and Reconciliation Commission; it functions in a similar way to the CDE but only follows cases concerning the disappeared.

evidence was passed to Judge Urrutia who had been assigned to take over the case from Judge Guzmán (VS, 2002b:25,30).

In September 2002, retired General Luis Ramírez Pineda, the former commander of *Regimiento Tacna* was arrested whilst in Argentina on an international arrest warrant issued by French judge, Roger Le Loire, in October 2001. The judge was investigating the disappearance of several French nationals in Chile, one of whom had been arrested in La Moneda Palace following the coup (VS, 2002b:22-25).[58] In January 2003, whilst extradition proceedings were being initiated in Argentina, Judge Urrutia indicted the General, in addition to eight other retired military officials in the Chilean case for the crimes concerning the disappeared victims. In March 2003, the Supreme Court agreed to dispatch an extradition request to Argentina, and in June, Judge Urrutia indicted five retired army functionaries for the illegal exhumation of the 12 people executed at *Fuerte Arteaga* (VS, 2003a:42-44). This was the first time that military officials had been prosecuted for the crime of illegal exhumation and removal of bodies. In September 2003, General Pineda was finally extradited from Argentina and in February 2004, Judge Urrutia also charged ex-vice commander of the army and former minister of defence, retired General Herman Brady, with responsibility for the 12 disappearances (VS, 2003b:79; VS 2004a:35-36). Brady's prosecution as the author of qualified murder was later confirmed by the *Corte de Apelaciones de Santiago* in May 2004 (VS, 2004a:36).

Case 7: 'Carlos Prats'

The case concerns the assassination of the Commander-in-Chief of the army prior to General Pinochet, General Carlos Prats Gonzalez and his wife Sofia Cuthbert, who were both murdered on 30 September 1974 having fled to Buenos Aires. A subsequent investigation in Argentina linked the assassination with that of Orlando Letelier in Washington and found substantial evidence of the involvement of the DINA. In 1983 Argentina requested the extradition of Michael Townley from the US; however, this was refused and the case eventually stalled (Human Rights Watch, 2001).

[58] Dr Georges Klein Pipper.

The Rettig Commission found evidence to support the Argentine discoveries, but successive requests to open a case in Chile failed on the basis that an investigation was already under way in Argentina. There, very little occurred until January 1996, when former DINA agent Enrique Arancibia Clavel was arrested in Buenos Aires (VS, 1996a:4-8). Following questioning, Clavel was prosecuted as author of the double murders in addition to being a member of an illicit association.

In October 2000, after several years of investigation, a number of extradition requests were dispatched to Chile, including that of General Pinochet, to be assessed by the Chilean Supreme Court (VS, 2000b:41-48). During this time, the *Tribunal Oral Federal (No.6)* of Buenos Aires heard the case against Enrique Clavel and in November 2000, he was found guilty of double murder and illicit association and was sentenced to life imprisonment. The final ruling made reference to the structure of the DINA and the role of General Contreras, 'who reported directly to his superior, General Pinochet'.

In July 2001, in a 3-2 decision, the Chilean Supreme Court rejected the extradition of General Pinochet, while in September Judge Servini de Cubría repeated the request of extradition concerning the others, all of whom were now charged in Argentina (VS, 2001a:49-51; VS, 2001b:33-38). The Supreme Court agreed to allow some interrogations but refused the request relating to General Pinochet, asserting that his *desafuero* had only been valid for the *Caravana de la Muerte* case. A request to extend Pinochet's *desafuero* to the Prats case was ultimately refused in September 2002 on the basis that he was not fit to stand trial; an appeal against the ruling was later rejected as inadmissible (VS, 2002b:13-15). In July 2002, Chilean judge Jorge Rodríguez refused all of the other extraditions requested by Argentina, adding that there was insufficient evidence to open an investigation in Chile. This decision was appealed to the Supreme Court, which in December confirmed the rejection of the extradition requests but found that sufficient evidence existed to warrant an investigation in Chile. A new case was assigned to Judge Rosa del Carmen Garay Ruiz of the *Diecinueve Juzgado del Crimen de Santiago*, who on 3 January 2003 passed

jurisdiction of the case to the *Corte de Apelaciones de Santiago* where Judge Alejandro Solis was assigned to investigate (VS, 2003a:8-12).

In February 2003, Judge Solis indicted five high-ranking officers all of whom had also been indicted in Argentina. Successive appeals from the defendants were rejected and in September 2003 two further indictments were made (VS, 2003b:14-15). When the research stage was completed, the case in Chile was continuing with seven defendants and was expected to conclude shortly.

Case 8: 'Carmelo Soria'

The case concerns the 1976 murder of Spanish diplomat Carmelo Soria Espinoza who, after being kidnapped, was later found dead alongside his car that had seemingly crashed into a stream.[59] Considerable international pressure due to Soria's diplomatic status led to an immediate investigation into his death, although this was later closed in 1979 having achieved little. Following democratic transition, the investigations of the Rettig Commission determined that Soria had been 'executed by agents of the state' and ordered an investigation to be opened in 1991 (IACHR, 1999). Investigations soon determined the DINA's involvement with the crime and several officers and agents were implicated, although there still remained doubt over the *modus operandi* of the murder.

In November 1993, the Supreme Court approved a request to transfer jurisdiction of the case to a military court and a month later the case was closed through the application of the Amnesty Law. An appeal based on the Vienna Convention and the non-application of a domestic amnesty to crimes committed against international officials succeeded in persuading the Supreme Court to reopen the case in April 1994 (VS, 1995a:22-23). However, this was denied by Judge Marcos Libedinsky and later Judge Eleodoro Ortiz Sepúlveda. The refusal of the latter in January 1995, was appealed before the Supreme Court.

[59] He was an employee of the editorial and publications section of the Latin American Demographic Centre (CELADE) (an agency of the Economic Commission for Latin America and the Caribbean (ECLAC) and part of the United Nations system)

In May 1995, in a divided decision of 3-2, the Supreme Court determined that Soria had been kidnapped, tortured and murdered, and ordered the indictment of two military officials. At the beginning of November 1995, having already agreed to free those indicted, Judge Ortiz acceded to the defence's demands and closed the investigation stage of the case, which was later confirmed by the Supreme Court. In May 1996 the Supreme Court ordered that the case should be closed permanently and in June, Judge Ortiz applied the Amnesty Law, thereby closing the case (VS, 1996a:16-20). Although the plaintiffs appealed the decision, and the public prosecutor recommended that application of the Amnesty Law be rejected, in August the Supreme Court confirmed the earlier ruling permanently suspending the case (VS, 1996b:4-7).[60]

Frustration led Soria's daughter to both appear before Spanish judge, Manuel García-Castellón (now investigating crimes committed against Spanish nationals in Chile) and, in February 1997, file a petition against the state of Chile before the Inter-American Commission on Human Rights (IACHR) (Pozuelo and Tarín, 1999:127-145; IACHR, 1999). A hearing in March 1999 allowed both sides to present their argument, and in May 1999 the IACHR sent its report to the government condemning the failure of justice. Nevertheless, the Chilean Government failed to take any action following the court ruling and, in May 2000, the family of Soria resorted once again to the Chilean courts, filing a civil lawsuit against the state for moral injuries and the denegation of justice (VS, 2000a:59). In 2001, an attempt to reopen the case failed, and in 2002 allegations that the grave of Soria did not contain his remains were found to be false (VS, 2001a:53; VS, 2002b:50).

Only in 2003, over three years after the IACHR's, ruling did any sort of significant progress occur. In January, the foreign minister signed an agreement (approved by the daughter of Soria) complying with the IACHR's 1999 recommendations (VS, 2003a:46). The government agreed to recognise the international protection awarded to Soria as an employee of the UN in return for the family dropping their civil suit against the state for moral damages. This permitted the case to

[60] The public prosecutor, Enrique Paillás, was later re-assigned for his recommendation, widely seen as punishment for his alternative interpretation of the Amnesty Law.

reopen on the basis of the non-applicability of the Amnesty Law to international crimes. In May 2003, the *Programa de Derechos Humanos del Ministerio del Interior* made itself a part of the process and on 30 October 2003, a lawsuit was filed against General Pinochet (VS, 2003b:27). This was approved by the *Corte de Apelaciones de Santiago* in November, who designated Judge Amanda Valdovinos, to investigate.

SUMMARY

In summary we can see that Case 1:'Operation Albania', not covered by the Amnesty Law, advanced following favourable rulings by the Supreme Court in 1997 and 1998, which rejected the closure of proceedings and appointed a special, civilian judge to investigate. In 2000, the case was transferred from military to civilian jurisdiction and was allowed to progress resulting in numerous indictments. Case 2:'Jiménez and Alegría', also not covered by the Amnesty Law, advanced again following a change of judge and a number of favourable rulings from the Supreme Court. The proceedings ended in the prosecution and conviction of a number of military officials. Case 3:'Caravan of Death', Case 4:'Pisagua', Case 5:'Villa Grimaldi' and Case 6:'La Moneda' were all opened following new lawsuits filed against General Pinochet. Despite all of the crimes being covered by the Amnesty Law, due to a change in jurisprudence within the *Corte de Apelaciones de Santiago* and the Supreme Court concerning its application and the interpretation of the crime of abduction, all of the cases were allowed to progress. In addition to this, Case 5:'Villa Grimaldi' and Case 6:'La Moneda' also advanced due to the assignment of special investigating judges appointed by the Supreme Court in 2001. All of these cases have resulted in numerous indictments, prosecutions, and in Case 5:'Villa Grimaldi', convictions. Case 7:'Prats' was not covered by the Amnesty Law as the crime occurred abroad and it advanced following the rejection of several extradition requests from Argentina and a ruling from the Supreme Court that there was sufficient evidence to open a case in Chile. Finally, Case 8:'Soria' previously covered by the Amnesty Law, reopened following an agreement between the government and the victim's family after a ruling by the IACHR.

Combined the cases appear to have advanced due to favourable judicial rulings facilitated by some governmental action. Considering the situation described in Chapter 1, it would seem that this represents a doctrinal change within the judiciary. Additionally, that the cases were able to progress as far as they have indicates that a change may also have occurred within the military.

Chapter 4: The Impact of Transnational Justice

Earlier we saw that transnational justice (the use of foreign judicial proceedings in third party countries) was a strategy adopted by transnational advovacy networks to bring pressure to bear on domestic governments to permit human rights prosecutions. According to domestic/transnational models of interaction, by pressurising governments both from 'above' and 'below', openings were created in domestic political and legal opportunity structures that favoured domestic groups pushing for trials (Brysk, 1994).

In order to examine in further detail the interaction procees and to evaluate the impact of transnational justice on domestic case progression, the parameters of enquiry had to be delineated more precisely. The first stage of this process entailed identifying, and ruling out, instances where transnational justice definitively could not have had an impact. In Chapter 2 we saw that the transnational justice impact had both political and procedural dimensions within domestic political and legal opportunity structures. Politically, transnational cases exerted 'moral leverage' upon governments to revisit the human rights issue, reducing their ability to 'overtly oppose domestic prosecutions'. They 'inspired' and 'renewed debate', 'spurring on domestic human rights groups and courts' and thereby 'reinvigorated' proceedings (Park, 2001:127; Roht-Arriaza, 2003:197). Procedurally, groundbreaking legal decisions had the 'effect of opening judicial space', helping to 'bolster legal argumentation' based upon international law as local judges became more comfortable using similar theories (Brody, 2001:25; Roht-Arriaza, 2003:210). The proceedings thereby enhanced 'cooperation and cross-fertilisation in the application of human rights doctrine and jurisprudence' between the transnational and domestic levels (Human Rights Watch, 2001). In addition, new evidence could have been discovered during transnational investigations as witnesses came forward 'who had never testified' previously, a particularly relevant factor considering the large numbers of people forced into exile (Roht-Arriaza, 2003:197; Wilson, 1999:933).

In order to look for, and examine, these phenomena it was first necessary to recreate and analyse the procedural history of the transnational cases. This would

facilitate the identification of areas of *potential* impact, which could be tested more fully through detailed empirical analyses in Argentina and Chile.

With regards to a political impact, for a transnational case to have exerted pressure proceedings must have developed beyond a certain stage. A case that never progressed beyond the initial stages would have little, if any, impact in comparison to a case that had progressed to the stage where, for example, individuals were indicted or prosecuted; extradition requests were filed; arrests made; or, finally, trials held, including those *in absentia*. Additionally, a case concerning a large number of crimes, particularly those involving an entire regime, and/or encapsulating many individuals, would be more likely to have an impact than a case involving relatively few crimes and individuals. In other words, the amount of political pressure that a transnational case generates will vary in proportion to its 'success' and 'scale'. In order to identify whether any significant pressure was likely to have been exerted upon the domestic level, it was important to establish how many individuals stood accused in each case and how far proceedings had been able to develop. To do this I analysed each set of proceedings for evidence of 'extradition/arrest requests', 'arrests', and 'trial'.

For a transnational case to be considered pivotal in *reinvigorating* stagnated domestic proceedings, however, these transnational developments must also have predated advances in the domestic cases (occurring after the 'cut-off' point). Whilst a transnational case that progressed after domestic advances had already begun would not necessarily be dismissed entirely as an influential factor, it would indicate that the transnational case played more of a catalytic role. On the other hand, in order for a claim of influence to be upheld, the time lapse between transnational and domestic advances could not be so great as to render the cases unrelated. Rather, case progression should broadly coincide. Although the correct scheduling of case progression would not necessarily be indicative of a causal relationship, its absence would rule transnational causality out of account. Therefore, it was vital to establish the dates that individual transnational proceedings opened and the timing of their significant developments. These could then be cross-referenced with the dates that domestic

cases had 'opened', 'reopened' or become 'reinvigorated', thereby permitting us to establish whether temporal order would allow a claim of causality to be made.

Concerning a procedural impact, it was argued that transnational investigations might have led to the discovery of new evidence which may have been used at the domestic level. In order to test this claim fully, it would be necessary to determine which testimonies had been heard for the first time at the transnational level; to establish the content of these testimonies; and then to determine whether this could have facilitated the progression of domestic cases. Time, resource and accessibility constraints, however, meant that it was simply not possible to determine the identity of each and every witness in all transnational and domestic cases and then analyse the content of their testimonies. Nevertheless, by examining the nature of the investigations and the focus of the transnational cases it was possible to determine the existence of any overlap between investigations – specifically, which victims and crimes were involved. This would enable direct comparison with those involved in domestic proceedings. Having in this way outlined the *plausibility* of new evidence being discovered, any links could then be more systematically explored through interviews with those intimately involved in the domestic cases. As such, the identity of victims involved, along with the crimes (or 'episodes') under investigation within transnational cases, was recorded and then cross-referenced to the domestic cases.[61]

Finally, as it is claimed that legal arguments used at the transnational level benefited domestic cases by emboldening domestic judiciaries to accept similar arguments, it was important to identify which proceedings incorporated such arguments. In Chapter 3 we saw that in several cases in both countries legal arguments were used to circumnavigate domestic amnesty laws. It was thus necessary to determine whether similar legal arguments had been used at the transnational level and, by cross-referencing the dates of their use, determine whether these predated their use domestically. Whilst the domestic use of a legal

[61] 'Episodes' incorporate a number of crimes, for example the 'Caravan of Death' or crimes committed at ESMA, the infamous Argentina detention centre.

argument incorporated at the transnational level would not necessarily indicate a causal relation, it would enable us to narrow the focus of further investigation.

The recreated procedural history involved cases in France, Germany, Italy, Spain, Sweden and the US, for Argentina, and cases in Belgium, France, Holland, Italy, Spain, and Switzerland, for Chile.[62] I then cross-referenced the case details with the domestic proceedings. I now present the findings of this process and draw conclusions on the probability that transnational justice impacted positively on domestic case progression, highlighting a number of specific questions to be addressed through further investigation.

POLITICAL IMPACT OF TRANSNATIONAL CASES IN ARGENTINA

Having recreated the procedural history of the transnational cases, I first ascertained whether proceedings were likely to have generated significant pressure upon the domestic level and, if so, the time-period in which this occurred. I recorded how many individuals were accused within the proceedings and to what extent cases have developed. I recorded the dates that proceedings opened, progressed, and, if relevant, closed. The findings of this analysis concerning Argentina are presented in Table 4.1.

[62] The full details of particular transnational cases are not presented within the thesis. Although complaints were filed in other countries, for example in Ecuador regarding Chile, these did not result in full cases and were therefore omitted from further investigation.

Table 4.1: Case variables concerning political impact of transnational proceedings, Argentine cases 1983-2002

Country	Opened	Extradition/Arrest Requests	Arrest	Trial	Number of Accused
France 1	1985	1990,2001	-	1990(abs)	1
France 2	1998	2000, 2001	2000	-	2
Germany	2001	2001	-	-	1
Italy 1	1988	2000	-	2000(abs)	7
Italy 2	2001	2001	-	-	2
Spain	1996	1997, 1999, 2001, 2003	1997, 2000	2005	98
Sweden	2001	-	-	-	1
US	1987	-	-	-	1

abs = trial in abstentia
Source: Constructed by the author from sources cited in Appendix 1.

We can see that three cases, France 1, Italy 1 and the US, opened during the 1980s; the case in Spain opened in 1996; the second French case opened in 1998; and the remaining cases in Germany, Italy 2, and Sweden all opened in 2001. Of the early cases, that in France progressed to request the extradition/arrest of one individual in 1990, and again in 2001 having proceeded to trial *in absentia* in 1990. The case in Italy 1, involving seven defendants, advanced to request extradition/arrests in 2000, and resulted in a trial *in absentia* in the same year. The case in the US did not progress to extradition/arrest request, or trial stage. The case in Spain, involving 98 defendants, led to requests for extradition/arrests on numerous occasions in 1997, 1999, 2001 and 2003. Actual arrests were made (outside of Argentina) in 1997 and 2000, leading to a trial in 2005. The second case in France, concerning two accused, progressed to request extradition/arrests in 2000 and 2001, and an actual arrest was made in 2000. The case in Germany and the second case in Italy, progressed to request extradition/arrests in 2001, but failed to advance any further. Finally, the case in Sweden has not progressed beyond the initial stages.

When we cross-reference the dates that these cases opened and progressed with that identified earlier in Chapter 3 as the 'period of crucial case activity' within the Argentine cases (1998-2001), we can discern a degree of overlap between the progression of the cases. From the table, we observe that only the cases in France

1, Italy 1, Spain, and the US clearly predate this period.[63] Of these, the case in the US, being only a civil case, did not develop to the stage where it might exert pressure upon the domestic arena. In addition, it occurred so many years prior to domestic case advance as to be considered unrelated.[64]

This is also true for the case in France 1, which resulted in a trial (*in absentia*) in 1990 which convicted naval officer, Alfredo Astiz, for the murder of two French nuns (Human Rights Watch, 2001). Throughout the 1990s the French government maintained pressure on the Argentine government to either extradite Astiz or let him stand trial in Argentina (Feitlowitz, 1998:215-228; First Page, 1996). Nevertheless, as the case concerned only Astiz, it was unlikely that this was sufficient to lead to the reopening and progression of the domestic cases. In fact, Argentina repeatedly refused his extradition and the case was not reopened.[65] Although a second extradition request was issued in 2001, this was after the development of other transnational cases and after many of the advances in the domestic cases had already occurred (Europa Press, 2001f).

Within the 'Italy 1' case, there were some important developments prior to 1998. Opening officially in 1988, initial progress was very slow (Human Rights Watch, 2001). Requests for judicial assistance during 1993 and 1994 were refused outright by the Argentine courts on the basis that the cases had already been judged in Argentina (Ithurburu, 1996). Further, in 1994, the Argentine *Cámara Federal* issued an injunction preventing the Italian judge and a prosecutor from interviewing witnesses in Argentina; a 1994 *commission rogatoria* was also blocked by the Argentine government (Redress, 1999:33; Ithurburu, 1996; Poder Judicial de la Nación, 1994). The Italian proceedings later stagnated and proceedings were suspended in 1995. Reopening in July 1997, the *Tribunale di Roma* accepted seven cases of disappearance and one case of child kidnapping out of the numerous (over 100 victims) previously investigated (Redress,

[63] The first 'advance' in Argentina was in Case 1 and concerned the June 1998 arrest of General Videla. As such the second case in France, which opened in November 1998, came after this development.

[64] General Suárez Mason had been arrested in the US. Pending his extradition to Argentina (which ultimately was successful) several civil suits were filed against him (Human Rights Watch, 2001; Lutz and Sikkink, 2001:9).

[65] However, Astiz was eventually forced into retirement.

1999:33). Nevertheless, by 1998, the period at which domestic cases began to advance, the case had progressed little further and it is thus unlikely that any significant pressure was exerted upon Argentina, at least initially.

The final case predating the developments at the domestic arena was held in Spain. In March 1996, lawsuits were filed charging members of the 1976 Argentine military *junta* with responsibility for the crimes of genocide and terrorism (Audiencia Nacional, 1996a). The case initially concerned the fate of ten Spanish nationals, although this soon increased to include 266 named Spanish nationals or descendents (Audiencia Nacional, 1996b, 1996c). Additional suits expanded on the nature of the crimes, linking many other former military members, police, and civilians with the atrocities. As the scope of the case increased exponentially, it was clear that those responsible intended the case to exert as much pressure as possible on the Argentine government and judiciary to reopen domestic proceedings.

On 10 June, Judge Baltasar Garzón of the fifth chamber of the *Audiencia Nacional* (AN) was assigned to investigate the allegations (Audiencia Nactional, 1996d). By June 28, Judge Garzón ruled that the court had jurisdiction to investigate the reported crimes and thus could 'prosecute any of the crimes committed by the accused and others responsible for the crimes' (Lacabe 1998). Although controversial, Garzón's interpretation of Spanish and international law allowed the case to proceed.

On 16 September 1996, Garzón sent a request for judicial cooperation to the Argentine courts. However, the Argentine authorities refused to cooperate, noting 'serious formal deficiencies' with the proceedings (Audiencia Nacional, 1997a).[66] Pressure began to be exerted upon the Argentine government when, on 25 March 1997, Garzón issued his first arrest order to the Argentine courts requesting the detention of former president and Commander-in-Chief of the army, General Leopoldo Galtieri (Audiencia Nacional, 1997b). He was charged with 'having actively participated in the creation and development of a genocidal

[66] President Menem was more explicit, stating that the investigations would not be opened 'even if the formal errors [were] corrected' (Wilson, 1996:1).

state of terror and inducing the kidnapping, murder and disappearance' of Spanish citizens. Predictably Argentina refused his extradition.

The case received a substantial boost when, on 7 October 1997, retired Argentine navy captain, Adolfo Scilingo, decided to appear *en cámara* before Judge Garzón (Mas, 1999:95). Scilingo had in 1995 been the first Argentine military official to openly confess to the crimes committed during the 'Dirty War'. Following a short bout in prison (allegedly to silence him), Scilingo had volunteered to testify in Spain (Mas, 1999:94). However, upon his arrival, Judge Garzón ordered his arrest and he thus became the case's first defendant (Human Rights Watch, 2001; Izquierda Unida, 1997). Following Scilingo's appearance, on 10 October 1997, Garzón issued prosecution orders for ten other Argentine military officers, including former *junta* member, Admiral Emilio Massera (Audiencia Nacional, 1997c).

Many domestic cases began to develop from 1998 onwards; high-profile arrests occurred in Case 1:'Videla', Case 2:'Vildoza' and Case 3:'Nicolaides' concerning the abduction of children. When we consider the situation described in Chapter 1 at the cut-off point, we must question whether transnational developments were *sufficient* to have caused the reinvigoration within the domestic cases. Would the transnational events have been sufficient to quell earlier military protest? Or had other domestic factors also intervened? Whilst these questions require further consideration, at this stage we can state that the developments within the Italian and Spanish transnational cases suggest that influence is at least plausible.

From June 1998, pressure was maintained, and in fact was increased by developments at the transnational level. The October 1998 arrest of General Pinochet in London within the Chilean Spanish case, although unconnected with Argentina, only served to increase the profile of both the cases in Spain. The second case in France was opened in November 1998 following Pinochet's detention, concerning the disappearance in Argentina of 15 French nationals. Little significant progress was made until August 2000 when former lieutenant-colonel Jorge Olivera was arrested whilst in Italy on an arrest warrant issued by

the French judge (Human Rights Watch, 2001; Página12, 2000). Despite Olivera ultimately escaping through the use of forged evidence, the arrest is likely to have increased pressure on Argentina to allow the domestic cases to continue advancing (Human Rights Watch, 2001; Lutz and Sikkink, 2001:23).

In June 1998, the first Italian case was endorsed by the Italian government as it applied to join the case as *partie civile,* thereby increasing pressure upon Argentina; this was accepted in January 1999.[67] In May 1999, the Italian courts charged General Guillermo Suárez Mason and General Santiago Omar Riveros with the disappearance of six people, and five other navy officials for the disappearance of two others (Corte di Assisi di Roma, 2000). After several months of trial *in absentia*, on 6 December 2000, the retired generals were both sentenced to life imprisonment on charges of kidnapping, torture, and premeditated murder; the others received lesser sentences of 24 years each (Human Rights Watch, 2001). As with the French case, the Argentine government refused to extradite those convicted.

At the same time, developments continued to be made in Spain. In November 1999, Judge Garzón processed a total of 98 Argentine military members and civilians, ordering the arrest of 87 of them; by 21 December of the same year orders had been issued via Interpol for the arrest of 48 of these (Human Rights Watch, 2001; Audiencia Nacional, 1999; Equipo Nizkor, 2000). As with the others, the Argentine government refused to comply with the request. In another development, in August 2000, Miguel Cavallo, a former Argentine naval officer, was arrested in Mexico (Human Rights Watch, 2001). Garzón quickly filed an extradition request, which was later accepted by Mexico in 2001 (Human Rights Watch, 2001; Roht-Arriaza, 2003:199). Cavallo was eventually extradited to Spain in June 2003, where he will face trial charged with the crimes of genocide, terrorism and torture (Equipo Nizkor, 2003).

[67] A *partie civile* is a system whereby an interested party may join the case and has the same rights to be informed about the progress of the case as the defendant, including information about the evidence gathered. Usually they also have the right to be represented by a lawyer, address the court and make representations regarding the appropriate sentences. In some systems, *parties civiles* are also allowed access to official documentation. These rights vary however according to different legal systems (Redress, 1999:13-14).

As we can see from Table 4.1, in 2001 cases also opened in Germany, Italy ('Italy 2') and in Sweden. In June 2001, an Italian judge ordered the detention of Alfredo Astiz and Jorge Vildoza concerning crimes committed at ESMA. In July 2001, after an international arrest warrant had been issued to INTERPOL, Astiz presented himself before Argentine Judge María Servini de Cubría, who became the first Argentine judge to comply with an external arrest order concerning human rights crimes (Europa Press, 2001a). Following a formal extradition request, the government of President Fernando de la Rua refused, and Astiz was freed in August 2001.

Nevertheless, the precedent of acting upon international arrest warrants had been set and a series of new arrest and extradition requests were filed with the Argentine courts. In July, a German judge requested the arrest of former general, Suárez Mason, which was enacted on 2 October by Argentine Judge Cavallo (Europa Press, 2001b, 2001c). In August 2001, Judge Garzón again requested the arrest of 18 Argentine military officers and civilians in association with the Spanish case, several of whom were arrested and their extraditions were formally requested in October 2001 (Europa Press, 2001d). Nevertheless, all of these requests were rejected *en masse* by the Argentine government in November 2001, based on the principle of 'territorial sovereignty' (Human Rights Watch 2001; Europa Press, 2001e). A later extradition request filed in December in association with the second French case, met the same fate (Europa Press, 2001f).

Although by 2001 substantial developments had taken place within the Argentine cases, the stream of arrests and extradition requests emanating from the transnational proceedings served to maintain pressure upon the Argentine government, making it harder to obstruct domestic progress. By accepting the validity of the international arrest warrants, the Argentine judges themselves further enhanced the amount of pressure placed upon the Argentine government either to agree to extradite those requested or to allow them to be placed on trial in Argentina. That this was a source of aggravation for the government is shown by its attempt to bring a stop to further requests. In December 2001, the government issued a decree stating that all future extraditions would be

automatically rejected on the basis of 'territorial sovereignty', effectively closing off the possibility of further arrests. Nevertheless, from the procedural history of the domestic cases we can see that by this time all selected cases had progressed significantly and, in several, the Amnesty Laws had been ruled unconstitutional. The decree was eventually revoked in 2003 by newly elected President Kirchner, reopening the possibility of extraditions. However, renewed attempts have largely failed due to the success within domestic cases.[68]

In summary, we can state that developments within the transnational cases in Spain and Italy predate the advances in Argentina and thus may have exerted some political pressure upon the domestic arena before any advances had occurred within the selected Argentine cases. However, as pressure from the transnational proceedings continued to increase throughout the period of domestic crucial case activity (1998-2001) it is also likely that the transnational proceedings served to maintain the momentum, deterring efforts to obstruct domestic progress.

PROCEDURAL IMPACT OF TRANSNATIONAL CASES ON DOMESTIC CASES IN ARGENTINA

Case Evidence

Having determined the existence of political pressure upon the domestic arena, the next stage of analysis sought to determine the plausibility of a procedural benefit. We have seen from the procedural history of the Argentine cases presented in Chapter 3, that the identification of specific abducted children was vital to the progression of Case 1:'Videla', Case 2:'Vildoza' and Case 4:'Poblete'. As such, it was important to determine whether evidence discovered within transnational cases had facilitated this process. Although for the remaining cases, evidence discovered at the transnational level would also have been of assistance, the procedural history of the domestic cases revealed that this would not have been vital to the cases' initial progression. Nevertheless, by cross-referencing the identity of transnational and domestic case victims,

[68] The Spanish government cited the Argentine congressional ruling on the unconstitutionality of the Amnesty Laws as its main reason for refusing to endorse Garzón's extradition requests. See Chapter 7 for more details.

investigated crimes, and/or episodes, it was possible to determine the existence of any overlap between the scope of investigations. The results of this process are presented below in Table 4.2.

Table 4.2: Cross-referenced domestic and transnational victims, crimes and episodes, Argentina

Transnational Case	Overlap of Victims/Crimes/Episodes
France 1	No
France 2	No
Germany	No
Italy 1	Yes
Italy 2	Yes
Spain	Yes
Sweden	No
US	No

Source: Constructed by the author from sources cited in Appendix 1.

The findings demonstrate the existence of an overlap in investigative scope between the selected domestic cases and the transnational cases in Italy and Spain. The initial Italian investigation relied heavily on testimonies from families of the victims coordinated by Argentine and Italian human rights groups. In 1990, the Italian *Liga por il Derecho y la Liberacion de los Pueblos* sought out witnesses who would testify before the Italian courts (Ithurburu, 1996). The Argentine domestic groups, SERPAJ, the *Madres* and the *Abuelas* helped specifically to coordinate witnesses who were willing to testify and Amnesty International were also involved. A report by the human rights organisation Redress (1999:32-33) comments that 'an enormous volume of documentation was collected including personal accounts from witnesses and evidence from relatives of the disappeared, exiles and human rights organisations'.

Although it would seem that the initial investigation was extensive, the case closed in 1995. When it reopened in 1997, it concerned only eight victims (Corte di Assisi di Roma, 2000). These individual cases had been chosen due to the substantial amount of evidence available and the extent of investigation was sufficient to result in criminal convictions in 2000 (Ithurburu 1996). Whilst much of the evidence utilised would not be new, having originated in Argentina,

we cannot rule out the fact that the coordination of the evidence led to new discoveries or that new testimonies were heard. As there was clear coordination between the Italian and Argentine human rights groups, the transference of any newly discovered evidence would also have been likely.

Concerning the second Italian case, it is unlikely that the investigation unearthed any new evidence that facilitated the progression of one of the domestic case studies. The case only opened in 2001, some years after all of the cases in Argentina had either opened, reopened, or had been reinvigorated, and has not, at present, progressed to the trial stage. Whilst it is possible that the case drew on evidence collated as part of the earlier investigation which did predate the advances in the Argentine cases, there had been insufficient evidence in the case to warrant its inclusion in the earlier trial.

There is certainly a degree of overlap between the focus of investigation within both Italian cases and several of the Argentine cases. Out of the more than 100 victims initially included in the first Italian case that opened in 1988, seven individuals are also included in the selected Argentine cases (Ithurburu 1996; Redress, 1999:32).[69] However, when the case reopened in 1997, the scope of proceedings was reduced to concern eight victims; two of which are included in the Argentine Case 3:'Nicolaides'. Two of the four victims associated with the second Italian case opening in 2001, are also included in the Argentine Case 3:'Nicolaides'. As out of these four victims, two are minors (one from each Italian case) both Italian cases involve the similar theme of child abduction, the focus of Argentine Cases 1, 2, 3 and 4. Additionally, all four victims were seen in the ESMA detention centre, once again the focus of Argentine Cases 2: 'Vildoza', 3: 'Nicolaides', and 4: 'Poblete'.[70]

We saw earlier that the Argentine Cases 1:'Videla', 2:'Vildoza' and 4:'Poblete' only advanced after the identification of specific individuals. However, none of these are included in any of the Italian cases. Therefore we can rule out that the

[69] See Appendix 4 for the names.
[70] The Italian victims all disappeared in Zone 1 and were last seen in detention centres, ESMA, La Cacha, and Vesubio. See Corte di Assisi di Roma (2000).

identification of children in Argentine Cases 1:'Videla', 2:'Vildoza' and 4:'Poblete' was due to specific investigations in Italy. Nevertheless, the investigations in Italy did concern both child abduction and ESMA, the criminal theme within Argentine Case 3:'Nicolaides'. As we saw earlier, this Argentine case advanced following the complaint regarding the systematic plan of child abduction. Although four victims within the Italian cases were included in Case 3:'Nicolaides', this case also involved several hundred other victims. Also, the Argentine case did not rely on the evidence of specific cases, but sought to determine overall institutional responsibility. As such, it seems unlikely that evidence regarding four of the victims could have been vital to the overall progression of the domestic case. Nevertheless, we cannot ignore the possibility that some vital piece of evidence helped four of the cases in Argentina to progress. As such, it would be necessary to investigate, via the specific case lawyers involved within Argentine Cases 1:'Videla', 2:'Vildoza', 3:'Nicolaides' and 4:'Poblete', whether any evidence was discovered in the Italian proceedings and was then used in these cases.

From the beginning of the Spanish case, 'hundreds of documents, including those previously filed with Argentinean courts, [were] filed with [the] court' (Lacabe 1998). We also know that numerous witnesses, including survivors of the repression, ex-disappeared, relatives of the victims, politicians, prosecutors from the trials in Argentina and even the ex-president Isabel Peron testified before Judge Garzón providing relevant information (Lacabe, 1998; Mas 1999:50-51). Lacabe (1998) even goes so far as to claim that Garzón's investigation 'has probably been the most extensive that has taken place so far vis-à-vis human rights violations in Argentina during the Dirty War'.

In addition to the numerous testimonies of former victims and other witnesses, Garzón also heard the declaration of retired naval officer Adolfo Scilingo who voluntarily appeared before him in October 1997 (Human Rights Watch, 2001). Although Scilingo had already testified before an Argentine court in 1996 in an attempt to have a criminal case opened there, and as such his testimony cannot be considered entirely new, the possibility still exists that some new information

was revealed.[71] According to Wilson (1999:939), he gave detailed evidence about clandestine military operations in Argentina confessing his and other named individuals' involvement with the crimes, described the leadership structure of clandestine military operations in Argentina and notably those involving throwing drugged prisoners from aircraft into the Rio de La Plata (Mas, 1999:92). He also provided Garzón with invaluable evidence by recreating a list of 180 names of military officials working within ESMA (Equipo Nizkor, 1997).

Judge Garzón also made use of (then) recently declassified CIA documents and of Paraguayan archives to detail the workings of Operation Condor (Audiencia Nacional, 1997b, 1997c, 1999). As no other criminal investigation had made use of this material by this date (although there had been analysis of the Paraguayan archives discovered in 1992) it is quite possible that his investigation led to new discoveries (Mariano, 1998:44; Slack, 1996:492).

Testimonies, witnesses, and other documentation were coordinated by a network of Argentine and Spanish human rights organisations, lawyers, academics and other interested parties (Roht-Arriaza, 2001:50). The Argentine groups involved, coordinated by Carlos Slepoy, include the *Abuelas*, CELS, *Familiares de Desaparecidos y Detenidos por Razones Políticas*, the *Madres (Linea Fundadora),* SERPAJ, the *Liga Argentina por los Derechos del Hombre*, the *Asamblea Permanente por los Derechos Humanos*, and the *Movimiento Ecumenico por los Derechos Humanos* (MEDH).[72] All of these groups have been involved with proceedings in Argentina in one form or another and as such, any newly discovered evidence would have been easily transferred to Argentina for use within domestic proceedings.

Concerning the overlap between Spanish and Argentine investigations, Judge Garzón's investigation named over 200 victims of both Spanish and non Spanish

[71] He had testified in early 1996 before judge Gustavo Literas in an attempt to open a case in Argentina. Judge Literas refused to open proceedings ruling that the crimes were covered by the Amnesty Laws.

[72] All of these groups are included in several declarations supporting the Spanish case and are also signatory to declarations expressing support for cases opening in France and Germany.

descent. Of these there are ten specifically included in his investigations which are also the focus of Argentine Cases 2:'Vildoza', 3:'Nicolaides' and 5:'Gómez' (see Audiencia Nacional, 1996a, 1996b, 1996c; Pozuelo and Tarín, 1999: 263-273). We have also noted that Case 2:'Vildoza' advanced due to the specific identification in 1998 of Javier Penino Viñas who, along with his mother, Cecilia, was also included in the Spanish case. However, Javier (living then with the surname Vildoza) was identified having himself approached the courts. It was not due to the discovery of any new evidence. Therefore, we can rule out the link between the progression of Argentine Case 2:'Vildoza' and the Spanish case. Concerning Case 3:'Nicolaides', reiterating my argument above, the progression of the case was not dependent upon the evidence within specific cases but was based on the overall number of identified children. Whilst it could be argued that some evidence discovered in Spain was helpful to the investigation, it is unlikely that this would have been vital to its overall progression. Finally, Case 5:'Gómez' reopened in Argentina following the *Cámara Federal* ruling that the Amnesty Laws did not necessarily prohibit an investigation, rather than due to any specific evidence. Although at this stage we cannot rule out the possibility that some evidence was discovered in Spain, it would seem unlikely.

For the most part, Judge Garzón's investigations focused more generally on the 'episodes' in which victims were killed, examining in particular the structure of command rather than the details of individual crimes. There is however, also an extensive overlap between the themes investigated by Garzón in Spain and those examined in Argentina. Judge Garzón paid particular attention to the system of repression used within clandestine detention centres, especially that of ESMA (for which he ordered numerous indictments), under investigation in Argentine Cases 2:'Vildoza', 3:'Nicolaides' and 4:'Poblete' (Audiencia Nactional, 1997c, 1999). Garzón also heard evidence on the systematic abduction of children, the subject of Argentine Cases 1:'Videla', 2:'Vildoza', 3:'Nicolaides' and 4:'Poblete' (Audiencia Nacional, 1997b, 1997c, 1999). There is also a link between the prosecution of Miguel Cavallo and Argentine Case 5:'Gómez' (Audiencia Nacional, 2000a). Finally (and perhaps most famously) Judge Garzón conducted extensive investigations into the *modus operandi* of Operation

Condor, which finally led him to order the arrest of General Pinochet; this has also come under investigation in Argentine Case 6:'Scagliusi' (Audiencia Nacional, 1997b, 1997c, 1999).

From Chapter 3, we saw that Case 1:'Videla' progressed due to the identification of two children and the testimony of a retired officer. Mariana Islas had been found in 1983, although the couple fled with the child and were only caught in 1992. Carlos D'Elia Casco was located and identified in 1995. As these dates predate the Spanish Case it is evident that their identification was unrelated. Additionally, as neither the children nor the officer were associated with the Spanish proceedings, we can rule out any procedural link between the Spanish case. I have already mentioned Cases 2:'Vildoza' and 3:'Nicolaides', although the possibility exists that testimony from Scilingo and possibly others concerning ESMA that had not been heard in Argentina, might have been useful to the progression of Case 3:'Nicolaides'. In addition to this we know that Judge Bagnasco travelled to Spain and Switzerland in 1998 in order to take testimony and that the public prosecutor working with him on the case, Eduardo Freiler, met with Judge Garzón (Mas, 1999:232-235). However, whether any evidence was discovered in Spain and whether this had been shared with the Argentine team would have to be determined by asking those involved with Case 3:'Nicolaides'.

Concerning Case 4:'Poblete', we have seen that the case progressed due to the location and identification of Claudia Poblete, who was not associated with the Spanish-Argentine proceedings. However, her father, Jose Poblete Roa had been part of the Spanish-Chilean case. Additionally, as she was present at ESMA, there exists the possibility that some evidence discovered in Spain could have facilitated this process (occurring in 1998) in Argentina. As such, it would be important to determine precisely how Claudia Poblete had been located and identified.

With Case 5:'Gómez', from the procedural history we can see that the case progressed following the ruling by *Cámara Federal* concerning the inapplicability of the Amnesty Laws. The case had already been investigated

following the return to civilian rule, and many of the facts had already been determined. Nevertheless, there are some links between Garzón's investigations. Conrado Gómez's son Frederico had travelled to Spain and testified before Judge Garzón (Bonadío, 2001). Additionally, Adolfo Scilingo had mentioned in his testimony in Spain that Miguel Cavallo, also working from ESMA, had been driving a brown Ford Fairline, the same as the one belonging to Conrado Gómez that had been stolen by his abductors. The abduction of Conrado Gómez is also mentioned in the extradition request of Miguel Cavallo (Audiencia Nacional, 2000b). Whilst, it seems unlikely that this evidence was new, it would be important to determine through further investigation whether any evidence had been discovered and was used in the domestic case.

Finally, Case 6:'Scagliusi' progressed due to new evidence in the form of a retired army sergeant and declassified US documents, and Bonadío ruling the Amnesty Laws unconstitutional. Nevertheless, Operation Condor links the investigation of Garzón to the case, and, as such, it needs to be determined through further investigation whether any evidence was discovered in Spain which was then used in Argentina.

Legal Arguments

From Chapter 3 we saw that Argentine Cases 4:'Poblete', 5:'Gómez' and 6:'Scagliusi' were only able to progress due to the use of legal arguments that ruled the Amnesty Laws to be unconstitutional, null and void. As we have seen in Case 4:'Poblete' on 6 March 2001 Judge Cavallo categorised the crimes associated with forced disappearance as crimes against humanity which, as international crimes according to international law, are imprescriptible due to their *jus cogens* nature. If it could be shown that similar arguments were first developed within transnational proceedings and were only later adopted at the domestic level after their successful use there, it would support, though not necessarily prove, the existence of a causal relation between the two.

From the procedural history of the transnational cases it was possible to discern that only the case in Spain made use of international law.[73] As with the rulings in Argentina, on several occasions from 1997, Judge Garzón categorised the crimes committed in Argentina as genocide, crimes against humanity, terrorism and torture; all international crimes (Audiencia Nacional, 1997c, 1998a, 1998b). As such, they were not susceptible to Amnesty Laws, statutory limitations, or even *cosa juzgado*. That these rulings predate that of Judge Cavallo suggests that the use of the argument in Spain could have influenced its use and acceptance within the domestic cases.

Nevertheless, such affirmations had already been made by several international bodies. Concerning Argentina, in 1989 the UN Committee against Torture found the Amnesty Laws to be 'incompatible with the spirit and purpose of the Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]'.[74] In 1992, the Inter American Commission on Human Rights found that the laws were also 'incompatible with Article XVIII (right to a fair trial) of the American Declaration of the Rights and Duties of Man and Articles 1, 8 and 15 of the American Convention on Human Rights' to which Argentina was signatory.[75] In 1995, the UN Human Rights Committee found that the laws violated paragraphs 2 and 3 of article 2 and paragraph 5 of article 9 of the International Covenant on Civil and Political Rights, stating that 'the compromises made by the State party with respect to its authoritarian past, especially the Law of *Due Obedience* and Law of *Punto Final* and the presidential pardon of top military personnel, are inconsistent with the requirements of the Covenant'.[76]

Therefore, it cannot be argued that Judge Garzón was the first to incorporate such arguments. Nevertheless, their use in the Spanish case was the first time

[73] See Appendix 1 for details of the process used.
[74] *Committee against Torture*, Communications N° 1/1988, 2/1988 and 3/1988, Argentina, decision dated 23 November 1989, paragraph 9. Cited in Amnesty International (2001b).
[75] *Inter-American Commission on Human Rights*, Report N° 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 October 1992. Cited in Amnesty International (2001b).
[76] 'Concluding Observations of the Human Rights Committee: Argentina', 5 April 1995, United Nations Document ccpr/c/79/add.46; a/50/40, paragraph 146. Cited in Amnesty International (2001b).

they had been applied to actually prosecute these particular crimes. This not only allowed international law to transcend from the concern of international and inter-regional bodies to the level of national courts, but the successful use of international law and these arguments within these transnational cases would, in creating a growing volume of case precedent, give greater weight to its use and acceptance in the courts of Argentina. It is therefore necessary to examine the rulings utilised at the domestic level, firstly to determine whether the rulings in Spain are cited in support of the arguments, as this would confirm that they gave increasing weight to the acceptance of the arguments domestically and, secondly, whether there was any precedent of similar arguments being used and accepted in Argentina, prior to its use in the Spanish case.

SUMMARY

In conclusion to the overall effect of transnational justice on the Argentine domestic case, there is some foundation to the argument that the timing of developments at the transnational level, specifically in Italy and Spain, could have reinvigorated domestic cases. However, prior to the first advances in Argentina, the only major developments to have occurred abroad were the opening of the Italian and Spanish cases, initial investigations, and the filing of two extradition requests concerning 11 officers and the arrest of one former navy officer, within the latter. Whilst these developments would have exerted some pressure on the domestic arena, it is debatable whether this would have been sufficient to cause the advances within the domestic cases. However, as developments at the transnational level continued to progress and exert increasing pressure upon the domestic arena at the same time that domestic cases continued to advance, there is certainly an argument to be made that the transnational proceedings acted as a catalyst upon this process. Concerning case evidence, it is plausible, though it would seem unlikely, that investigations led to the discovery of new evidence that later was used to advance domestic cases. Finally, we have seen that the use and acceptance of international law within Spain might have facilitated its later use within the Argentine courts. In order to ascertain the role of transnational justice more precisely, it is necessary to

conduct further investigation and address the questions raised through this analysis.

POLITICAL IMPACT OF TRANSNATIONAL CASES IN CHILE

In order to determine the plausibility of transnational proceedings exerting political pressure upon the Chilean domestic arena, as with Argentina, the date the cases 'opened' and progressed to involve requests for 'extradition/arrest', actual 'arrests' and 'trials', either full or *in absentia* (*abs*), was recorded along with the 'number accused' within proceedings. The findings of this analysis are presented below in Table 4.3.

Table 4.3: Case variables concerning political impact of transnational proceedings, Chilean cases 1990-2002

Country	Opened	Extradition /Arrest Requests	Arrest	Trial	Number of Accused
Belgium	1998	1998	-	-	1
France	1998	1998-2002	1(2002)	-	18
Holland	1994	-	-	-	1
Italy1	n/a	1999-2000	-	1995(abs)	2
Italy 2	2000	-	-	-	1
Spain	1996	1998-2000	1(1998)	-	7
Switzerland	1998	1998	-	-	1

abs = trial in absentia
Source: Constructed by the author from sources cited in Appendix 1.

We can see that only three cases opened before 1998, in Holland, Italy 1 and Spain. Of these, the case in Holland, involving only one defendant, failed to develop beyond the initial stage; the case in Italy, involving two defendants, progressed to the trial stage in 1995, yet extradition requests were only issued between 1999 and 2000. The case in Spain, concerning seven defendants, opened in 1996 and advanced to request extraditions between 1998 and 2000; the case led to one, rather famous, arrest in 1998 – General Pinochet. Cases in Belgium, France, and Switzerland opened in 1998 yet, of these, only the French case involved more than one individual and progressed beyond requesting an

extradition/arrest in 1998.[77] We can see that the French case involved several extradition requests between 1998 and 2002, and resulted in one arrest in 2002.[78] Finally, a second case opened in Italy in 2000, again concerning General Pinochet, but failed to progress beyond the initial stages.

When we cross-reference the dates that these cases progressed with that identified earlier in Chapter 3 as the period of crucial case activity in the Chilean cases (1998-2003), we can discern a degree of overlap between the progression of the cases. From the table we can see that only cases in Holland, Italy and Spain, clearly predate this period. As the case in Holland failed to progress beyond the initial stages, it is unlikely that the proceedings exerted any significant pressure upon the domestic arena. The Italian case resulted in a trial *in absentia* in 1995. Generals Manuel Contreras Sepúlveda and Raul Iturriaga Neumann were sentenced to 20 and 18 years prison respectively, for the attempted assassination of Bernardo Leighton and his wife Ana Fresno in Rome, in October 1975 (VS, 1996a:21). Whilst on the face of it this development would seem to have generated pressure upon Chile, in 1995 the Chilean courts had just sentenced General Contreras to five years imprisonment for the murder of Orlando Letelier.[79] Secondly, as Italy had no extradition agreement with Chile, no requests for extradition were made for either of those convicted until 1999, by which time other transnational proceedings had developed (VS, 1999b:41-42).[80]

Turning to the Spanish proceedings, the case was opened on 1 July 1996, through the filing of lawsuits accusing the original *junta* members, the former head of the secret police, and other military officers of genocide, terrorism, and torture, committed during military rule in Chile (Audiencia Nacional, 1996e).[81] From the outset, as with the Argentine case, the case was intended to create as much publicity and pressure upon the domestic level as possible. The case was

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[77] The individual concerned was General Pinochet and requests for his arrest and extradition were filed following his detention in Britain.
[78] This was of General Pineda in Argentina, mentioned in Chilean case 6:'La Moneda'. See Chapter 3 for more details.
[79] See Chapter 1 for more details of the case.
[80] The extradition of both was refused in 2000 (VS, 2000b:50-51).
[81] Generals Augusto Pinochet Ugarte, Gustavo Leigh Guzman, Cesar Mendoza Duran and Admiral Jose Toribio Merino Castro, Fernando Matthei Aubel, and Rodolfo Stange Oelckers were all directly accused.

supported by the Spanish political party *Izquierda Unida* and by a number of Chilean NGOs, and these helped to coordinate the flurry of victims and witnesses who travelled to Spain to testify, including the daughter of former president Salavador Allende, Isabel Allende.[82] Several retired military officers, including General Lagos Osorio and General Poblete Garces, as well as the Chilean military's then Prosecutor General, Fernando Torres Silva (notorious for his opposition to human rights cases in Chile), also testified (Wilson, 1999:938, 947-948).[83] As such, the case would have exerted some pressure upon the domestic arena.

Truly significant pressure followed the arrest, in October 1998, of General Pinochet in Britain in connection with the case. This singular action raised both cases in Spain to another level where they immediately gained worldwide media attention. The Chilean government protested the arrest, claiming that the General had diplomatic immunity. The British government rejected this argument, as Pinochet was neither a Head of State nor an accredited diplomat. As such, the case was a judicial matter and thus it refused to intervene, thereby crushing Chilean hopes of a swift political end to the case (Davis, 2000:30). On 28 October 1998, the High Court found that General Pinochet had immunity from prosecution due to his diplomatic status as former Head of State. However, whilst an appeal to the House of Lords was pending, Pinochet would remain under arrest (Davis, 2000:34).

On 25 November 1998, the House of Lords accepted the appeal by a 3:2 majority and ruled that General Pinochet was not immune from prosecution in English courts (Davis, 2000:37). This groundbreaking legal decision seemed to pave the way for Pinochet's extradition despite political pressure from all angles on the British government to release him. On 9 December, Jack Straw (the then Home Secretary) gave his authorisation for extradition proceedings to begin.

[82] NGOs include: CODEPU, FASIC and SERPAJ (Chile) (Wilson 1999:.936, FN 20).
[83] General Torres Silva was reportedly trying to ascertain whether General Pinochet was safe to travel to Europe.

On 10 December, Pinochet's lawyers appealed the Lords' hearing on the basis that Lord Hoffman (one of those allowing the appeal) had undeclared links to Amnesty International. On 17 December, five law lords unanimously revoked the 25 November ruling, stating that Lord Hoffman should have disqualified himself from the ruling (Davis, 2000:41). On 24 March 1999, the Lords ruling on the appeal was released. By a majority of 6:1 the law lords ruled that Pinochet did not have immunity from charges of torture and conspiracy to torture committed after 8 December 1988, when the Convention against Torture was incorporated within UK law, and thus could be extradited to Spain (Davis, 2000: 44).

Extradition hearings finally began on 27 September 1999, at the Bow Street Magistrates Court before Deputy Chief Metropolitan Magistrate Ronald Bartle; Pinochet faced a total of 35 charges (34 counts of torture and one on conspiracy to torture) (Davis, 2000:56). On 8 October 1999, Bartle delivered his ruling that Pinochet could be extradited for crimes allegedly committed after 8 December 1988. Following the exhaustion of legal avenues for Pinochet's release, the Chilean government requested that Pinochet should be released on compassionate grounds. He was subjected to medical tests on 5 January 2000, the results of which convinced Jack Straw on 11 January to declare there was sufficient evidence to release Pinochet. Between this date and 2 March 2000, a legal battle was fought between the Home Secretary and those wishing to place Pinochet on trial (including the four countries now requesting his extradition).[84] Straw finally ruled that General Pinochet would be released for humanitarian reasons, so ending the case in Britain and Spanish hopes of placing him on trial.

Clearly the arrest and detention of General Pinochet exerted substantial pressure upon Chile to prosecute those accused of human rights crimes. The opening and development of proceedings in Belgium, France, and Switzerland, in addition to the second Italian case in 2000, were all in response to Pinochet's arrest.[85] Prior to this date, there had been no other extradition/arrest requests and although

[84] By this time France, Belgium, and Switzerland had also requested Pinochet's extradition in addition to Spain.

[85] All of these cases were filed against General Pinochet after his arrest in London (VS, 2000a:64; Amnesty International, 2001c, Redress, 1999:20, 25, 43)

pressure might have been created by the opening of the case, it can hardly be claimed that any significant pressure was exerted. Therefore, we can state that the date that transnational proceedings began to exert significant pressure on the domestic level was 1998 with the arrest of Pinochet, the same year that advances began to occur in Chile.

From Chapter 3 we can see that Case 1:'Albania' began to progress in March 1998, Case 3:'Caravan of Death' opened and progressed from January 1998, and Case 4:'Pisagua' opened in August 1998. Although these advances are minor compared to that which occurred after October 1998, they are vital as they occurred *before* any significant pressure had been exerted by the development of transnational proceedings. In addition to Pinochet's ongoing detention, in several other countries new cases were filed and requests for extraditions/arrests were made. The case in Spain continued to maintain pressure on Chile until Pinochet was released in 2000, and even then, in May 2001, another suit was filed against General Hernán Brady Roche (the ex-Minister of Defence) for crimes of genocide, terrorism and torture. The case in France, progressing to request a series of extraditions between 1998 and 2002 and eventually leading to an arrest in 2002, would have also maintained pressure upon the domestic level.

As such, we can conclude that significant pressure was applied upon the domestic arena through the development of transnational cases. However, whilst this existed in a minimal form from 1996 when the Spanish case opened, it was only after Pinochet's arrest in October 1998 that the Chilean government were forced to take any notice. By this time there had already been some important advances in several cases in Chile; significantly lawsuits had started to be filed against Pinochet for the first time. This leads us to believe that the underlying reasons behind these initial advances were not directly related to developments within transnational cases. Nevertheless, the subsequent development of the Spanish case and Pinochet's continuing detention would have maintained a high level of political pressure upon the domestic arena to allow human rights cases to advance and did therefore have an impact. This was increased through the opening and progression of several other transnational cases. At this stage it would seem, therefore, that the role of transnational justice within the advance of

domestic cases was one of a catalyst rather than cause. However, in order to determine the role of transnational justice more precisely, it is important, through further investigation, to determine the reasons behind early domestic case progression. By identifying other domestic factors that have helped to advance the domestic cases, we would be better able to understand the nature of transnational justice's impact.

PROCEDURAL IMPACT OF TRANSNATIONAL CASES ON DOMESTIC CASES IN CHILE

Case Evidence

Having determined that transnational proceedings developed during a similar period as the Chilean domestic cases, it was then necessary to determine the plausibility of a procedural impact. As with Argentina, the scope of transnational investigations was cross-referenced with that of the domestic cases in order to identify any overlap between 'victims', 'crimes' or 'episodes'. The result of the analysis is presented below in Table 4.4. From this table we can see that in two cases, France and Spain, an overlap exists between the victims, crimes or episodes under investigation within the transnational and domestic cases.

Table 4.4: Cross-referenced domestic and transnational victims, crimes and episodes, Chile

Transnational Case	Overlap of Victims/Crimes/Episodes
Belgium	No
France	Yes
Holland	No
Italy 1	No
Italy 2	No
Spain	Yes
Switzerland	No

Source: Constructed by the author from sources cited in Appendix 1.

In France, the investigation conducted by Judge Roger le Loire originally concerned the disappearance of three individuals, although this later grew to five (Redress, 1999:25; Europa Press, 2001g). One of these, Georges Klein Pipper,

was also the subject of investigations in Chilean Case 6:'La Moneda'.[86] Judge Le Loire's investigations were extensive enough to result in a series of extradition requests between 1998 and 2002, and eventually, as we have seen in Chapter 3, led to the arrest of General Pineda in Argentina. Whilst Judge Le Loire was clearly investigating the same crime as one of the Chilean cases, it is difficult to see what evidence would have been discovered abroad and then used to advance the Chilean case. Investigations into La Moneda reopened in Chile in 1999 following lawsuits filed against Pinochet, having already been investigated following the return to democratic rule. The lawsuit regarding Klein was not filed in Chile until 4 April 2001. Therefore even had new evidence been discovered in France concerning Klein it was not relevant to the case until 2001, by which time the case in Chile was already underway.

The second case where some degree of overlap was identified was in Spain. Out of the original Spanish nationals under investigation, three victims are also the concern of two of the Chilean cases under analysis within this study. Both Michelle Peña Herreros and Antonio Elizondo Ormacetea were transferred to Villa Grimaldi, the focus of Chilean Case 5, and Carmelo Soria, was clearly the object of Case 8:'Soria'. Additionally, there is a degree of overlap between the scope of the investigations conducted by Judge Garcia-Castellon and by Judge Garzón (who took over the case in 1998) with Case 3:'Caravan of Death' and Case 7:'General Prats'.

The nature of the investigations conducted by both judges do lend themselves to the view that some new discoveries might have been made. Judge García-Castellon travelled to the US to meet with Justice Department officials and hear testimony from those closest to the Letelier investigation (Wilson, 1999:945).[87] According to Wilson (1999:946), he was 'happy with the level of US cooperation in providing evidence despite the fact that much of the classified material had not been revealed'. As mentioned earlier, there had been numerous (several thousand) testimonies presented, including that of former general,

[86] See Appendix 4.
[87] Wilson states that García-Castellon heard the testimony of former FBI agent Carter Cornick and former federal prosecutor Lawrence Barcella (Wilson, 1999:945).

Sergio Poblete Garces, a retired Chilean air force officer living in exile since 1973, who had documented his own evidence of the repression. Retired General Joaquin Lagos Osorio also gave details of evidence that he had been ordered to remove from official documentation concerning crimes associated with the Caravan of Death (Wilson, 1999:948).

Garzón's scope of investigation was much wider, making use of the tonnes of evidence discovered in Paraguay concerning Operation Condor (Wilson, 1999:972). Although it was the Argentine connection that had first interested Judge Garzón, the cases were linked by the operation where Chilean 'subversives' arrested in Argentina were handed over to the DINA. The Paraguayan archives had only been discovered in 1992, and they had not been utilised by Chilean investigators up to that point. Garzón also made use of (then) recently declassified CIA material requested from the US. Additionally, as we have already seen, a number of Chilean human rights groups were involved with the Spanish proceedings, indicating that any evidence discovered could have been transferred to Chile. As such, the nature and extent of investigation suggests that new evidence could have been discovered to be used to benefit Chilean cases.

However, when we consider that in Chile investigations themselves had never been prohibited, merely the prosecution of those implicated, the likelihood of newly discovered evidence benefiting the domestic cases is substantially reduced. Although there are specific links between the identified victims, cases concerning Villa Grimaldi had been investigated, indeed the detention centre was included within the Rettig Report of 1991. Neither was the Soria case wanting in evidence. As we can see from the procedural history of the case in Chapter 3, several investigations had been able to establish the criminal responsibility of several DINA agents. We can also see that the case was only reopened in 2003, after Pinochet had been returned to Chile, following a ruling from the IACHR, and as such we can dismiss the notion that evidence discovered at the transnational level was instrumental to the reopening of the case.

Concerning the Prats case, although no investigation had been previously conducted in Chile, again there was no lack of evidence. We can see from the procedural history of the case that substantial investigations had been carried out in Argentina during the 1980s and that the case there had significantly progressed after the January 1996 arrest of the Chilean Agent Enrique Clavel. Predating the filing of the Spanish case, it is clear that there was already sufficient evidence available to the Argentine judge for the case to progress. In the Caravan of Death, much had already been recorded in the Rettig Report, and individual investigations had been made into the fate of those disappeared. However, we cannot at this stage rule out the possibility that some evidence was discovered during the Spanish investigations concerning the Caravan of Death. Although we have seen in Chapter 3 that the case progressed due to Judge Guzmán´s reinterpretation of the Amnesty Law, as General Pinochet would later be indicted within the case it is important to determine whether its development was assisted by the transnational investigation.

In conclusion, there are some potential links between the focus of transnational and domestic investigations. We know that investigations in Chile had already determined most of the facts of the cases. However, it would be necessary to determine the extent that this occurred through further investigation.

Legal Arguments

From the procedural history of the domestic cases, we saw that Cases 3, 4, 5 and 6 advanced due to the reinterpretation of the 1978 Amnesty Law. As such, if it could be demonstrated that the argument used was first developed and accepted within a transnational case prior to its use in Chile, we would be able to discern a possible causal link. Within the transnational cases there has been no attempt to reinterpret the Amnesty Law. To do so would be to tacitly accept its validity. In the Spanish case, as with the Argentine Amnesty Laws, Judge Garzón argued that the 1978 Amnesty Law is contrary to international law as the crimes - genocide, crimes against humanity, terrorism and torture - are international crimes with *jus cogens* status, and as such are imprescriptible. Only in one Chilean case under study has this argument been incorporated within a legal ruling. Within Case 5:'Villa Grimaldi', a similar argument was used by the

Supreme Court in 2003 to confirm the prosecution and sentences of the accused within the Sandoval case. Whilst it could be argued at this stage that this was due to the acceptance of the argument at the transnational level, which opened judicial space for the domestic judiciary to incorporate similar arguments, overall its use has been insignificant and it has not been instrumental in the advance of any other case.

There is a link, however, between rulings at the domestic and transnational level concerning the interpretation of the crime of disappearance, used at the domestic level to argue for the inapplicability of the Amnesty Law in some cases. Within the British extradition proceedings concerning General Pinochet, Judge Garzón argued that disappearance was an ongoing crime that only ended when the body of the victim was discovered (Davis, 2000:47).[88] This was the same argument later utilised by Judge Guzmán to prosecute several officers within Case 3:'Caravan of Death' in early 1999 and has since been repeated to advance Cases 4, 5, and 6, in addition to many others not covered by this study. As such, it is important to determine through further investigation whether this argument had been utilised and accepted by the Chilean courts prior to its use within the Spanish case. Whilst the absence of the legal argument prior to this date would not necessarily indicate a causal relation, if it had been utilised and accepted previously then this would weaken the argument on the procedural impact of transnational justice.

SUMMARY

In conclusion, as with Argentina, we have discerned some partial links between the progression of domestic and transnational cases. Concerning the political impact, it would seem that any significant developments at the transnational level only occurred after some progress had already been made in Chile. Whilst it seems therefore that the transnational cases did not *cause* domestic advances, a case can certainly be made that later developments, specifically the arrest and detention of Pinochet, acted as a catalyst upon the progression of the domestic

[88] He also claimed that this constituted (mental) torture to the families of the victim.

cases. As such, it is important to identify the causes behind the early domestic advances that predate transnational developments, and determine their overall importance within domestic case progression. This will allow a more precise assessment of the political impact of transnational proceedings.

Secondly we have found some overlap between the scope of domestic and transnational investigations. Whilst this suggests that evidence could have been discovered at the transnational level and then utilised to advance domestic cases, this would seem unlikely considering that substantial investigations had already been carried out in Chile. Nevertheless, as a link has been identified between the transnational cases in France and Spain and several of the domestic cases, it is important to determine through further investigations whether this did occur. Finally, we have determined that the reinterpretation of the Amnesty Law in several of the domestic cases could be linked to the use of a similar argument concerning the nature of the crime of disappearance used by Judge Garzón within the Spanish case. It is therefore important to determine whether this argument had been successfully used in Chile prior to its use within the Spanish case.

Chapter 5: Advance of Human Rights Prosecutions in Argentina 1990-2003

I conducted a number of elite-level interviews with actors centrally involved with the proceedings in Argentina.[89] Through the interviews, I explored how domestic human rights cases had progressed, focusing particularly (but not exclusively) on the selected case studies, seeking to determine the role of transnational justice as well as the domestic factors identified by the literature. Having codified and analysed the data it was possible to draw conclusions on the procedural and political advance of cases and assess the role of transnational justice. I now present the findings of the field research drawing extensively on the material generated through interviews, supported by other primary and secondary sources. I first examine the procedural development of the cases and determine the extent that domestic investigations were impelled by transnational proceedings. I then move on to their political development, where I explore changes in the judiciary, the military and political society and assess the overall role played by transnational justice.

PROCEDURAL DEVELOPMENT OF ARGENTINE CASES

Case Evidence

With regards to the identification of children who had been abducted in Cases 1:'Videla', 2:'Vildoza', 3:'Nicolaides', and 4:'Poblete', and the conclusion in all of these except Case 4:'Poblete' that this had been conducted on a systematic scale, Dr Alcira Rios, case lawyer for the *Abuelas,* explained how cases concerning child abduction had been able to progress:

> Where babies were born in the detention centres or where children had been abducted with their parents, there was never impunity; they (the cases) simply progressed. Courts condemned them (the accused) after determining more or less those responsible for the disappearance of the minors.[90]

The associated crimes were specifically excluded from the Amnesty Laws. Article 5 of *Ley* 23.492, *'Punto Final',* excludes crimes concerning the

[89] See Appendix 1 for a list and dates of the interviews, along with full titles of organisations here referred to by their acronyms.
[90] Interview with Dr Alcira Rios, 28 April 2003, Buenos Aires.

'abduction and concealment of minors' and Article 2 of *Ley* 23.521 '*Obediencia Debida*' specifically excludes the 'violation, abduction and concealment of minors'.[91] With these exceptions, investigations into the illegal appropriation of minors were allowed to continue throughout the 1990s.

Nevertheless, Rios noted that progress was slow as 'at the beginning, there were only a few judges that understood the problem and began to investigate'. She explained that the work of the *Abuelas* had been facilitated by the creation in 1987 of the *Banco Nacional de Datos Genéticos,* a data bank that collects DNA samples of all the families searching for missing people. When a child suspected of being of a disappeared couple was located, their true identity could be determined to a 99 per cent degree of success by the tests. Rios added that the ratification of the 1990 UN Convention on the Rights of the Child also 'facilitated the work of the *Abuelas*'.[92]

The convention created an inalienable right of the child to his or her identity thereby placing the onus upon the state to actively search for missing children and restore their identity.[93] The ratification of the treaty allowed the *Abuelas* to use the right to identity (*Derecho a la Identidad*) as their legal foundation for the restitution of the disappeared children (Arditti, 1999:234). This was bolstered in July 1992, through the creation of the *Comisión Nacional por el Derecho a la Identidad* (CONADI), the purpose of which was to 'impel the search of the disappeared children' and 'to fulfil the commitment made by the state when it ratified the Convention on the Rights of the Child' (Arditti, 1999:234).

Through the arduous process of localisation and identification, sufficient cases were proven to demonstrate that child abduction had occurred on a systematic basis. Rios explained, 'during 1984 to 1998, we were compiling a lot of jurisprudence and many cases where it was possible to observe the idea of a

[91] See Art. 5, *Ley 23.492* 'Punto Final,' 24 December 1986, and Art. 2 *Ley 23.521* 'Obediencia Debida' 8 June 1987.
[92] Interview with Dr Alcira Rios, 28 April 2003, Buenos Aires.
[93] See Article 8 of the UN Convention on the Rights of the Child (1989). The treaty entered into force in 1990.

systematic plan'.[94] This was corroborated by Alberto Pedroncini, one of the lawyers who filed the lawsuit in December 1996 that led to the initiation of Case 3. He stated:

> Before December 1996, proceedings concerned individual cases of child abduction, determining criminal responsibility for the abduction of the particular child, or those born in the detention centres...but case by case. In December 1996, we initiated with six *Abuelas*, a lawsuit, not against the material authors of the crimes, but against those who had control of the apparatus of the state, those that led the system of repression.

As there had been insufficient evidence at the time of the early trials in the 1980s to convict the leaders of the military *juntas*, they had been absolved of the crimes related to child abduction. Now, after years of investigations and the 'superior quantity of proven cases of child abduction' there was sufficient evidence to prove the existence of a systematic plan.[95]

The lawsuit itself shows that by 1996, the *Abuelas* had documented over 300 cases of illegally appropriated children. These numbers suggested that child abduction must have been systematic and as the majority of the children located had been found with military families, the plan must have been orchestrated by the ruling *juntas* (Abuelas de la Plaza de Mayo, 1996). During the trial of the *juntas* in 1985, the *Cámara Federal* had been unable to prosecute those accused, with responsibility for a criminal plan of abduction concerning children as there had been insufficient evidence, only two cases at the time had been proved (Cámara Federal, 1985).[96] With now over 300 documented cases (in addition to new evidence in the form of documents discovered in Córdoba), the reason for not investigating the systematic plan of child abduction was no longer valid.[97] The development of the individual cases over time therefore supplied sufficient proof through their numbers for the *Abuelas* to file a lawsuit concerning the systematic plan; this ultimately led to the opening in 1997, of Case 3:'Nicolaides' under Judge Bagnasco.

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[94] Interview with Dr Rios, 28 April 2003, Buenos Aires.
[95] Interview with Alberto Pedroncini, 30 April 2003, Buenos Aires.
[96] The two cases proved were Felipe Martín and María Eugenia Caracoche de Gatica.
[97] In the *Jefatura de Policía de Córdoba* an inventory of documents, destroyed by order of Lieutenant General Nicolaides, had been found. There had been a document entitled 'Instructions about the procedure of continuation concerning the children of political leaders or unionists disappeared'. See Abuelas de la Plaza de Mayo (1996).

However, the first judge to determine that child abduction had occurred systematically was Judge Marquevich in Case 1:'Videla'. Rios recounted that within an individual case under his remit, the suspect, Dr Noberto Bianco, had previously fled (in 1985) with his wife and two 'adopted' children to Paraguay. Although Argentina tried to have him extradited, Paraguay, at the time under the rule of the dictator Stroessner, refused. When Stroessner's regime fell, Paraguay eventually agreed to extradite Dr Bianco.[98] Rios stressed the importance of this. 'He had been a military doctor at the Campo de Mayo and was key proof of what had happened there concerning the birth of children'.[99]

Dr Bianco then declared before Judge Marquevich that the abduction of children in the Campo de Mayo had been ordered by General Videla.[100] Rios stated, 'Marquevich asked Bianco where these orders came from, he replied, "From the top"; when asked who the top was, he replied "the Commander-in-Chief of the army"'. According to Rios, 'this proved the existence of a systematic plan of child abduction, linked it with the army command, and thus with General Videla'. Through the combination of Dr Bianco's testimony and the number of proven cases of child abduction, Marquevich was able to determine the existence of the systematic plan of child abduction and order the arrest of Videla. This, Rios claimed, 'allowed others judges to come to the same conclusion'. It was no coincidence that Judge Servini de Cubría, who had the majority of the cases filed by the *Abuelas* 'came to the same conclusion in a matter of months', which predated Bagnasco's similar ruling 'by a matter of days'.[101]

Concerning Case 4: 'Poblete', I asked human rights lawyer Carolina Varsky (of CELS), about the opening of the case, whether in 1998 (when the case opened) Claudia Poblete had already been found. She replied by explaining the procedure for opening the cases concerning child abduction: 'The *Abuelas* have to find the child, then the biological family and so once they have more or less found the

[98] Also see Marquevich (1998).
[99] Interview with Dr Alcira Rios, 28 April 2003, Buenos Aires.
[100] See Marquevich (1998).
[101] Interview with Dr Alcira Rios, 28 April 2003, Buenos Aires.

people, then they start the case'. I asked whether they had already got to that stage in 1998. She replied:

> When they started, they had already found the biological family, or somebody that was claiming the girl. The case was started with all these people and then the judge investigates and finds and asks people to take blood to prove the child's identity.[102]

According to Rios, who elaborated upon the details of the case, the *Abuelas* discovered that 'Dr Julio Cesar Caceres Monies had signed the birth certificate of Mercedes Landa' and the doctor was 'known to be involved' with the appropriation of the children. Additionally, 'there were problems with the dates concerning the girl's birth'. Mercedes' date of birth was registered as June 1978 although the parents, Landa and Moreira had received her in December 1978. This, combined with further investigation had led the *Abuelas* to believe Mercedes was Claudia Poblete and a case was filed with the courts.[103]

The overlap between the focus of the domestic and transnational cases identified in Chapter 4 made it important to determine whether there had been any assistance from the transnational cases that facilitated the identification of children or the conclusion that the abduction had been carried out as part of a systematic plan.

Asked whether any new information had been discovered within proceedings in Italy and/or Spain, concerning the abducted children or indeed other crimes, Rios replied:

> No, the case in Spain, as in Italy, was only an attempt by the *Abuelas* to administer a life sentence to the repressors so that they could be judged there. If they are arrested abroad they would be sent to prison.

I asked outright whether any evidence used was new and had been later incorporated within cases concerning the abduction of children in Argentina. Rios replied, 'no, we took it (the evidence) there'.[104]

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[102] Interview with Carolina Varsky, 20 March 2003, Buenos Aires.
[103] Interview with Dr Alcira Rios, 28 April 2003, Buenos Aires.
[104] Interview with Dr Alcira Rios, 28 April 2003, Buenos Aires.

This was supported by Pedroncini who, when asked whether any evidence had been discovered in Italy that had facilitated the progression of the domestic cases, stated:

> We weren't there [in Italy]; we were in contact, cooperated, but nothing concrete. Later the Argentine justice cooperated with them and gave them information about how the repression had been conducted.

I further asked, 'so there wasn't any help from the proceedings in Italy?' Pedroncini replied, 'no, they received it from here [Argentina]'.[105]

Pedroncini went into more detail concerning the case in Spain. 'Judge Bagnasco had asked Garzón to send him testimonies and declarations from his investigation in Spain, but Garzón never replied.' When I asked why, he replied, 'I don't know, but it is lamentable because the crimes were also under investigation here'. I asked whether there was new information discovered in Spain. He answered, '...possibly, there were testimonies, or perhaps through the investigations in Paraguay, because Garzón carried out investigations in Paraguay'. I therefore asked whether the testimony by Adolfo Scilingo in Spain in October 1997 was of use within the cases concerning child abduction in Argentina. He replied, 'no, there was a testimony made by Scilingo in Argentina'. When I asked whether the testimony in Spain had included more information, he said:

> Yes, clearly there was more [information], but what was important about the testimonies here was that, although they were known to have inaccuracies concerning the name or the age of each children, they recognised the clandestine system in operation at ESMA.

In response to whether this was useful to the cases he replied, 'clearly'.[106]

Eduardo Freiler, the public prosecutor in Case 3:'Nicolaides', revealed that as similar cases were under investigation abroad 'we asked, and the Judge in Spain sent us the testimonies of many people'. 'Judge Garzón sent us two boxes, containing material evidence, testimonies'. I asked whether these were new testimonies containing new information. He replied:

> Not so much new information, but [...] to record what happened, we had to use the testimonies of the survivors. Many of these were not living in this

[105] Interview with Alberto Pedroncini, 30 April 2003, Buenos Aires.
[106] Interview with Alberto Pedroncini, 30 April 2003, Buenos Aires.

> country [Argentina], [...] and so some of them, from Spain and Switzerland, their declarations were taken by Garzón in Spain, and we asked the judge to send us those taken in the Spanish court.[107]

The statements by Freiler would seem to contradict those of Pedroncini concerning whether information was sent from Spain. We know from the earlier chapter, that Freiler did meet with Judge Garzón in Spain and, as the public prosecutor involved within the case, his statement is perhaps the more accurate. I asked Freiler directly whether these additional testimonies were then later used in the case in Argentina, he replied, 'yes, they brought much information about other cases to the investigation'.[108]

Although when asked if evidence from Spain had helped the *Abuelas* to find Claudia Poblete (in Case 4:'Poblete'), Varsky wasn't sure, she did reveal that evidence had been used to benefit other Argentine cases.

> We have a case in Argentina, a truth trial case, where after somebody declared in Spain, we got the declaration and read it. As we read that declaration in Spain we asked the criminal court, to ask Garzón to call that person again and ask that person if he knew or he met...

This case, concerning Sr. Ferrali, was only one particular case. Varsky also added another example where 'Garzón wanted to extradite people, and Argentina refused'. This is an important demonstration where an investigation previously prevented at the domestic level opened as a direct consequence of the Spanish case. However, Varsky did add that this had occurred after Judge Cavallo had already ruled the Amnesty Laws to be unconstitutional, by which time other judges in Argentina were doing likewise. She summarised the impact from the Spanish case, stating that it was 'useful'; however she pointed out that in Spain, Judge Garzón was investigating the structure of repression rather than the individual cases that occurred. Although Judge Garzón made use of individual incidents to support the overall case he was making, for example about the system of clandestine detention centres, he did not investigate in detail what happened to specific individual victims. Nevertheless, she stated that the cases in Italy were different because they concerned specific victims and those

[107] Interview with Eduardo Freiler, 29 April 2003, Buenos Aires.
[108] Interview with Eduardo Freiler, 29 April 2003, Buenos Aires.

responsible for the crimes committed against them.[109] This distinction is further borne out by the testaments of the other respondents.

Therefore, within the cases concerning individual crimes and the identification of individual victims, we have seen that no evidence, either from Italy or Spain, was used to benefit domestic cases. However, concerning Case 3:'Nicolaides', which investigated the systematic operation of child abduction, the information gathered by Judge Garzón was of use. The nature and focus of the investigations were more closely matched than other cases with a smaller scope.

Of the cases not concerning child abduction, Case 5:'Gómez' opened in 2000 due to the *Cámara Federal* ruling that the Amnesty Laws did not prohibit an investigation. After Judge Literas had refused to accept the ruling, Judge Bonadío had taken over the investigation. Conrado Gómez had been named within the Spanish proceedings, indeed his son, Frederico had travelled to Spain in order to testify. However, considering the nature of the Spanish investigation and the fact that much of the evidence within the Argentine case had already been gathered it was unlikely that new evidence would benefit the progression of the case. Unfortunately it was not possible to test this assumption through an interview with the lawyer of the case, Eduardo Barcesat. Nevertheless, in an interview with Juan D.W. of SERPAJ, closely involved with the Spanish case, I asked whether there had been new testimonies in Spain, Italy, or other cases. He replied:

> There were a few cases, two or three, a few new cases, but the important thing was that many people made new testimonies who had talked to the CONADEP. It was about 15 years later, a lot, or many, of these people were able to bring new evidence to the cases, because the mothers had been looking for their sons and had learnt new things, and so we took about 50 or 60 testimonies of Spanish disappeared, and they brought new elements to the investigation, things that they didn't have in 1984, but new testimonies, I think there were few.

This supports the idea that little new evidence had been discovered abroad. In Chapter 4, I suggested that Scilingo's statement, as it concerned ESMA and the task forces working from there, could have been linked to the Gómez case. However, we have already seen that Pedroncini asserted that Scilingo's

[109] Interview with Carolina Varsky, 20 March 2003, Buenos Aires.

testimony was not heard for the first time in Spain, but in Argentina. This had been in front of Judge Literas, the same judge who would later refuse to open the Gómez case, both before 1999, and after the *Cámara Federal* had ordered him to do so in 2000.[110] Therefore, even if new, related evidence had been discovered it would have been insufficient alone to reopen the case. This only occurred due to the ruling by the *Cámara Federal* that the Amnesty Laws did not preclude a prior investigation into the crimes.

Within Case 6: 'Scagliusi', the lawyer of the case, Carolina Varsky, commented that the judge had made use of the declassified evidence from the US. When I asked whether this had been released due to the case in Spain she replied:

> It was due to the work of the *Abuelas* and CELS who had a meeting with Madeline Albright, it was to do with the freedom of information act (in the US) and the National Security Archives.[111]

In August 2002, more than 4,600 previously classified US documents arrived in Argentina, and were made available to the courts. According to the National Security Archive the documents provided new information on several issues relevant to the case under Bonadío.[112]

I asked Varsky whether this evidence was vital to the progression of the case and she replied:

> In Scagliusi you have two types of information, from one side there is the declassified documents, on the other there are three files that appear, nobody knows from where, that the army has the 601 Battalion (intelligence unit).

These *informes* are cited heavily within the 2002 ruling of Judge Bonadío ordering the prosecution of Galtieri and thirty other officers and officials.[113] When I asked how the files 'appeared', she answered, that one day the files had just arrived addressed to the investigating judge and were sent by an anonymous source.[114]

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[110] See Bagnasco (2000).
[111] Interview with Carolina Varsky, 20 March 2003, Buenos Aires.
[112] See Osorio (2002).
[113] See Bonadío (2002).
[114] Interview with Carolina Varksy, 20 March 2003, Buenos Aires.

Whilst this bizarre arrival of evidence is intriguing in itself, it demonstrates that the case was not reliant on any information discovered abroad. Although the argument could be made that the US might not have decided to declassify some of its documents had the case in Spain concerning both Argentina and Chile not advanced, as Varsky reveals, the process was in fact requested by the Argentine human rights organisations. Overall then, the transnational proceedings did not provide instrumental evidence allowing the case to progress.

Having analysed the progression of each case studied we can state that the identification of the children in Cases 1: 'Videla', 2: 'Vildoza' and 4:'Poblete', allowing the cases to progress, was unrelated to the cases abroad. In Case 6:'Scagliusi', although there is some overlap in the investigations conducted by judges Bonadío and Garzón, and some of the victims were included in the original Italian case, the testimony of Varsky (lawyer within the case) confirms that no use was made of any evidence discovered abroad. In Case 5:'Gómez', we cannot rule out entirely the idea that some evidence was discovered abroad, although considering the nature of the case this would likely be inconsequential to the progression of the case. Only in Case 3: 'Nicolaides' was a direct link between domestic and transnational proceedings confirmed. Evidence gathered by Judge Garzón was transferred to the Argentine court and was used within proceedings to the benefit of the case. Nevertheless, as the case concerned proving the systematic nature of child abduction, and as Freiler himself (public prosecutor in the case) comments, this was not so much new information but extra information to be added to that already collated in Argentina, it is debatable whether this evidence was vital to the progression of the case.

Overall, considering the statements of the interviewees and the information from the procedural history, it is clear that evidence discovered abroad (if indeed there was any new evidence) was not instrumental to the advance of any of the cases studied. However, several direct links between other domestic cases and the Spanish proceedings were identified. The cases concerning child abduction progressed due to their exemption from the Amnesty Laws and were facilitated by a number of executive measures, particularly the ratification of the UN Convention on the Rights of the Child in 1990. Through further investigations

this led to a lawsuit being filed regarding the systematic nature of the operation which ultimately led to the arrest of a number of high-ranking officers.

The other cases advanced due to legal rulings that circumnavigated and ultimately overruled the Amnesty Laws, which I examine in more detail below. Additionally, the US declassification project, and the mysterious 'appearance' of military intelligence information was useful to the progression of Case 6:'Scagliusi'. Whilst it is impossible to comment on the latter of these, the declassified documents were released as part of an agreement with the domestic human rights groups and the US, and thus should be considered a product of the continual and persistent work of the human rights organisation, the same that has ultimately led to the location and identification of numerous children permitting many of these cases to advance.

Legal Arguments

In Chapter 4 I identified a possible link between the use of international law in Spain and in Argentina. Whether the use of international law in Spain, and indeed in other cases, influenced its use by judges within the Argentine courts is explored in the section below on the judiciary. However here, I now further investigate the existence of a direct procedural impact on the domestic cases by determining the extent that the rulings abroad were cited in support of the use of international law in Argentina.

Further investigation of the legal arguments incorporated within the selected case studies supported the notion of a cross-fertilisation in judicial doctrine between the Argentine courts and those abroad. On 14 July 1998, Judge Marquevich formally prosecuted Videla, arguing that the crimes associated with child abduction, 'by their cruel, inhuman and aberrant characteristics', constitute 'a special category of crimes denominated as crimes against humanity [...] by the international community'.[115] He justified this categorisation by citing numerous

[115] See Marquevich (1998), Part VIII. In support of his argument Marquevich cited the decision of the *Cámara Federal de Apelaciones de San Martin, Sala II*, in *Causa nro. 421/93 'Zaffaroni Islas, Mariana s/av. Circunstancias de su desaparición - Furci, Miguel Angel - González de Furci, Adriana'*, August 1994.

international treaties ratified by Argentina.[116] Using these same treaties he argued that the associated crimes of the case were imprescriptible under international law due to their *jus cogens* status. This is the same argument as presented by Judge Garzón.

Marquevich then used domestic constitutional provisions to argue that international law has a higher status than domestic law and, as such, statutory limitations as well as the defence of *cosa juzgado* were inapplicable. Article 75 (inc. 22) and 118 of the Argentine Constitution grants supremacy to international law (or *derecho de gentes*) over national law.[117] As such, the imprescriptibility of the crimes according to international law overrides any prescription found in national law. This basis was used to argue that although many of the international treaties categorising the crimes committed in Argentina as crimes against humanity were only ratified after the commission of the relevant crimes, their imprescriptible nature overrode the national prohibition of retroactive justice as found in Article 18 of the Constitution.[118]

In support of his argument Marquevich made use of other Argentine cases, particularly the Supreme Court's decision in the 1990 extradition of Josef Schwammberger and the *Cámara Federal* decision in the 1995 extradition of Erich Priebke to support his argument concerning the imprescriptibility of crimes against humanity as international crimes.[119] Both of these individuals were

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[116] He cites the UN Convention for the Prevention and Punishment of the Crime of Genocide (1948); The American Convention on Human Rights; The UN Covenant on Civil and Political Rights (1966); The UN Convention on the Rights of the Child (1989); The UN Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity (1968); and, finally, the Inter-American Convention on the Forced Disappearance of Persons (1994).

[117] See Article 75 and 118 of the Argentine Constitution.

[118] Article 18 of the Constitution establishes the principle of *nullum crimen nulla poena sine lege* and thereby prohibits the application of retroactive justice. See Argentine Constitution, Article 18.

[119] In both of these cases, it was affirmed that Article 118 gave provision for the exception of Article 18 and allowed the application of retroactive justice to ensure the imprescriptibility of crimes against humanity and of lesser humanity as established through international law. Although the words of article 118 grant exceptional status to crimes against *derecho de gentes* committed outside of Argentina, Marquevich argued that the same interpretation must apply to crimes committed in Argentina reasoning that it would be ridiculous for the law to enable the prosecution of crimes against *derecho de gentes* outside of Argentina but not when they were committed inside its borders. See cases '*Schwammberger, Josef s/solicitud de extradicion*' and '*Priebke, Erich s/solicitud de extradicion*' available at www.derhumanos.com.ar/jurisprudencia_argentina.htm.

accused of committing Nazi war crimes, and it had been determined that the imprescriptible nature of the international crimes of which they were accused overrode any national provisions of prescription. Within Marquevich's ruling there is no reference to the transnational cases in Spain or elsewhere.

The same legal basis (although there are some differences) was later used by the *Cámara Federal* to reject the appeals of both Videla and Massera concerning the incidence of *cosa juzgado* on 9 September 1999, by Judge Bagnasco to prosecute those involved in Case 3:'Nicolaides' and by the *Cámara Federal* to reopen Case 5:'Gómez' on 4 May 2000. The ruling of Judge Cavallo on 6 March 2001 within Case 4:'Poblete' went slightly further to determine that the Amnesty Laws were unconstitutional, null and void. Cavallo looked at how the Amnesty Laws impeded the obligations of the state to prosecute international crimes, examining in detail their validity before several treaties.[120] Cavallo concluded that as the Amnesty Laws violated these treaties by prohibiting the State from fulfilling its international obligations, they must be considered invalid. Finally, he argued that the Amnesty Laws violated Article 29 of the Constitution that prohibits the legislature from allowing the executive branch 'special powers that put the life, honour, and fortunes of Argentines at the mercy of whatever government or person.'[121] According to Cavallo, the Amnesty Laws violated this principle by taking away the judiciary's power to administer justice for these crimes.

On 1 October 2001, Judge Bonadío also ruled the Amnesty Laws unconstitutional, null and void in Case 5:'Gómez' and again, in September 2002, in Case 6:'Scagliusi'. Both of the earlier rulings were upheld by the *Cámara Federal* in November 2001, and again by the Prosecutor General Nicholas Bercera in August 2002. All of these later rulings cite decisions within transnational cases to support their argument. The ruling by the *Cámara Federal* in September 1999, rejecting the appeal of Admiral Massera, cites the decisions

[120] The American Convention of Human Rights, The UN Covenant on Civil and Political Rights (1966); and the Convention on the Prevention of Torture and other Cruel or Humiliating Practice (1984).
[121] Translation by Human Rights Watch in Human Rights Watch (2001).

of 6 July 1988, in the Suárez Mason case in the US,[122] 25 November 1998, in the Pinochet Case in the British House of Lords,[123] and the 24 January 1988 judgement of the Inter-American Court of Human Rights in the Blake Case, to support the ruling, as examples of the recognition of the imprescriptibility of crimes against humanity.[124] Similar use was made of these and other decisions in transnational cases in other later rulings by the *Cámara Federal* and by Judges Cavallo and Bonadío in 2001.

We can thus see a direct impact from 1999 of the legal arguments incorporated within the transnational cases. However, what the analysis of the rulings also tell us is that the first use of international law in Argentina to rule the crimes of the dictatorship as crimes against humanity was not directly affected (i.e. procedurally) by the same argument within the transnational cases. There already existed examples of the use of a similar argument in Argentina and furthermore the argument relied on Argentine constitutional provisions rather than solely international law. It is thus arguable that similar rulings could have been made several years previously; that they were not, supports the notion that the use of international law in Argentina was influenced by its use abroad in the transnational cases.

It is thus important to note that Article 75 was only added to the Constitution in 1994 along with other amendments. Concerning the powers of Congress, section 22 is particularly important. It states categorically that 'treaties and concordats have a higher hierarchy than laws'. It then lists a number of international treaties ratified by Argentina, including those used by various judges to categorise the crimes committed in Argentina as crimes against humanity.[125] The Constitution

[122] See 'Forti v. Suárez Mason, Nro.C-87-2058-DLJ, United States District Court of the Northern District of California, 694 F. Supp. 707; 6 July 1988.'
[123] See 'Opinions of The Lords of Appeal for Judgment in the Cause, Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appellants) Ex Parte Pinochet'.
[124] See 'Case Blake vs. Guatemala, Judgment of January 24 1998', Inter-American Court of Human Rights.
[125] The treaties listed include: The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child.

then states that 'in the full force of their provisions, they have constitutional hierarchy'.[126] The introduction of an article that incorporated international law into the domestic realm must be considered as significantly affecting a judge's ability to use international law. Almost all of the rulings cited above make use of Article 75 and its provisions to demonstrate the higher status of international law. Many of the international treaties cited in the rulings were expressly listed and raised to the status of law by this article. It also has the provision for allowing treaties ratified after the amendments to achieve equal status. Two treaties of notable concern are the UN Convention on the Non-Applicability of Statutory Limitations (1968), and the Inter-American Convention on the Forced Disappearance of Persons (1994), both of which were only ratified by Argentina in 1995 and have been cited in several of the rulings mentioned above. The ratification of these treaties provided greater strength to the acceptance of *jus cogens* norms and thus the application of international law. Therefore although we can argue that the use of international law would seem to have been influenced by the Spanish case amongst others, important provisions within the Argentine Constitution itself allowed this to be effectual.[127] This suggests that developments within political society were also an important factor in allowing the later progression of the human rights cases. This aspect will be explored further in the relevant section below.

POLITICAL DEVELOPMENT OF ARGENTINE CASES

In order to examine the political development of these cases, I explore developments in the judiciary, the military and political society. I seek to assess the overall role played by transnational justice. It is evident from the detailed case progression presented in Chapter 3 that a change in attitude and behaviour towards trials has taken place in these institutions. The question, therefore, is were these changes due primarily to transnational developments, or were independent changes already afoot that were supportive of case progression?

[126] See the Argentine Constitution as amended in 1994, Article 75 inc. 22 and Article 118.

[127] The distinctiveness of this feature is even more marked when we consider Chile in the next chapter whose constitution has no special provision for the use of international law.

The Judiciary

From the procedural history of the cases in Chapter 3, we saw that a number of judicial rulings were vital in allowing the cases to proceed. Unlike in Chile, following democratic transition the judiciary had not been opposed to human rights prosecutions; rather, many judges had been in favour. Nevertheless, the use of international law to rule the Amnesty Laws unconstitutional, null and void still represented an important change, albeit one in jurisprudence. We have just seen that there is a clear link between the legal arguments used in Spain and those used within the domestic human rights cases to rule the associated crimes as crimes against humanity. This was the basis for later rulings to argue that the Amnesty Laws were invalid. However, such a legal basis could have been used previously in Argentina, particularly considering the constitutional supremacy accorded to international law by Article 75 of the Constitution. This further suggests that the use of international law in Argentina was a reaction to its use abroad thus supporting the notion of a political influence from transnational proceedings.

Within the interviews, it was thus important to determine whether the respondents believed that the Spanish cases had influenced the judges' decision to use international law, and whether it had made it more acceptable to the Argentine courts. When I asked Pedroncini whether the Spanish case had given more force to the use of international law concerning these cases in Argentina, he replied: 'Yes, especially the ruling that confirmed the competence of the Spanish court to judge the crimes concerned with here in this manner'.[128]

When asked the same question, Freiler went into more detail.

> Yes totally, I believe that the case in Spain was an emblematic case for the world in general by demonstrating the necessity of applying the principle of universal jurisdiction for crimes against humanity, for international crimes.

In the same line, Freiler explained that:

> Initially there were many against the idea of universal jurisdiction and international law. Many judges around the world, not only in Argentina, were opposed to arguments used in Spain. However, look at what happened in Mexico with the case of Cavallo, look at England with what happened to

[128] Interview with Alberto Pedroncini, 30 April 2003, Buenos Aires.

> Pinochet in the House of Lords. There was suddenly a new preoccupation with international law and its use in national courts.

Freiler clearly intimated that this had affected the Argentine judges and their willingness to use international law. He explained that 'the conscience of the world over impunity had affected Argentina':

> When they [the people] look at a country in South America that is supposed to be a democracy, in a democracy it is never said that you cannot judge those who have committed genocide.[129]

Freiler's statements support the idea that the use of international law within the transnational cases influenced the judges in Argentina to not only to do likewise but spurred them on to prosecute for crimes of this nature. D.W. agreed with this notion believing that the Spanish case had 'opened more [judicial] space' and forced the judges to 'pay more attention' to human rights cases in Argentina.[130]

When I asked Varsky about the ruling within Case 4:'Poblete' that found the Amnesty Laws to be invalid and, in particular, the use of international law supported by the citation of transnational cases, she stated:

> What happened with Pinochet in the House of Lords in Britain, and what happened in Mexico, with [Miguel] Cavallo, these two things helped Judge Cavallo to decide [to use an] international law argument.

She believed that during the time of the ruling the issue of human rights and the use of international law had been brought to the forefront of debate in both Argentina and around the world.

> Many people were talking about Pinochet, [Miguel] Cavallo in Mexico and the International Criminal Court, genocide, the disappeared. Within the case of Barrios Altos in the Inter-American court in March 2001 there had also been a ruling that these types of crimes have to be prosecuted and punished.[131]

Varsky also commented on the fact that the use of the term 'genocide' by Garzón had also been an important factor in promoting the use of international law. In raising the crimes associated with the military regime to this status again placed an increasing emphasise on the international nature of the crimes and furthered

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[129] Interview with Eduardo Freiler, 29 April 2003, Buenos Aires.
[130] Interview with Juan D.W., 18 March 2003, Buenos Aires.
[131] Interview with Carolina Varsky, 20 March 2003, Buenos Aires.

the notion of an obligation on the state to prosecute or extradite. All of this served to further persuade the judges in Argentina to accept similar arguments.[132]

Although the use of international law to prosecute crimes against humanity represents a jurisprudential change, one seemingly influenced by events abroad, it was also necessary to determine whether this had impacted upon the entire judiciary. Was the judiciary now more in favour of human rights prosecutions and had other factors also played a role? I thus asked the interviewees whether the advances in the human rights cases represented a change in the judiciary.

Freiler believed that it did, but that the advances within the cases of child abduction had 'driven many judges on and animated them to declare the laws of *obediencia debida* and *punto final* unconstitutional'. He thought that the progress and arrests within these cases had:

> Permitted the development of the conscience of the public and of many judicial actors concerning the notion that there was value and principle in the fight for the human rights issue, and that this included justice.

This, he continued, 'led to the initiation of many [other] cases that either opened or reopened or had more force'. Discussing a change within the judiciary, he commented that although it had 'not been a linear process' there had been 'more determination' within the judiciary and the courts to 'resolve the problem', and that this had been in part due to the advances of the child abduction cases.[133] Whilst he believed that the transnational cases had affected the conscience of the judicial actors, particularly their willingness to use international law, the process had been initiated through the advances made within the cases concerning the abduction of children.

However, the remaining respondents were far more sceptical. Rios believed that change within the judiciary was not so much a juridical question, as political. She stated, 'although the courts are supposed to conform with the law, in this country there is an extra juridical element.' Referring to the pending decision within the Supreme Court on the constitutionality of the Amnesty Laws, she

[132] Interview with Carolina Varsky, 20 March 2003, Buenos Aires.
[133] Interview with Eduardo Freiler, 29 April 2003, Buenos Aires.

stated 'the decision of the Supreme Court depends on who is in power'. But when pushed over whether a change had occurred in the willingness to take on human rights cases, she said, 'yes, after the detention of Videla and Massera' and also cited the importance of Judge Cavallo's use of international law.[134] Although clearly sceptical, Rios' statements support those of Freiler, i.e. that the success of cases concerning child abduction, particularly the arrests of the former *junta* leaders, created their own impact and that this was enhanced by the developments abroad.

In response to whether a change had occurred in the judiciary, Varsky echoed the comments of Rios, commenting that 'all the judges' had been named by Menem, and that the 'Supreme Court responds to Menem and they continue to respond to Menem'.[135] This sentiment was one shared by the majority of those interviewed. In fact it is no coincidence that examining the progression of the cases, the Supreme Court had not once ruled on the unconstitutionality of the Amnesty Laws.[136] According to those interviewed, the Supreme Court was, and still is, considered to be heavily biased in favour of the conservative position of former president Menem.

Examining the composition of the court in 2003, presented in Table 5:1 below, sheds light on this argument.

[134] Interview with Dr Alcira Rios, 28 April 2003, Buenos Aires.
[135] It must be remembered that when the interviews were being conducted Menem was standing as a candidate in the presidential elections.
[136] At the time the research abroad was conducted, the Supreme Court had failed to either accept or reject any of the rulings concerning the constitutionality of the Amnesty Laws, despite these rulings having been made over four years previously.

Table 5.1: Composition of the Argentine Supreme Court in June 2003

Supreme Court Judge:	Year Appointed
C. S. Fayt	1983
E. Petracchi	1983
A. C. Belluscio	1983
J. S. Nazareno	1990
E. J. M. O'Connor,	1990
A. Boggiano	1991
G. A. F. López	1994
A. R. Vazquez	1995
J. C. Maqueda	2002

Source: Constructed by the Author

In June 2003, three of the judges had been appointed during the administration of President Alfonsín (1983-1989), and five had been appointed under the tenure of President Menem (1989-1999); one judge was appointed by President Duhalde (2002-2003) in 2002. From this we can see that the majority of the judges had been appointed by President Menem.

What the table does not show is that the composition of the Supreme Court was radically altered by Menem following an expansion law in 1990 (Chavez, 2004:456). Membership of the Court was enlarged from five to nine, allowing President Menem to 'pack' the court with his supporters. The effect of law was further increased by the resignation of two Alfonsín appointees in protest of the expansion, increasing the number new appointees to six out of nine (Molinelli, Palanza and Sin, 1999:684). Table 5:2 shows the new composition of the Supreme Court after the implementation of the expansion law in 1990.

Table 5:2 Composition of the Supreme Court in 1990 with Appointment Dates

Judges	Appointed
A.C. Belluscio	1983
C.S. Fayt	1983
E. Petracchi	1983
J.C. Oyhanarte	1990
J.S Nazareno	1990
M.A. Cavagna	1990
R.E.G. Levene	1990
R.C. Barra	1990
E.J. M. O'Connor	1990

Source: Molinelli, Palanza and Sin (1999:684).

From the table it is evident that of the nine Supreme Court judges, six were appointed in 1990 by President Menem. Chavez (2004:457-458) points out that Julio Oyhanarte was a 'long-time friend' of Menem and Eduardo Moliné O'Connor, was the brother of the wives of two of Menem's 'closest political collaborators'; the other four, were all 'staunch PJ members'. This pro-government bias (that became known as the '*mayoría automatática menemista*' or the automatic Menemist majority) refrained from challenging the president in cases of political significance and ensured the judiciary's dependence on the executive (Chavez, 2004:457,462). This view is supported by Gargarella who criticises the Supreme Court having examined several occasions where, in his view, it 'refused to fulfil its constitutional role' and should have subjected to close scrutiny 'attempts by the executive to expand its own powers'(Gargarella, 2003:192).

We saw in Chapter 1 that Menem was strongly opposed to further human rights prosecutions. However, if we consider that the composition of the Supreme Court was dominated by Menem's supporters throughout his presidency (1989-1999) and that the first important arrests within human rights cases occurred during this time, in 1998, we must ask why did Menem refrain from political interference through his support within the Supreme Court? Through the

developments of the cases investigating child abduction there began to emerge within the lower courts, particularly the *Cámara Federal,* a new jurisprudence on the use of international law to prosecute crimes against humanity. Conceivably, had the political will existed, Menem could have persuaded the Supreme Court to interject within proceedings, preventing the consolidation of this jurisprudence. However, the progression of the cases shows that this did not occur. This suggests either a change within the Supreme Court concerning its position with respect to human rights trials and thus increased independence from the executive, or a changed position within the executive towards a position of non-interference.

Although the position of the executive is studied in more detail below, it would seem that in addition to the pressures created by both the 'Scilingo effect' and the transnational proceedings, there was an important change within political society that affected the judiciary, particularly the Supreme Court. The defeat of the PJ in the 1997 congressional elections led for the first time in Menem's presidency to a period of divided government (Chavez, 2004:471). Although the PJ held on to an absolute majority in the Senate, in the *Cámara de Diputados*, its share of the vote fell from 51 per cent to 46 per cent (Molinelli, Palanza and Sin, 1999:277-278). According to Chavez (and supported by Bielsa) for the first time Menem faced strong opposition and had difficulty imposing his agenda, which 'permitted the courts to assert their autonomy from the executive' (Chavez, 2004:47; Bielsa, 1999:99-103). The Supreme Court was then able to oppose Menem's attempts to stand for re-election (to do so would have required a constitutional amendment) and 'no longer protected the administration from [criminal] investigation' (Chavez, 2004:475).[137] It is thus conceivable that had Menem wanted to interfere with the progression of the human rights cases during this last period of his administration, due to the 'enhanced judicial independence' the Supreme Court would have been less willing to interfere than it had been previously (Chavez, 2004:475).

[137] Chavez cites as an example that the Supreme Court refused to seize jurisdiction over an investigation into illegal arm sales to Croatia (Chavez, 2004:475).

In summary, changes within the judiciary have seemingly facilitated the progression of the human rights cases. The lower courts and the *Cámara Federal* have embraced the new jurisprudence concerning the use of international law to prosecute crimes against humanity, and this was clearly influenced by transnational proceedings as well as the progress within the cases concerning child abduction. However, it seems that changes within political society allowed the judiciary to reclaim some autonomy from the executive, making it less susceptible to political interference. Although this has not resulted in a pro-human rights position, neither has the Supreme Court actively tried to close or hinder proceedings. Whilst it is still important to examine further change within political society, the reticence of the Supreme Court to rule on the Amnesty Laws is a positive development when compared to the Court's previous bias towards the politics of Menem and his opposition to human rights trials.

The Military

From the literature review we saw that following the reopening of the debate over the crimes of the past after the confessions of Adolfo Scilingo, the then chief of the army, General Martín Balza, made a public apology (or *autocrítica)* for the crimes committed by the military during the 'Dirty War'. In April 1995, he appeared on national television and stated that the taking of power had led to 'illegitimate means of obtaining information, including the suppression of life' and repeated that 'the ends never justify the means'. Additionally, he had attacked the notion of due obedience stating that:

> No one is obliged to carry out an immoral order or one at odds with the law and military regulations. Whoever does so commits a criminal act, deserving of the penalty its seriousness merits. Whoever gives immoral orders is committing a crime, whoever executes immoral orders is committing a crime, whoever employs unjust means to achieve an end he considers just is committing a crime.[138]

He then invited all members of the military establishment to come forward with any information concerning the disappeared which would be treated in confidence. This seemingly pro-democratic stance of General Balza was again shown following the arrests of General Videla and Admiral Massera in 1998.

[138] General Balza cited in Feitlowitz (1998:223) and Verbitsky (1996:149).

Initially, the military's reaction had been mixed; officially, Videla and Massera were no longer military officers having been stripped of rank following their convictions and although pardoned, they had remained in disgrace (*La Nación*, 1998f). It was therefore easier for the military as an institution to maintain a degree of distance between itself and the former *junta* members now under arrest. The main worry for the military was that following the arrest of Videla, numerous others (including those on active duty) would have to testify before the judges (*Clarín*, 1998f). Following the arrests, the *Jefe del Tercer Cuerpo* of the army declared that there was 'worry, not discomfort' within the armed forces. Others, such as Massera, claimed that there were high levels of discontent in the armed forces and suggested that a repeat of the past (i.e. armed uprisings) may occur if Videla and others were to be put on trial (*Clarín*, 1998g). However, General Balza immediately refuted this accusation through an impassioned speech to the nation:

> Before us are inaccurate journalistic stories, that by misleading and distorting the facts, insinuate the non-compliance of judicial requirements by the military. [...] These false accusations insinuate that our institution is able to return to an outdated form of military expression. This is totally false: society can relax and be proud to have an army committed strictly to its specific tasks and subordinated to the laws of the Republic. The Army, now disciplined and cohesive, has learnt the hard lessons of the past, and to claim that the conduct of the men and women of the force is undemocratic is an unacceptable allegation that we believe is undeserved. It is difficult to support the allegations that some have proffered about the force, but we are absolutely convinced that these slanders will not be able to shake us from the path that we have embarked, nor will they be able to break our will in contributing to the reconciliation of all Argentines.[139]

In part to alleviate fears and quell the rumours circulated by the press, Balza made this declaration in addition to guaranteeing the presence of all military members before the judiciary if they were required to appear concerning crimes that had not already been judged or pardoned (*Clarín*, 1998e). This last commitment reassured the military that all cases concerning human rights abuse were not about to be reopened, and pardons were not going to be revoked. Once again Balza demonstrated his commitment to democracy and reassured the government over the military's subordination. These words and gestures, in addition to other examples, suggest that under the leadership of General Balza,

[139] Author's translation. See *Clarín* (1998e).

there had been a distinct change in the military's attitude concerning human rights trials.

When this proposition was presented to the respondents, Varsky replied in the negative:

> No, I don't think so; look at the attitude of General Brinzoni [the then chief of the army], he is worse. Since General Balza made his *autocrítica*, nothing has changed, no one talked or brought any new information forward.[140]

Varksy's opinion about General Brinzoni is supported by the literature. According to Human Rights Watch (2001) following the arrest of General Galtieri and 42 others in association with the case in Spain, General Brinzoni rallied to Galtieri's protection having invited him only months before to stand beside him on a national parade. That the words of Balza actually changed little was a position also supported by Margarita Gropper (of the *Madres*) and D.W. When asked whether there had been a change in the military, Gropper replied, 'No, never, they are the same, always the same'.[141] D.W. stated:

> Balza's speech, was not supported by the most of the military. He was one person who wanted to change things, but the institution didn't change.

He continued:

> To have the head of the army say these things, even if there were no concrete results was good, but the institution [as a whole] didn't change. They have all the background, the institution, I criticise the institution. There is a kind of *Esprit de Corps*, I think Brinzoni is representative of what most of the military really feels about the human rights cases.[142]

I posed a more specific question to Freiler. In addition to statements above, Balza had also submitted information to the courts concerning the destruction of military documents pertaining to the birth of children within detention centres. This was one of the crimes several of those indicted within Case 3:'Nicolaides' were charged with - covering up the crime. In January 1999, General Nicolaides had disputed that he had covered up the truth claiming that all documents destroyed had been registered and were still in the possession of the army. A few

[140] Interview with Carolina Varsky, 20 March 2003, Buenos Aires.
[141] Interview with Maragarita Gropper, 26 March 2003, Buenos Aires.
[142] Interview with Juan D.W., 18 March 2003, Buenos Aires.

days later General Balza had refuted the allegation, affirming that there were no documents (*Clarín*, 1999d).

I asked Freiler whether these actions constituted a change in attitude within the military establishment. He replied, 'yes, there is a change with Balza, but the issue with the documents concerned children'. He went on to explain that there had always been less opposition to trials concerning the crimes of child abduction. He continued, 'with Balza, he had a different vocation, he was very distinct'. Concerning the military as an institution, he went on: 'those under Balza had a responsibility, to respect the hierarchy of command' and, as such, 'although they obeyed him, it didn't mean they agreed with him'. When asked whether the arrests within the case (Case 3:'Nicolaides') could have occurred previously, he replied:

> There has been a reduction in the power of the military. Democracy has continued to consolidate, political power is now consolidated and, with that, the power of the judiciary and the judges has also consolidated.

He continued:

> Before, there remained the phantom of a coup, from day to day. Things have changed; now only 5 per cent of those who took part in the repression are still in active duty. The grand majority of the military are not associated with the crimes. They are younger, they are not responsible (for the crimes). As the military has changed, justice has been more possible.[143]

Freiler thus supported the notion that General Balza as an individual was different to his predecessors, though not necessarily representative of the institution as a whole. As Varsky pointed out, Balza had not been associated with human rights violations.[144] In contrast, General Brinzoni had been secretary-general of the provincial government in the Chaco province during military rule and was accused by CELS of complicity with the Margarita Belén massacre in 1976. Human Rights Watch (2001) comments that General Brinzoni 'frequently complained in public about human rights in contrast to the silence of the other service chiefs' and had reportedly sympathised with military personnel who have been detained.

[143] Interview with Eduardo Freiler, 29 April 2003, Buenos Aires.
[144] Interview with Carolina Varsky, 20 March 2003, Buenos Aires.

The personal leadership of General Balza was thus seemingly a factor facilitating the initial arrests within the cases. However, following his retirement in 2000 the majority of those interviewed believed that the new chief of the army, General Brinzoni, did not share the same attributes and views concerning the human rights issue as Balza, and that his opposition was a position more closely aligned to the prevailing attitude within the armed forces than that of his predecessor. That cases were still able progress, despite Brinzoni's stance, supports the argument that the military were by 2000 subordinated to civilian rule. This proposition is supported by the statements of Rios. In response to the question had the military changed its position to human rights trials, Rios replied emphatically: 'no'. However, when asked whether the power of the military had been reduced, as Freiler proposed, she agreed:

> Yes, but they are pressurising the Supreme Court to say that the Amnesty Laws are constitutional, they don't have the power that they had before, but they still have the power of pressure and persuasion.[145]

This shows that although the military has not necessarily changed its position on the human rights issue, it does not have the power to bring a halt to them.

This indicates a reduction in military power in the civil-military relationship. In Chapter 1 we saw that the military's power to dictate the limits of justice to the government was based on its ability to act upon its threats and ultimately instigate another coup. President Alfonsín had tried to curtail military power by starving the institution of funds, and that this had merely served to exacerbate the tensions created by the ongoing human rights issue. In contrast, Menem, by appeasing the military, was able to win loyalty and thereby impose his military reforms as part of the price for ensuring impunity. Upon further investigation we can see that the austerity measures continued throughout Menem's presidency. In Table 5:3 the annual military expenditure during this period is presented.

[145] Interview with Dr Alcira Rios, 28 April 2003. She went on to claim that the 2003 presidential candidate, Domingo Murphy, was 'a candidate of theirs'.

Table 5.3 Argentine Military Expenditure 1989-1999

Year	GDP (millions)	CGE (millions)	ME as % of GDP	ME as % of CGE
1989	168 000	18 800	2.6	23.7
1990	172 000	19 400	1.9	16.7
1991	196 000	22 600	1.3	11.6
1992	223 000	26 600	1.9	16.1
1993	237 000	34 700	1.8	12.4
1994	251 000	38 200	1.9	12.2
1995	243 000	37 500	1.8	12.0
1996	255 000	39 700	1.7	10.9
1997	275 000	42 400	1.3	8.4
1998	285 000	44 800	1.3	8.0
1999	275 000	47400E	1.6	9.1E

Key: *CGE = Central Government Expenditure; ME = Military Expenditure*
Source: *Wmeat 28th Edition, 1999-2000.* ('World Military Expenditures and Arms Transfers'). US Department of State, Bureau of Verification and Compliance, June 2002.

Examining the table we can see a reduction in the military's allocation of resources as a percentage of Central Government Expenditure (CGE), from 23.7 per cent in 1989 to an estimated 9.1 per cent in 1999. This represents a 38 per cent reduction in the percentage of CGE spent on the military over the ten years. When viewed in context with the 152 per cent growth in CGE from 18,800 million in 1989 to an estimated 47,400 million in 1999, the reduction as a percentage represents a static military budget in actual spending (i.e. the amount remains the same, but as a percentage of CGE goes down). Whilst this doesn't represent a reduction in military spending, what it shows is that there was no further investment within the armed forces during the 1990s. When we consider the situation described in Chapter 1, where the budget had been decimated, we can see that there was no let-up in the austerity measures throughout Menem's presidency.

The literature on civil-military relations suggests that this and other policies of Menem continued to reduce the autonomy of the military throughout the 1990s, permitting ever increasing degrees of military subordination. Nevertheless, it would seem that the motivation behind these policies was for pragmatic rather than principled reasons. Hunter (1997:465) claims that the continuation of the trend towards lower military budgets was partly due to Menem's polices of

economic adjustment and neo-liberal restructuring. However, she also cites the importance of pressure from international lending agencies and claims that the government regarded military expenditure as the area 'most expendable'. Huser (2002:184) goes into more detail over the ongoing effect of the minimal budget, claiming that in 1998 50 per cent went towards personnel expenses, 32 per cent to retirement, pension and other social security expenses leaving only 18 per cent to cover operations, investment and debt service. The lack of funds ultimately led to the grounding of the air force and the scrapping of several ship building programmes, clearly diminishing the operational capability of the military, but perhaps also its prestige.

In addition to this, during the 1990s Menem privatised and sold off the many assets of the armed forces including industrial complexes that employed many thousands of people. This process, all but completed by 1993, served to reduce the autonomy of the military and increase its dependence on the government for funding (Huser, 2002:145). Further 'downsizing' included changes to the number of military personnel; although cadre numbers remained relatively constant, conscription numbers especially important for the army, plummeted.

Between 1989 and 1999, the number of armed forces personnel fell from 95,000 to 73,000, dropping to an all-time low of 65,000 during 1992-1993 and 1995-1996. According to Huser (2002:149), the result of this reduction in manpower led the armed forces to become essentially a cadre force, 'skilled and developed through the military schooling system but having little in the way of troops or functioning equipment'. The problem was exacerbated by the low salaries; for roughly half of the cadre, working two jobs became the norm resulting in what Huser (2002:152) terms a 'part-time military'.

In 1994, Menem brought an end to obligatory military service and established a purely voluntary system (Hunter, 1994:464). This served to further weaken the operational ability of the military, particularly the army which relied predominantly on conscripts. Additionally, by becoming a completely professional force, it distanced the military institution from the day to day lives of much of the population. Huser (2002:156) comments that the reform brought

an end to the military structure of a 'politicised cadre and a conscripted, involuntary troop cohort'. In creating an 'instrumental force and vitiating the politicised one', he argues that the reform 'was a large step toward[s] an Argentine military institution more attuned to new mission realties' that permitted a more 'flexible, responsive structure and operational capability'.

These changes were complemented by the change in the institution's outlook. Changing international politics, the end of the cold war, and the establishment of regional economic links through MERCOSUR meant that external warfare had become all but unthinkable. Menem, always more internationalist in his outlook than Alfonsín, strengthened Argentina's ties with the US and the UN following the end of the Cold War. In 1990 Menem committed two Argentine navy destroyers to the Persian Gulf during the Gulf War, leading Argentina to become the only Latin American country to commit forces during the conflict. This largely symbolic action sought to thrust Argentina into the international world and allowed later Argentine forces to be committed (ironically) to support UN peacekeepers in former Yugoslavia preventing human rights atrocities (Norden, 1996:437). Huser (2002:137) argues that by looking outwards and internationally the military's internal focus diminished whilst enhancing its reputation at home and abroad. This is supported by Norden (1996:437) who believes that by taking part in these international operations the military in Argentina 'has managed to find a legitimate, professional role for its otherwise demoralised and relatively undirected armed forces'.

The minimal budget, privatisation of military assets and overall reduction in the size of the force, complemented by restructuring that allowed the armed forces to retain prestige led the military to become an internationally orientated, professional force with a reduced internal role. The overall changes in reducing the military's autonomy and power effectively took the military out of the political equation. According to Hunter, Menem's interest in 'enhancing his own personal power and autonomy [...] compelled him to marginalise established power centres, including the military' (Hunter, 1997:464). When this process is placed into a human rights context, the policies of Menem achieved the subordination of the military to civilian rule. From 1990 when he first won the

loyalty of the institution in return for promising impunity, Menem was able to impose economic and organisational reforms that in the long term would ensure the military's subordination. When Videla, Massera and others were arrested in 1998, the military institution was one more concerned with its peace-keeping mission in the former Yugoslavia and its international reputation rather than relics of the past being dragged through the courts to face charges for crimes committed over 20 years ago. Added to this is Freiler's statement that only 5 per cent of the military had been in active duty during the period of military rule. Evidently, the military was a changed institution. It was unlikely that the arrests would provoke armed uprisings and an attempted coup would be inconceivable. Those opposed to the continuance of prosecutions would have to limit their protest to legal recourse; by 1998 they could no longer rely on the persuasive threat from the military as an institution.

Political Society

In Chapter 1 we saw that, of the two main political parties, the PJ were less in favour of human rights trials at transition than the ruling UCR. However, the issue did not so clearly polarise political society as in Chile where the military retained high degrees of support. Initially there was a vague political consensus over the need to pursue policies of truth and justice, but right at the outset even the UCR government of Alfonsín recognised the limits that this could be achieved. Unlike in Chile, the main proponents of justice were not those within political society but within civil society. The issue was always treated with a sense of pragmatism rather than with any great ideological conviction. With the successive military uprisings, we saw that the consensus shifted to the recognition that the appeasement of the military was necessary to stabilise the democratic system.

Nevertheless, it is evident that developments within political society have played an important role in creating conditions more conducive to the progression of human rights trials. The wide-reaching institutional reforms imposed by President Menem led to the subordination of the military. Additionally, both the governments of Alfonsín and Menem ratified a number of international treaties and conventions, not least the UN Convention on the Rights of the Child that

facilitated the work of the *Abuelas* by giving a legal basis to the right to identity. A number of governmental initiatives, such as the creation of the DNA database and the *Comisión Nacional por el Derecho a la Identidad* (CONADI) in 1992, also served to facilitate the work of the human rights organisations. Additionally, the constitutional amendments in 1994 led to the incorporation of international human rights treaties and the status of international law to be raised above national law. These constitutional changes would later prove vital to the adoption of international law arguments that allowed judges to circumnavigate the Amnesty Laws and eventually rule them unconstitutional. Finally, the result of congressional elections in 1997 seemingly allowed the judiciary to reclaim some of its autonomy from the executive reducing the capability of the government to interfere with the judicial process.

However, these developments do not represent any positional change within political society towards trials. The reforms were imposed upon the military from the time of Alfonsín, and in Menem's case were integral to his wider economic and political strategy. Government initiatives facilitating the work of human rights organisations were either symbolic gestures or predominantly concerned the identification of abducted children. The constitutional reforms were approved through what has been termed the 1993 Oliveros Pact between the PJ and the UCR, where Alfonsín agreed to support a reform permitting President Menem to stand for re-election in return for a number of concessions. Previously presidents had only been allowed to serve for one term of office and the reciprocal arrangement permitted the incorporation into national law of the international treaties including Article 75 granting constitutional supremacy to international law, as well as a number of other controls on executive power (Chavez, 2004:453).

As such, the impact of political society upon the progression of the cases has been an indirect rather than a direct one. However, what this also represents is a move to a position of non-interference from the government. Following the number of high-profile arrests between 1998-1999, cases were allowed to continue developing. Perhaps the greatest 'rupture' or test of the tolerance within political society was the ruling of Judge Cavallo concerning the

unconstitutionality of the Amnesty Laws. This ruling threatened to reopen many investigations into human rights atrocities. However, by this time the government was unwilling or unable to prevent the progression of further cases. As stated, this does not represent a pro-human rights position but is representative of a shift towards non-interference. I have already mentioned that one possible explanation is the loss of full congressional control by the executive in 1997. This, reportedly, allowed the judiciary to reclaim some of its independence. However, as there was also a change of president in 1999-2000, with the election of Fernando de la Rua, it was important during the interviews to determine whether the result had any effect on the progression of the cases.

When I asked the respondents whether any of the administrations had taken a different approach to the human rights issue, Varksy replied, 'de la Rua was no different to Menem. He didn't care about human rights, he refused the extradition requests [from abroad]'.[146] D.W agreed in principle stating that, 'no I don't think it changed a lot. De la Rua was no better [than Menem], although there was perhaps slightly less interference with the courts'.[147] Although none of the other respondents felt the change in executive had a bearing on the progress of the cases, the reduction in interference with the judiciary, as cited by D.W., supports the idea of increased judicial autonomy from 1997. Whilst clearly this cannot explain case progression alone, it does support the notion that by 1999-2000 the government was either unwilling or unable to interfere with the judicial process.

In Chapter 1 we saw arguments that the confessions of Scilingo in 1995 and subsequent events had reopened the debate in Argentina over the human rights issue. Clearly an impact in civil society and an increase in the demand for justice would have repercussions within political society. Concerning its political impact, D.W. stated:

> I think the change following the confessions of Scilingo was fundamental. What Scilingo said was nothing new for those working within the human rights community, but the fact that it was a military official who was talking

[146] Interview with Carolina Varsky, 20 March 2003, Buenos Aires.
[147] Interview with Juan D.W., 18 March 2003, Buenos Aires.

> seemed to convince the public that this was the truth and these things really happened.

Emphasising the controversial nature of the revelations he continued:

> That it was a military official, someone who had participated in the crimes, caused an important impact within society; it was shocking for many people.[148]

That the 'Scilingo effect' had an impact on Argentine society was supported by Varsky, who claimed that it was 'the most important event' that occurred during this time concerning human rights. When I asked her to elaborate on the impact caused, she stated:

> For the families of the disappeared it let other people know, it made what happened become true in the eyes of the people, although those in the human rights movement already knew the truth'.[149]

That in his confessions, Scilingo said little new is supported by the literature. The existence of the 'flights of death' detailed by Scilingo had been reported by CONADEP in 1984 (CONADEP, 2003:235). However up until this point, there had been no official acknowledgement of their existence.[150] As Varksy pointed out, many people had until then denied that such things had happened in Argentina. It was the official acknowledgement by a former military officer directly involved that created controversy. No longer could the military deny the truth of what had happened, and blame the atrocities on the excesses of a few individuals (Verbitsky, 1996:192). This clearly increased the legitimacy of the calls for truth and justice and served to increase pressure upon political society to permit human rights investigations.

According to Varksy, the confessions of Scilingo and the renewed debate over the disappeared was one of the reasons that CELS filed two lawsuits with the courts asking that investigations be opened in order to determine the fate of two individuals that had disappeared.[151] Nevertheless, in 1998 the Supreme Court refused to permit investigations citing the applicability of the Amnesty Laws. In October 1998, CELS and several human rights organisations had filed an appeal

[148] Interview with Juan D.W of SERPAJ, 18 March 2003, Buenos Aires.
[149] Interview with Carolina Varsky, 20 March 2003, Buenos Aires.
[150] Even the CONADEP held that the allegations were 'hardly credible.'
[151] Interview with Carolina Varksy, 20 March 2003, Buenos Aires.

before the IACHR concerning the violation by the state of Argentina of the 'right to truth' of the fate of the disappeared, as protected by several international treaties ratified by Argentina, including the American Convention on Human Rights. This was accepted by the IACHR and, in November 1999 a 'friendly agreement' was reached between the government and the plaintiffs. This led to what have been termed the 'truth trials', a process in which judicial hearings record testimonies of the victims and their relatives and can order individuals to appear before the court. However, unlike full legal trials, the courts have no powers of prosecution (Human Rights Watch, 2001).

The importance of the 'truth trials' in reopening the debate over human rights atrocities were cited by several of those interviewed including Varsky and, as we can see, were a direct result of the response of the human rights organisations following Scilingo's confessions. However, the refusal by the Supreme Court to allow any investigations demonstrates that its position had not changed within regard to human rights prosecutions. The beginning of truth trials perhaps suggests that the government's position towards at least truth was softening. By this time there had been numerous advances within several cases, most notably the arrest of several former high-ranking military officers. These events support the notion that political society was beginning to move towards a position where increasing attempts at truth, if not ultimately justice, would be permitted.

During roughly the same time, the cases in Spain, Italy and others had opened and progressed. It was thus important to establish the political impact of the transnational proceedings.

Varsky believed that the transnational proceedings did have some impact on Argentina, stating that the cases in Sweden, Spain, Italy and France were a sign to the government that it should 'take care'. She stated, 'when Garzón said to INTERPOL, that he wanted eight people arrested it was a kind of pressure on the government'.[152] D.W. also thought that the cases abroad had had a political impact on Argentina but that this was only one of a number of factors. He argued

[152] Interview with Carolina Varsky, 20 March 2003, Buenos Aires.

that it was a combination of factors, including the twentieth anniversary of the coup in 1996 and the cases abroad, that was important:

> More than 100,000 people turned up, because it was 20 years since the coup. Because of Scilingo, and of what Balza had said, even though it wasn't enough for us, ... it all helped. All the rest, the new trials, Spain, Germany, it all helped the progression of the cases.

D.W. continued to argue that the human rights organisations had been working for justice and truth for a long time. He then went on to emphasise that the 'quality [of the arguments], the pressure and the good work of the human rights organisations for 20 years' explained why cases were now progressing. He then summarised, citing his earlier points:

> I really think that the main factor is the work of the human rights organisations, basically what they've done through all these years, always been working for justice and truth...its more the cases themselves, the political pressure...moral pressure I would say, from trials abroad, and from the good quality of the lawyers here.[153]

Menem had ignored the extradition requests from transnational investigations, and President de la Rua, faced with a mounting number of arrests due to individual judges responding to them, issued a decree to reject all future requests. However, from 1998 and the arrest of Videla, the government's response to developments in Argentina had been slightly more positive. Following the arrest of General Videla, the government's reaction had initially been one of surprise, disapproval and then indifference. The arrest allowed Menem, who was in France at the time, to divert pressure from the French government concerning its request for the extradition of Captain Astiz (Human Rights Watch, 2001). He merely commented that Argentina had one of the best justice systems in the world (Sikkink, 2004:33; *Clarín*, 1998a). However, clearly being in France at the time made it harder to condemn the arrest of Videla.

Following the arrest, Menem was not faced with a military rebellion, in fact his chief of the army had refuted the suggestion that the arrests were causing tension. During a speech at a newly opened naval base following the arrest of Massera several months later, Menem emphasised that 'unity between the Argentine people and the armed forces is indestructible.' The day before he had

[153] Interview with Juan D.W., 18 March 2003, Buenos Aires.

quashed any speculation that he might decree more pardons stating that: 'I have done everything that I had to do, now it is purely in the hands of the justice system' (*La Nación*, 1998g). This position is indicative of a significant shift of governmental policy towards one of non-interference.

Further evidence of a change in political society, and one prior to the arrest, is the repealing of the Amnesty Laws by Congress in March 1998 (Amnesty International, 2003). Although the law was interpreted as not having retrospective effect and the Amnesty Laws would still be applicable, that there was a sufficient majority within both houses to pass this symbolic condemnation of the laws, is truly significant. This further supports the view that there has been a gradual change within political society towards a position of non-interference. From the interviews it seems that rather than being due to changes within the executive, the change has been due to the collective pressure created by both civil society (including the demands for justice from the human rights organisations) and the developments at the transnational level. The confessions of Scilingo and the statements of General Balza helped to reinvigorate the human rights issue in Argentina. With cases progressing in Europe, further pressure was placed upon political society to permit human rights trials. All of this led to a political climate more conducive to the prosecution of the past human rights atrocities. When, within the cases concerning child abduction, a number of former high-ranking officers were arrested, the actors with political society, particularly the government, were not prepared to directly intervene and bring a halt to the progression of the cases.

However, the knowledge that the military would remain subordinated to civilian rule was vital. Following the first round of arrests, it became increasingly clear that the military would not take any hostile action. There was no pressing call for political society to intervene and to do so would have been politically risky considering the proximity of the next presidential and congressional elections in 1999. By the change in government in 2000, developments abroad had facilitated the use of international law and increased the legitimacy of prosecuting these crimes in Argentina. As cases continued to progress in Argentina and the military remained subordinated, the government maintained its position of non-

interference, whilst ensuring that all extradition requests from abroad were refused. Finally, the Amnesty Laws were ruled unconstitutional, arguably opening the way for many more prosecutions. That this did not provoke a military backlash further demonstrates that the military was subordinated to civilian rule. This was again shown at the end of 2001 with the economic collapse and the fall of the de la Rua government. Despite rumours and even calls for military intervention, General Brinzoni rebuked any such suggestion and gave a firm commitment to the democratic system.

Whilst those interviewed remained sceptical over the future and how far the prosecutions would go, from this analysis it would seem that the very political obstacles that had prevented the prosecutions in Argentina following transition, have been removed. It would thus be unlikely that any government would need, or indeed want, to put a stop to them. Ultimately, whether political society has moved towards a position of non-interference will be shown by its future actions, or inactions.

SUMMARY

In conclusion, the advance of the human rights cases in Argentina can be explained by a number of domestic and transnational factors. Exemption from the Amnesty Laws of crimes concerning child abduction has been absolutely instrumental to the whole process. Within these cases, facilitated by executive initiatives, evidence has been gathered and prosecutions made until finally judges began to indict those responsible for the overall systematic operation. This in many ways tested the reaction of the military and political society. However, due to austerity measures and structural reforms, not to mention the committed leadership of General Balza, the military had seemingly been subordinated to civilian rule and thus was unwilling to intervene to save its former leaders. The government and political society in general was also unwilling to interfere following the reinvigoration of the human rights issue in 1995 due to the confessions of Scilingo. Additional pressure had also been created by the numerous transnational proceedings abroad and the increasing number of extradition requests. However, the process did not stop there. The

increased use of international law within the transnational cases which led to Pinochet's arrest amongst others had an influence on the Argentine judiciary. A new jurisprudence had started to emerge that in 2001 challenged the constitutionality of the Amnesty Laws. Once again, whilst the judiciary increased its autonomy, neither the military nor political society were prepared to risk their prestige or popularity by active measures of intervention and the rulings remained. This has allowed other cases to open and progress, resulting in numerous prosecutions all unimaginable only a few years ago.

In assessing the role of transnational justice within this process, we can determine that this has been one of catalyst rather than cause. The use of international law at the transnational level was an important influence on the Argentine judiciary, and the proceedings served to create and maintain pressure on the domestic level to permit human rights trials; this certainly made it harder for the government to actively prevent them. However, the investigations did not lead to the discovery of new evidence that was vital to the progression of the domestic cases, although there were examples where it had been useful. Likewise the adoption of international law in Argentine cases was only possible due to constitutional provisions created by domestic reforms. Whilst the impact from transnational justice was thus important, its effects have been to an extent overshadowed by the importance of domestic factors, with regard to changes within the judiciary, the military and political society. These findings support in part the arguments presented within the literature review concerning the identified impact from transnational justice and also the importance of the confessions of Scilingo and the declaration by General Balza. However, what this study offers is a deeper explanation of the whole process of the advance of human rights cases. In particular, the findings demonstrate the complex, interlinked nature of political change within the domestic arena and how this has interacted with developments at the transnational level.

Chapter 6: Advance of Human Rights Prosecutions in Chile: 1996-2003

I conducted a number of elite-level interviews with actors centrally involved with the proceedings in Chile.[154] Through the interviews, I explored how domestic human rights cases had progressed, focusing particularly (but not exclusively) on the selected case studies, seeking to determine the role of transnational justice as well as the domestic factors identified by the literature. Having codified and analysed the data it was possible to draw conclusions on the procedural and political advance of cases and assess the role of transnational justice. I now present the findings of the field research drawing extensively on the material generated through interviews, supported by other primary and secondary sources. I first examine the procedural development of the cases and determine the extent that domestic investigations were impelled by transnational proceedings. I then move on to their political development, where I explore changes in the judiciary, the military and political society and assess the overall role played by transnational justice.

PROCEDURAL DEVELOPMENT OF CHILEAN CASES

The proceedings in Spain were opened in 1996 and Cases 3:'Caravan of Death', 4:'Pisagua', 5:'Villa Grimaldi', and 6:'La Moneda', all opened in Chile following new lawsuits filed against General Pinochet, a process which began in 1998 (i.e. after the case in Spain had opened). It was important to determine whether there was a link between the two processes. Within the cases under examination, the first accusation against Pinochet was filed on 28 January 1998 by the lawyer Hiram Villagra. During an interview I asked him why the accusation had been filed when it was. He replied that it was formulated for two specific reasons. The first was juridical:

> Within the case, it was very clear that Pinochet gave the orders, it was systematic, it had to come from him. These were homicides that were ordered by the group [the Caravan] and carried out by lower officers. All of this had to do with the higher orders of Pinochet.

[154] See Appendix 1 for a list and dates of the interviews, along with full titles of organisations here referred to by their acronyms.

The second motive for filing the lawsuit was political:

> Pinochet was about to become a lifetime senator. The facts [of the case] were so clear, it was clear that he was involved. It would discredit him, it would dirty his image as a politician. It was a way to counter-balance the image of a respectable statesman that Pinochet was trying to project at this time.[155]

The very first accusation filed against Pinochet had been filed on 12 January 1998, by the Secretary General of the Communist Party, Gladys Marín, accusing General Pinochet and others of crimes, including genocide and kidnapping, associated with the 'episode' termed 'Calle Conferencia' (VS, 1998a:5).[156] That this accusation had been filed for similar reasons was confirmed in an interview with Jorge Insunza, a senior member of the Communist Party. He stated:

> In January 1998, we were faced with a specific reason: Pinochet was about to step down as Commander-in-Chief (of the army). We decided to file an accusation because nobody could say it was aimed at all the armed forces. Additionally, he had the intention of installing himself as a lifetime senator. This was a way to raise our protests against the concept of a lifetime senator and that it was completely unacceptable that a man responsible for crimes against humanity could enter the Senate.[157]

The decision to file the initial accusations was therefore not linked to the development of transnational cases. This was again confirmed during an interview with Victor Espinoza of CODEPU (closely involved with the Spanish proceedings). Stating that 'the best thing would have been for Pinochet to be tried in Spain', Espinoza revealed that the first accusation filed against Pinochet in Chile had 'created annoyance' within the groups working with the case in Spain:

> By filing the accusation it exposed the fact that a case could be opened in Chile. This was one of the main arguments for opening the case in Spain. It would now be easier to close the case abroad and we thought that the case opening here (in Chile) could not prosper.[158]

Whilst highlighting the lack of communication between those working in Spain and the lawyers in Chile, this further supports the view that the decision to bring lawsuits against Pinochet in Chile was not linked to the case in Spain. In fact, by

[155] Interview with Hiram Villagra, 10 April 2003, Santiago.
[156] See Corte de Apelaciones de Santiago (1998a).
[157] Interview with Jorge Insunza, 22 April 2003, Santiago.
[158] Interview with Victor Espinoza, 8 April 2003, Santiago.

undermining one of the strongest arguments for permitting Spanish jurisdiction, if anything, the accusations actually threatened the continuation of the transnational case. We cannot ignore, however, the fact that the number of criminal accusations increased following Pinochet's arrest and detention in Britain as part of the Spanish proceedings. Up until Pinochet's arrest, 12 accusations had been filed against him in Chile. Between October 1998 and March 2000, when Pinochet returned to Chile, 48 more accusations were filed against the General, bringing the total to 60; this increased by a further 136 by the end of the year (FASIC, 2001). Although accusations had been made prior to, and during, Pinochet's detention, following his return to Chile their rate increased immensely.

The Discovery and Use of Evidence

Earlier (Chapter 4) I identified an overlap between the individuals and/or crimes/episodes under investigation in Spain and France with several of the domestic cases studied. Within an interview with Victor Espinoza, I asked whether there had been any new evidence or information discovered during the investigations in Spain. He replied:

> No, these were not new cases, these were all old cases, old cases of Spanish citizens. That was the link, the Spanish citizens that were executed in Chile. Only later was the accusation broadened to include the genocide against the Chilean people, to include torture and other crimes against humanity.

However, he added:

> What was new was that many people testified for the first time, those in exile. Some exiled generals, democratic generals... Poblete was important. Other people, many from this organisation (CODEPU), many people went to Spain to testify.

That the information was not new, but that new testimonies had been made, was a conclusion shared by Viviana Diaz of the AFDD, also involved with the Spanish proceedings:

> There were many who went to testify before (Judge) García-Castellon. There were people in Europe, exiles who had been forced out of Chile, they went to testify.

Asked whether these exiles could have brought new light to some of the cases through new information, she answered:

> No...well, you have to remember that the case covers the Spaniards that were disappeared or executed in Chile. In addition to these specific cases, they [the Spanish judges] also looked at the specific structures of the regime, the decree laws, the constitution, the 1978 Amnesty Law, all of this was conveyed to Spain, but none of it was 'new'.

I then asked her about the testimonies of the military officers. She stated that it was 'important', particularly that the military prosecutor, for whatever reasons of his own, decided to travel to Spain to testify. 'He legitimised the whole process'. In order to determine whether the declarations of the military officials constituted a 'breaking of the silence' as had occurred in Argentina with the confessions of Adolfo Scilingo, I asked whether other military officials had testified in Chile prior to the Spanish case. She answered 'yes, many have testified before in Chile'. She then went into some detail over a case in 1985 where a number of generals had testified. Therefore, although the decision by military officials to testify might have brought increased legitimacy to the case in Spain, it cannot be considered to have unilaterally broken the silence of the military in Chile.

In interviews with the lawyers of the cases where an overlap between the Spanish case was identified, none of them cited an example where evidence had been discovered in Spain and then used to benefit the domestic case. Concerning Case 3:'Caravan of Death', Villagra reiterated that it was 'an old case' and that 'most of the evidence had been gathered during early investigations'.[159] This statement was supported by a later examination of legal documentation obtained in Chile, which shows the individual cases making up the larger 'mega-case' to have been investigated throughout the 1980s and 1990s.[160] In response to the same question concerning Case 5:'Villa Grimaldi', lawyer Nelson Caucoto stated that 'all of the cases (within Grimaldi) had been investigated before, we knew who was responsible'.[161] Concerning Case 7:'Prats', the lawyer, Hernán Quezada, pointed out that there had been an investigation in Argentina since 1974 and that the case had advanced (in Argentina) following the arrest of a former DINA agent in 1996. Asked why extradition requests for Chilean officers

[159] Interview with Hiram Villagra, 10 April 2003, Santiago.
[160] They had been closed by the Amnesty Law. See Guzmán (1999).
[161] Interview with Nelson Caucoto, 11 April 2003, Santiago.

had only been filed in 2000, and whether this was due to the discovery of new evidence, Quezada replied:

> The (Argentine) court had to persuade itself that there was a special reason for filing extradition requests. This took from 1996. The arrest [of Enrique Arancibia Clavel] was very important in persuading them to ask for the extraditions.[162]

Finally, concerning Case 8:'Soria', Alfonso Insunza stated that 'the problem has never been the evidence, we knew who did it, and we know how they did it, the problem has always been the Amnesty Law'.[163] Once again that substantial investigations had already established the facts of the case by the time the case in Spain had opened was supported by an analysis of the legal documentation.[164]

Concerning the identified overlap between the investigation in France and Case 6:'La Moneda', when I asked the lawyer of the case, Nelson Caucoto, whether any information from the case in France had helped the case, or whether there had been cooperation and/or communication, he replied simply 'no'.[165] Veronica Reyna of FASIC (who filed several affidavits in the case) went into more detail, explaining that the case was 'an old case; it came here in 1992 after several bodies had been discovered in the Santiago General Cemetery':

> There were many witnesses, survivors of the transfer from La Moneda (palace) to the battalion (*Regimiento Tacna)* so we knew who took them there. We don't know why they were killed there, or buried there, but the line of command was clear.

She revealed that FASIC had worked with campaigners in France and had sent important testimonies, but was critical of the idea that any evidence had been discovered there.[166]

Therefore, on the basis of this evidence, in these cases, it is highly unlikely that any evidence was discovered in Spain or France that benefited case progression.

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[162] Interview with Hernan Quezada, 14 April 2003, Santiago.
[163] Interview with Alfonso Insunza, 16 April 2003, Santiago.
[164] See IACHR (1999).
[165] Interview with Nelson Caucoto, 11 April 2003, Santiago.
[166] Interview with Veronica Reyna, 9 April 2003, Santiago.

The Adoption of Legal Arguments

In Chapter 4, we saw that from the outset of the Spanish case, a similar legal argument (amongst others) was utilised to that later used in 1999 by Judge Guzmán within Case 3:'The Caravan of Death' to rule the Amnesty Law inapplicable to crimes of disappearance due to their 'permanent' and 'ongoing' nature. This argument was later accepted by the Supreme Court (in July 1999) and has since been replicated within Case 4:'Pisagua', Case 5:'Villa Grimaldi' and Case 6:'La Moneda'. Nevertheless, it was noted that in Spain this argument was based on international law, specifically the UN Declaration on the Protection of All Persons from Enforced Disappearance (1992). The use of this legal basis was not replicated by Judge Guzmán in his ruling of June 1999, or in fact by any other judge in Chile.[167]

However, if the plaintiffs in Chile had adopted the same legal argument as used and accepted within the Spanish courts, this might have persuaded the Chilean courts to accept that the crime was permanent and ongoing, though not to adopt the same legal basis (i.e. international law). On further examination of the lawsuits filed against Pinochet, it was found that precisely the same argument concerning the ongoing nature of disappearance based in international law as used in Spain from 1996, was used against Pinochet in Chile from the very first accusation of 12 January 1998 and was repeated in numerous others.[168] Therefore it was possible that the plaintiffs in Chile had adopted the same legal strategy as used in Spain.

When asked whether the arguments that he and others had used as the legal basis for suits against Pinochet had been adopted from Spain, Hiram Villagra, lawyer who filed (amongst others), the second *querella* against Pinochet, replied: 'no, we have always argued this...they were always the same arguments'.[169] This was confirmed by other lawyers who claimed that it hadn't been the legal arguments

[167] Until January 2004, there had been only one isolated example where international law had been incorporated. This was in September 1998 in the Poblete Cordova case and concerned the Geneva Conventions.
[168] See Corte de Apelaciones (1998c) and FASIC (2001).
[169] Interview with Hiram Villagra, 10 April 2003, Santiago.

that had changed, but the willingness of the courts to accept them.[170] As the same legal arguments had always been presented by the plaintiffs, the acceptance of the permanent, ongoing nature of the crime of disappearance by the Chilean courts cannot be said to represent a direct procedural impact from Spain. It would seem, in fact, more likely that Spain adopted them from Chile. However, it could be argued that the acceptance of the argument in Spain gave added force to its acceptance in Chile. The possibility of such a political impact is explored further in the section below.

Overall, we can state that the procedural impact of transnational proceedings on the advance of the domestic cases is fairly minimal. The accusations filed against General Pinochet were not related to the opening and development of the Spanish or any other transnational case. The examination has also shown that it is highly unlikely that any 'new' evidence was discovered within transnational proceedings and then used to benefit the case studies, indeed any cases in Chile at all. Finally, although we cannot state whether the acceptance of the interpretation of disappearance as a permanent, ongoing crime was linked to the same decision in Spain, we do know that this same argument had always been used in Chile. Combined, these findings therefore suggest that transnational justice had little procedural impact on the progression of the domestic cases.

POLITICAL DEVELOPMENT OF CHILEAN CASES

In order to examine the political development of these cases, I explore developments in the judiciary, the military and political society. I seek to assess the overall role played by transnational justice. It is evident from the detailed case progression presented in Chapter 3 that a change in attitude and behaviour towards trials has taken place in these institutions. The question, therefore, is were these changes due primarily to transnational developments, or were independent changes already afoot that were supportive of case progression?

[170] Interviews with Nelson Caucoto, 11 April 2003, Veronica Reyna, 9 April 2003, Santiago and Jorge Insunza, 22 April 2003, Santiago.

The Judiciary

Most of those interviewed agreed that the advances made within the case studies, in addition to many other cases, represented a change within the judiciary and particularly the Supreme Court. Nevertheless, there was a variation in opinion concerning the nature and causes of this change. Concerning the impact from transnational justice, Hiram Villagra believed that Pinochet's arrest had been a 'major catalyst' for change within the judiciary. He commented that:

> Before his arrest, we had some gains, but we were always going uphill. With the arrest of Pinochet it was like we reached level ground, everything was much easier judicially.

Discussing Case 3:'Caravan of Death' in particular, he stated that the arrest of General Pinochet in Britain 'broke the feeling of untouchability surrounding Pinochet'. Whilst lawsuits had been filed against Pinochet in Chile prior to his arrest, 'he was never subpoenaed, nothing was happening'. The first stage within the case that he believed demonstrated a real change was 'when [Judge] Guzmán sent an exhortation to Pinochet whilst he was detained in Britain.'

> The notion of Pinochet's invulnerability had been shattered and this opened up judicial space in Chile for other cases to open and progress.[171]

Caucoto shared these sentiments, believing that the arrest had been 'decisive'. Citing the fact that the proceedings in Britain had even set new precedents in English law concerning the crimes of torture and the prosecution of former heads of state, he remarked that 'Chile is a country that is always looking outside':

> When countries like Britain and Spain, with all their tradition and history, make these rulings, they have a great impact here. Here we are descendents from Spain, we are inheritors of Spanish law, if Spain has reasons to prosecute, it has an effect here.

In addition to recognising the international pressure that the courts were exposed to, he additionally cited a juridical effect concerning the use of international law:

> When the rulings concerning international law were made by the AN [Audiencia Nacional] and the House of Lords it had an influence in Chile. Before, international law had never been taken seriously.

Although Caucoto noted that international law had rarely been used to prosecute human rights crimes, he thought that this had been an important development

[171] Interview with Hiram Villagra, 10 April 2003, Santiago.

that had forced the Chilean judiciary to take note: 'one question we have to ask ourselves; when before [his arrest] was Pinochet ever forced to testify, when could he ever have been questioned, interrogated?'[172]

The views of Villagra and Caucoto were generally shared by the majority of those interviewed, in particular, Viviana Diaz, Patricia Silva, Elizabeth Lira, Yuri Gahona, and Juan Subercaseaux. All of these believed that the Pinochet arrest had been a vital factor in creating more judicial space in which human rights cases could progress. Veronica Reyna also believed that the 'Garzón effect' had been a phenomenon 'felt' in Chile. In particular this 'affected' Judge Guzmán, who headed the investigation into all the lawsuits filed against Pinochet and who became the first judge to prosecute military officers on the basis that the crime of abduction was ongoing until either the victims or their bodies were located. In contrast with other judges, he also conducted large scale excavations of suspected burial sites in order to locate the bodies of the disappeared. 'That a judge (Garzón) dared to do what he did, I think Guzmán was very influenced by what happened in Spain…I think it inspired the judges here'.[173]

Other respondents however, tended to see the impact on the judiciary from Pinochet's arrest as one mediated by the government and political society. Brkovic commented that the Chilean judiciary 'must be one of the most highly political sensitive judiciaries in the world'. Stating that he believed the judiciary was 'far from being independent' he continued:

> I don't believe the judiciary is motivated to solve cases. What we see now is the result of a political consensus, to hurry up the cases. The consensus is between the military, the right, the government and the Supreme Court, and it was forced upon them by the arrest of Pinochet.

He explained that Pinochet's arrest had both 'created an openness within which it was possible, perhaps for the first time, to really investigate what happened', but also that 'the judicial branch is dependent and mindful of the government in office'. Although the judiciary responded to pressures to investigate, in his view this did not represent greater independence.[174]

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[172] Interview with Nelson Caucoto, 11 April 2003, Santiago.
[173] Interview with Veronica Reyna, 9 April 2003, Santiago.
[174] Interview with Adil Brkovic, 8 April 2003, Santiago.

Hernán Quezada also believed that the Pinochet arrest had an impact, stating that it was one of the 'most important factors' within the progression of human rights cases. However, for him this was due to the official line taken by the government that Pinochet could and should be brought back to Chile to be put on trial. This argument was first used by the Chilean government at the beginning of 1999 when it seemed as if extradition proceedings were imminent. Quezada stated that 'the formal, official discourse from the government that a fair trial was possible in Chile certainly had an impact on the judges [in Chile]'. However, unlike Brkovic, he believed this impact had led towards a more 'autonomous and independent judiciary'. The arrest and the reaction of the government served, he believed, to create a more 'open environment' for human rights and investigations, the military 'distanced itself' from the violators of human rights and the judges had 'perceived' this, 'emboldening' them to press ahead with investigations.[175] Saavedra perceived the change as 'a great change in mentality'; 'the pro-military judges are still pro-military, but the judges that are independent have been able to reclaim their independence'.[176] Referring to the failure of the courts to protect people during the regime, Diaz shared this view stating that the judges were now 'trying to rescue their image from history...I think now they are trying to do what they couldn't do before'.[177]

Although many of those interviewed agreed that Pinochet's arrest had been important with regards to a change in the judiciary, a similar number believed that a compositional change of the Supreme Court had been just as important, if not more so. In December 1997, *Ley* No. 19.541 had enlarged the membership of the whole court from 17 judges to 21 and, more importantly, all judges (previously appointed for life) were forced to retire once they reached the age of 75.[178] According to lawyer Caucoto, the subsequent change in the members of the Supreme Court explained the jurisprudential change in the interpretation of the Amnesty Law. He also believed that this explained why, in early 1998, the Supreme Court had agreed to assign a special investigating judge to Case 1: 'Operation Albania'. This was only the second time in any case under military

[175] Interview with Hernan Quezada, 14 April 2003, Santiago.
[176] Interview with Jorge Mario Saavedra, 8 April 2003, Santiago.
[177] Interview with Viviana Diaz, 17 April 2003, Santiago.
[178] See *Ley* No. 19.541. December 1997.

jurisdiction that a special prosecuting judge had been assigned to investigate; pointing out that this was 'the fifth time we had asked [for a civilian judge to be assigned],' it was clear that the Court was beginning to change.[179]

Bravo-López also believed that the law was important; commenting on its effect he stated:

> There was a renovation, not totally, but fifty per cent of the court changed and many who had been appointed by Pinochet left. Naturally these had not been inclined to rule in favour of investigations, but to apply the Amnesty Law. [After the reforms] the Supreme Court was complemented by judges who completely changed the criteria for investigating human rights cases.

He also believed that the effects of the compositional changes were noticeable from 1997:

> During this time, the Supreme Court started to rule that cases involving the disappeared and human rights cases in general, should be investigated. This meant proving the facts of the abduction or the execution, and determining who was responsible for these events, before the Amnesty Law could be applied.

In addition, there was also a distinct change in the judges' interpretation of the crime of abduction and the applicability of the Amnesty Law:

> Before, judges had ruled that abduction was an ongoing crime, but that we have to prove it is ongoing after 1978. After the changes in composition, the judges ruled that it was not possible to apply the Amnesty Law, nor statutory limitations because abduction was an ongoing crime until the person or the body was located.[180]

Alfonso Insunza compared the decisions of the Supreme Court regarding the application of the Amnesty Law which closed Case 8:'Soria' in 1996 and that which permitted the investigation to continue with regards to the executed prisoners in Case 3:'Caravan of Death' in 1999: 'In 1996, we still had the same Pinochet appointees, but by 1999 the majority of the Supreme Court was completely different.' In addition to pointing out that the new judges had not been appointed by Pinochet, he went to explain that the difference was partly generational:

> There is a new generation of judges, not only in the Supreme Court. They have taken these cases seriously. Many of these judges have been surprised

[179] The precedent bode well; the other case had been the 'Degollados' case, one of the few that had resulted in convictions in 1994. Interview with Nelson Caucoto, 11 April, 2003, Santiago.
[180] Interview with Francisco Bravo-López, 23 April 2003, Santiago.

> and alarmed when they have discovered what has happened here...they have successfully made advances in the cases.[181]

Saavedra also supported the notion of a generational change: 'All of the previous judges were old, all very old.' After the reforms took place, 'new, younger judges were appointed.' He also explained how a change in the Supreme Court could affect the entire judiciary.

> Because the judges ascend in their promotion, the lower [court] judges always look to see what the Supreme Court is doing. So now there is a feeling that they can act [within human rights cases].

The effects of a compositional change in the Supreme Court would therefore be able to filter down to the lower courts, of which Saavedra specifically cited the *Corte de Apelaciones de Santiago*.[182] Alfonso Insunza and Francisco Bravo-López also added another aspect of judicial reform, pointing out that the 1995, *Ley* 19.374, had divided the Supreme Court into different chambers, creating the *Sala Penal*, a specialised chamber that would exclusively hear appeals on criminal cases.[183] This new chamber was composed of judges who had 'much more expertise in criminal law'.[184] Reyna pointed out that the combination of both reforms had allowed 'very qualified jurists to enter the Supreme Court whose whole career had not been spent within the judiciary'. She implied that these new judges, unlike their predecessors, were not tainted with the failings of the judiciary. Stressing the difference of the new judges, she stated that 'naturally, the government chose more progressive judges'.[185] Summarising the changes, Victor Espinoza stated: 'the retirement of the majority of the *Pinochetistas*, allowed the democratization process of the Supreme Court; due to this a new jurisprudence began to develop'.[186]

In addition to the compositional changes, Brkovic and Saavedra both argued that the attempted impeachment of the then President of the Supreme Court, Servando Jordán López, in 1997, for allegedly manipulating criminal proceedings had also affected the judiciary. Although the impeachment

[181] Interview with Alfonso Insunza, 16 April 2003, Santiago.
[182] Interview with Jorge Mario Saavedra, 8 April 2003, Santiago.
[183] See *Ley* No. 19.374, 18 February 1995.
[184] Interview with Alfonso Insunza, 16 April 2003, Santiago.
[185] Interview with Veroncia Reyna, 9 April 2003, Santiago.
[186] Interview with Victor Espinoza, 8 April 2003, Santiago.

ultimately failed, according to Brkovic, it 'ended the notion that the judges were above the law; I think this helped to promote a climate of change within the judiciary'.[187]

Whilst the impact of Pinochet's arrest in London clearly had an effect on the judiciary both directly and indirectly, it seems that prior to this the judiciary was already undergoing change. The 1997 reform allowed a younger, perhaps more independently minded, generation of judges to enter the Supreme Court and that this, in addition to the attempted impeachment of its president in the same year, permitted a new mentality to emerge. Examining the composition of the Supreme Court in 1990 presented in Table 6.1 below, we can see the domination of Pinochet appointed judges.

Table 6.1: Composition of the 1990 Supreme Court with Appointment and Retirement Dates

	Judge	Appointed	Retired
1	L. Maldonado	1966	1991
2	R. Retamal	1966	1992 d
3	E. C. Labra	1971	1992 d
4	M. Aburto	1974	1998
5	E. Ulloa	1974	1992
6	E. Araya	1976	1998
7	H. Cereceda	1985	1993 i
8	S. E. Jordán López	1985	-
9	E. Zurita	1985	1998
10	O. J.Faúndez	1988	2001
11	R. Dávila	1989	1998
12	L. Beraud	1989	1998
13	A. Toro	1989	2000
14	M. Perales	1989	1993
15	G. Valenzuela	1989	1998
16	C. H. Álvarez Garcia	1989	-
17	S. M. Bravo	1989	1990 d

Key: d-died i-impeached
Source: Constructed by the author from Matus (1999), La Tercera *and* Europa Press *(various dates)*

The table shows that in 1990 all 17 members of the Supreme Court had been appointed either by Pinochet or prior to his regime - seven were appointed in 1989. Examining the dates that these judges either died or retired we can see that

[187] Interview with Adil Brkovic, 8 April 2003, Santiago.

during the tenure of President Aylwin (1990-1994) no fewer than seven judges were appointed.[188] The balance of the Court would therefore still have been in favour, although only marginally, of General Pinochet. During the tenure of President Frei (1994-2000), little changed until 1997, when the promulgation of *Ley* 19.541 led to the immediate appointment of two judges.[189] However, it would take until August 1998 for the full provisions of the law to take effect (VS, 1998b:24). This explains why six of the judges retired in 1998 and not in 1997.

When we examine the composition of the Supreme Court in August 1998 after the provisions of the law had been implemented, as presented in Table 6.2 below, we can see the extent of change in the members since 1990.

Table 6.2: Composition and appointment date of Supreme Court Judges in August 1998

	Judge	**Appointed**
1	S. Jordán López	1988
2	J. O. Faundez	1988
3	C. H. Álvarez García	1988
4	A. Toro	1988
5	G. Navas	1993
6	O. Carrasco Acuña	1991
7	J. L. Correa Bulo	1992
8	M. E. Astrob Garrido Montt	1992
9	M. Libedinsky Tschorne	1993
10	A. E. Ortiz Sepúlveda	1994
11	J. Benquis Camhi	1997
12	E. E. Tapia Witting	1997
13	R. F. Gálvez Blanco	01/1998
14	A. A. Chaigneau Del Campo	01/1998
15	J. A. Rodríguez Ariztia	01/1998
16	E. Cury Urzua	01/1998
17	J. L. Pérez Zanartu	01/1998
18	O. A. Álvarez Hernández	01/1998
19	U. Marín Vallejo	01/1998
20	D. Yurac Soto	07/ 1998
21	J. H. Medina Cuevas	08/1998

Source: Constructed by the Author from Poder Judicial de Chile (2001); Matus (1999); *La Tercera* (various reports).

[188] These were Judge Bañados 1990, O. Carrasco Acuña 1991, J. L. Correa Bulo 1992, M. E. Astrob Garrido Montt 1992, V. Hernández Rioseco 1992, G. Navas 1993, M. Libedinsky Tschorne 1993.
[189] J. Benquis Camhi and E. E. Tapia Witting.

We can see that out of the newly enlarged 21-member court, only four had been appointed by General Pinochet; six had been appointed by President Aylwin; and the remaining 11 had been appointed by President Frei. This represents a 17-4 balance of judges appointed since the return to democratic rule. The 1997 reform thus single-handedly altered the balance within the Supreme Court from a small majority of Pinochet appointed judges to a complete domination by those appointed after democratic transition. We cannot say that this automatically changed the position of the Supreme Court from being opposed to human rights prosecutions to suddenly being in favour, as clearly not all judges appointed after 1990 would necessarily be in favour of prosecutions. However, what we can say is that the 'renovation' of the Court would at least have promoted a climate of change, in which the majority of the judges would have been more receptive to the influence created by Pinochet's arrest, amongst other factors.

Within the interviews, we have seen that Bravo-López in addition to others, claimed that the changes within the mentality of the judiciary had been noticeable as far back as 1997. By examining the rulings of the Supreme Court during this time we are able to confirm that changes seemingly were taking place prior to Pinochet's arrest in October 1998. The reports of the *Vicaría de Solidaridad* show that during second half of 1997, the Supreme Court (including the vote of the military's Prosecutor-general), reached an impasse over whether to apply the Amnesty Law in four separate rulings (VS, 1997b:17).[190] Whilst this does not necessarily represent a pro-human rights stance, it does suggest that the court's mentality had changed from that in 1996, where the majority of the Court's rulings, if not all, had favoured amnesty. The notion of change is furthered by a ruling in November 1997. In a 4-2 decision, the Court revoked a military court's 1996 application of the Amnesty Law concerning the disappearance of two individuals. The judges found that the Amnesty Law could not be applied because it had not been possible to determine whether the

[190] The Penal Chamber of the Supreme Court were tied (3-3) in ruling on the application of the Amnesty Law concerning cases: 'Caso de desaparecidos de Paine', 'Caso de Carlos Humberto Contreras Maluje' and 'Caso de los desaparecidos María Cristina López Stewart, Roberto Acuña Reyes, and Edgardo Enríquez,' (part of operation Colombo) on 6 August 1997, and 'Los ocho de Valparaíso' in November 1997. At the time the Prosecutor-General of the military was allowed to act as an extra judge in the Supreme Court on votes dealing with military issues. He had voted for the application of the Amnesty Law in every case.

disappearance of the two victims concerned was related to their detention by the DINA in 1974, as they had neither been found alive nor dead (VS,1997b:18).[191]

This trend continued during the first half of 1998 (after the implementation of the reform) when the Supreme Court revoked the application of the Amnesty Law in three more cases concerning disappeared persons on the same legal basis (VS, 1998a:22).[192] These rulings are even more surprising when we consider that the Prosecutor-General of the military, Fernando Torres Silva, had been allowed to cast his vote as a temporary member of the Supreme Court in all of these decisions (VS,1997b:18). That his consistent vote for the application of the Amnesty Law and military jurisdiction in all cases was outnumbered, demonstrates the degree of change in mentality within the chamber. Commenting on this change in the Supreme Court, the *Vicaría de Solidaridad* describes the decisions as representative of a 'new scene' (*nuevo scenario*) in the prosecution of violations of human rights and one that was 'intimately related with the changes in composition of the Supreme Court' (VS,1998a:23).

During the second half of 1998, the Supreme Court ruled on the application of the Amnesty Law in another seven cases; its decisions were, however, inconsistent with those early in the year. In the first three cases (one of which concerned two persons who had disappeared), the Supreme Court confirmed the application of the Amnesty Law (VS, 1998b:21).[193] In the fourth decision, which concerned an execution, the Amnesty Law was rejected; in the fifth and sixth, the case was closed through prescription rather than the Amnesty Law, and finally in the seventh, the Amnesty Law was again rejected (VS, 1998b:24).[194]

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[191] The case concerned the disappearances of Rodolfo Espejo Gómez and Gregorio Gaete Farías. Those voting against the majority were Judge Adolfo Bañados and Prosecutor-General, Torres Silva.

[192] The court revoked the Amnesty Law in March 1998, concerning a case of 24 disappeared *campesinos* in Paine; the Law had been applied by a military court in June 1996. In May 1998, the Supreme Court revoked the application of the Amnesty Law in a case investigating the disappearance of 8 MIR militants that had been transferred to Villa Grimaldi. Finally, in June 1998, the Supreme Court revoked the Amnesty Law concerning a case of the 1974 disappearance of Luis Ortiz Moraga.

[193] The Court ruled on 19 August 1998, 20 August 1998, 8 September 1998.

[194] The fourth ruling was made on 9 September, the fifth ruling on 6 October, the sixth 26 October and the seventh 11 November. The ruling on 9 September concerned the Poblete Cordova case. The ruling was noticeable because for the first time it was ruled that the Geneva

However, upon closer examination the inconsistencies can be explained by differences in the composition of the court. Some of the late 1998 rulings were made by a 1997 composition of the *Sala Penal*. According to the *Vicaría de Solidaridad's* report (1998b:24), all of the rulings either applying the Amnesty Law or closing the case through prescription were administered by a 1997 composition. The two rulings rejecting the application of amnesty were both made by 1998 compositions (VS, 1998b:26). That such a noticeable difference is evident between the rulings of the 1997 and 1998 compositions of the *Sala Penal* of the Supreme Court only emphasises further how important the compositional changes had been to the progression of human rights cases.

Although these last two rulings were made after Pinochet's arrest, it would seem clear that the compositional changes had permitted a new interpretation of the Amnesty Law, that was favourable to the continuation of investigations, to take effect. That this was representative of an overall change in mentality is supported by other 'progressive' rulings made by the Court during this time. In April 1998, the Court rejected requests for military jurisdiction concerning two human rights cases, ruling that investigations should be carried out by civilian courts (VS, 1998a:22-23). The only judge to vote in favour of military jurisdiction was Fernando Torres Silva.

When we examine rulings after Pinochet's arrest, we can see the consolidation of this doctrinal change. In 1999 (several months prior to Judge Guzmán's ruling in Case 3:'Caravan of Death'), the Supreme Court revoked two applications of the Amnesty Law (VS, 1999a:23). In the first, on 7 January 1999, the court found that disappearance constituted a crime of 'a permanent character, which has continued to be committed after the period covered by the Amnesty Law' (VS, 1999a:23). This represented a little publicised breakthrough in the interpretation of the Amnesty Law. By ruling that disappearance was a permanent crime until the location of either the person or their remains, many new cases of disappearance could theoretically be opened. The second ruling, concerning Nelson Flores Zapata, executed 2 October 1973, found that before the Amnesty

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Conventions should have been upheld during the military's 'state of siege'. However, this decision has not been repeated since.

Law could be applied, an investigation must 'first determine the identity and criminal responsibility of those involved' (VS, 1999a:24). This last interpretation represented further consolidation of the arguments that had been developed through the first half of 1998.

According to those interviewed the favourable rulings permitting the human rights cases to advance did represent a changed mentality in the judiciary, particularly the Supreme Court. In addition to other factors (such as the impeachment hearings against Judge Servando Jordán), this change originated with the 1997 reform allowing a complete renovation of the Supreme Court's members. By the time of Pinochet's arrest in October 1998, the new 1998 composition of the *Sala Penal* had ruled on several occasions to reject the application of the Amnesty Law for cases concerning the disappeared and had twice refused to transfer jurisdiction of human rights cases to military courts. Following Pinochet's arrest, we can see within the case studies the consolidation of this changed mentality of the judiciary and of the new jurisprudence concerning the inapplicability of the Amnesty both prior to establishing the facts of the case and to the crime of ongoing abduction. Ultimately this has allowed cases to progress and has enabled numerous indictments and convictions.

In assessing the role of transnational justice within the process of judicial change, many of those interviewed believed it had an important impact on the courts, particularly the notion of creating 'judicial space' in which the judges could manoeuvre (a 'transnational interpretation'). However, as there were clear signs of doctrinal change favouring the progression of human rights cases prior to Pinochet's arrest (a 'domestic interpretation'), we can conclude that the role of transnational justice was one of a catalyst, speeding up and perhaps deepening the degree of judicial change, but not initiating it.

The Military

For cases to have advanced as far as they have, a parallel change must also have taken place within the military. Combined, the cases have progressed to the stage where a substantial number of military officials, including high-ranking officers, and even General Pinochet himself, have been indicted, prosecuted and, in some

cases, convicted. When we compare this situation with that described in Chapter 1, that the military have allowed these advances to occur without any significant or violent protest signifies a clear shift.

It was necessary to explore the nature and causes behind this change, enabling us to better assess the overall role of transnational justice. Discussing whether there had been a change within the military institution, Chilean academic Elizabeth Lira believed that the arrest of Pinochet in Britain had an impact on the military by 'reopening the debate over the legitimacy of the military's actions' during the military regime. Citing in particular the argument used by Pinochet's defence that 'torture was an act of state', she believed that this had created an 'irresolvable debate' within the military because 'no one can say "I favour torture"'. This, she stated, provoked a 'conflict of loyalties' within the institution:

> If I defend Pinochet, then I place myself morally against the things that I believe in. As a general, I have to defend everything the military did, but how can I defend the killing of children, pregnant women, what degree of danger could they have presented?

She continued that this led the military to 'differentiate between themselves and their [former] leader', forcing them apart politically. Adding that the way in which Pinochet escaped from justice in Britain, and later in Chile, 'increased the distance between Pinochet and the military institution'. She expanded:

> The fact that he had to invent a sickness, a mental illness, I believe this had an unforeseen effect. His prestige in the armed forces really declined after this.

Accordingly, Lira believed that the conflict created by Pinochet's arrest in London began 'an internal process' that explained the gradual change within the military institution.[195]

Discussing the decision of the military to enter into talks within the *Mesa de Diálogo* in 1999, Veronica Reyna recognised that Pinochet's arrest abroad had impacted upon the armed forces. She revealed that FASIC had been invited to a meeting by the then defence minister, Edmundo Pérez Yoma, who told them of

[195] Interview with Elizabeth Lira, 22 April 2003, Santiago.

'the interest within the officers of the military' about holding talks with the victims and their families. Reyna stated:

> After the arrest of Pinochet these officers realised that they could no longer continue to lie to the younger generation of officers. They could not continue to say that the stories of human rights atrocities were a communist conspiracy.

The defence minister had realised that these officers had a 'new willingness' to enter into talks and were 'open to confront the issue of the human rights violations head on'. This, she stated, was 'all because of Pinochet's arrest' in Britain.[196] Many others interviewed believed that the military's decision to enter into talks with the victims was in order to present to the outside world an image of reconciliation between the military and the relatives of the victims, designed to secure Pinochet's release from Britain.[197] This also supports the idea that Pinochet's arrest was the instigating factor in the military's decision to participate.

Many of those interviewed agreed that the arrest of Pinochet abroad did have an impact on the military, particularly serving to create distance between Pinochet and the armed forces who didn't want to be associated with the crimes of his regime. However, the majority of the interviewees believed that a combination of factors, rather than this single event, explained why the military had allowed cases to progress. Brkovic stated that 'the retirement of General Pinochet' as Commander-in-Chief of the army in 1998, was 'particularly important'.[198] This was supported by Saavedra, who stated that after Pinochet's retirement 'the officers of the army began to move away from him politically'.[199] Ex-Deputy Pollarolo also believed that prior to Pinochet's arrest 'there had already been a change' in the military. She explained:

> The new military leadership was looking to professionalise and modernise the military; it was looking to distance itself from Pinochet. I think this was a process that was initiated from within the armed forces themselves, before Pinochet was arrested.[200]

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[196] Interview with Veronica Reyna, 9 April 2003, Santiago.
[197] A view shared by Diaz and Silva in particular.
[198] Interview with Adil Brkovic, 8 April 2003, Santiago.
[199] Interview with Jorge Mario Saavedra, 8 April 2003, Santiago.
[200] Interview with Fanny Pollarolo, 21 April 2003, Santiago.

The sense of an internal process was furthered by Brkovic who explained that 'today, there is a new generation [of military officers] that are not directly related to the crimes [committed during the military regime]'. This has led 'the armed forces of today to try and distance themselves from the past'. He continued, 'they are still connected, they (the military) give them (the accused) legal advice; however at the same time they are much less willing to risk their institution by supporting these people'.[201]

These views are supported in the literature. According to Angell (2003a:73), when General Izurieta took over as Commander-in-Chief of the army in 1998, he himself 'removed from the military those officers suspected [...] of involvement in cases of human rights abuse' and 'forced into retirement' over '200 officers associated with hard-line attitudes'. This explains the promotion of a new generation of officers to the higher ranks, referred to by Brkovic. In fact, upon his promotion to Commander-in-Chief, General Izurieta stated that the military had cooperated, and would continue to cooperate with the courts' in relation to the human rights cases (VS, 1998a:4).

One way to explore the importance of these early changes is to examine the developments within the human rights cases prior to Pinochet's arrest in October 1998. Prior to his arrest, 12 lawsuits had been filed against General Pinochet and these had been accepted by the courts. The Supreme Court had rejected the application of the Amnesty Law on several occasions allowing investigations to progress, and in Case 1: 'Operation Albania', the military had agreed to release the names of the CNI agents, thus facilitating the prosecution of five military officials. When compared with the opposition of the military under Pinochet, although these developments don't necessarily indicate a radically changed attitude of the military, it would seem that there had been a softening of its position.[202]

[201] Interview with Adil Brkovic, 8 April 2003, Santiago.
[202] This is based on the notion that whereas under Pinochet there had been consternation within the military over the *Pinocheques* case, the new complaints charging him with genocide failed to provoke the same reaction.

However, it is equally possible to argue that the military had only tolerated the accusations against Pinochet because it was clear that he would have senatorial immunity from prosecution. The rejection of the application of the Amnesty Law had occurred on many occasions previously, and the relevant cases (prior to October 1998) only involved junior ranking officers. Other than the few cases where convictions had already been made, only five military officials, none of whom were high-ranking, had been indicted. All of these were within Case 1: 'Operation Albania', an 'emblematic' case not covered by the Amnesty Law and thus unlikely to lead to the reopening of any other cases.[203] Whilst we can state that some progression had been made within human rights cases by October 1998, their number and status would not have generated great consternation within the military.

If we use the indictment of a general (as a high-ranking officer) as a test of the likelihood of military dissent, from the procedural history of the cases we can see that the first was in April 1999 within Case 2:'Jiménez and Alegría'.[204] The prosecution of retired General Alvarez Scoglia along with 11 other officers and officials had been ordered by the *Corte de Apelaciones de Santiago*. However, by all accounts his prosecution did not create much controversy (VS, 1999a:14). This could be due to several reasons; although indicted, as with other military defendants, General Alvarez Scoglia was allowed to remain within a military installation. Secondly, the ruling had been issued by the *Corte de Apelaciones de Santiago*, meaning that the ultimate decision still lay with the Supreme Court (historically open to political persuasion). Additionally, the arrests, even of a general, would have little consequence for other military officers not involved with the case. Nevertheless, despite this seeming apathy, on 15 July 1999, in a clear show of solidarity designed to intimidate the judges, 21 retired generals attended Alvarez's bail hearing, which (unsurprisingly) was conceded (VS, 1999a:22).

[203] The term 'emblematic' had been used on numerous occasions by the government arguing that these cases should be resolved. This notion was resented by the human rights organisations who believed that all cases should be judged on their own merits.
[204] This was in fact the first of all the cases in Chile to indict a (retired) general.

The June 1999 indictment of General Arellano Stark former head of the DINE, in addition to several other high-ranking officers in Case 3:'Caravan of Death', led to the first signs of consternation. Judge Guzmán's interpretation of the inapplicability of the Amnesty Law concerning the disappeared and the Supreme Court's confirmation of his ruling, and its refusal to apply the Amnesty Law until an investigation had determined criminal responsibility for all crimes (including those executed), caused outrage in the military (VS, 1999a:9). These rulings threatened to reopen literally hundreds of other cases affecting many officers both retired and on active duty. When the indictments were approved by the Supreme Court in July, the ex-vice commander of the army, Julio Cannessa and the ex-commander of the navy, Jorge Martínez Busch, both of whom were designated senators, expressed that the ruling 'disturbed much of the uniformed world', that it was not good to continue delving into the past and that the courts should adhere to the original spirit of the Amnesty Law (VS, 1999b:13). The next day several RN and UDI senators including the former commanders of the Air Force and the *Carabineros*, held a press conference in which they criticised the courts for 'keeping open cases that had no purpose' and 'depriving people of their liberty' when it was evident that there was no legal basis to do so. They also indicated that classifying the disappeared as 'abducted' represented 'a notable abandonment of duty on the behalf of the judges'. A meeting followed between the commanders of the army, navy, air force, and the Director-General of the *Carabineros* with the Minister of Defence, reportedly to 'communicate their worry over things affecting the institutions, particularly the judicial processes concerning the past violation of human rights' (VS, 1999b:12-13).

The reaction of the military and their political allies demonstrates the maintenance of vehement opposition to the progress of human rights trials from the military. However, despite this the indictments remained.[205] The military were either unable, or unwilling, to intervene and bring a halt to the process. Although several of those interviewed believed that changes had occurred in the military prior to Pinochet's detention, as the first 'test' of the military only occurred after this event, it is not possible to say whether these earlier changes

[205] General Arrellano Stark was later conceded the benefit of house arrest.

alone would have led to the same outcome. By mid 1999, however the military was no longer able to dictate to the government and the courts the limits of justice as it had done so previously. The causes behind this must be seen as a combination of factors in which the retirement of Pinochet as Commander-in-Chief of the army, the generational change within the military, as well as the impact of Pinochet's arrest and ongoing detention, all played a role.

Later events have helped to consolidate, if not increase, the degree of change. Although we have already mentioned that the decision of the military to enter into talks within the *Mesa de Diálogo* was indicative of a changed position, several of those interviewed believed that the process itself had an important impact on the military institution. Lira claimed that the talks, in particular the 'personal confrontation' between the military and its victims 'revealed the weakness of the military's arguments' concerning human rights crimes. Discussing the final agreements reached, Lira stated:

> There were 3000 cases of disappeared persons...it showed that this (disappearance) was an official policy. This was a key point within the talks. After this, although they never admitted the crimes, they never again claimed that they had been 'excesses'. This is a turning point for the armed forces.[206]

When the military finally released information concerning the disappeared at the beginning of 2001, in addition to naming certain burial sites, the report claimed that the bodies of 150 of those named had been thrown into the sea (VS,2001a:16). Many critics argued that it was no coincidence that most of the names released by the military concerned victims whose bodies had been allegedly thrown into the sea, as this made any further investigation impossible.[207] However, the information was later shown to be inaccurate. On 24 April 2001, the *Servicio Médico Legal* confirmed that a bone exhumed from *Fuerte Arteaga* in March during an excavation (conducted by a judge of exclusive dedication) corresponded to Juan Luis Rivera Matus who, according to the information submitted by the military, had been thrown into the sea (VC, 2001a).[208] Lira argued that this was 'a mistake for the military' as 'it exposed the

[206] Interview with Elizabeth Lira, 22 April 2003, Santiago.
[207] Interview with Viviana Diaz, 17 April 2003, Santiago.
[208] A communist leader detained by the *Comando Conjunto* in 1975

fact that they were still willing to lie to the people and cover-up their crimes'. This, she claimed, only served to further damage the image of the military giving 'increasing recognition to the right of the families to know the fate of the disappeared'. Since the talks, Lira stated, 'the idea that they [the victims] were extremists or terrorists has become of no importance'.[209]

Brkovic agreed that the *Mesa de Diálogo* had been important, because 'for the first time the military acknowledged a degree of responsibility [for the crimes]'.[210] Supporting this, Pollarolo claimed that the talks had allowed:

> A new closeness between the government and the military to develop. It was like the consolidation of a better relationship between the government and the military. A way for the military to distance itself from Pinochet but also a way to prevent any real progress in the cases.[211]

Additionally, following his return to Chile in March 2000, Pinochet was stripped of his diplomatic immunity, arrested and indicted within Case 3: 'Caravan of Death', charged with multiple homicides and abductions. By this time many advances had occurred within the cases and, as we have seen, the changed mentality within the judiciary had begun to consolidate. Nevertheless, his prosecution was still significant. Silva, in particular, stated that the 'greatest degree of tension [within the military] was when Pinochet was arrested [in Chile]'.[212] Villagra also commented:

> If he was no longer immune, then none of the lower ranking officers could be immune either. Before maybe some low-ranking military officials could be arrested but now everybody below Pinochet could be.[213]

This clearly had an impact on the military as well as the judiciary. Silva commented that Pinochet's later escape from justice also allowed investigations to progress more easily:

> I think that with the prosecution of Pinochet out of the way there was less tension. The military was calmer because at the end of the day they believed that the [remaining] cases would be amnestied. All of what is happening is to do with the politics of appearance. At the end of the day, they know that the government is not interested in seeing lots of military officers being prosecuted.[214]

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[209] Interview with Elizabeth Lira, 22 April 2003, Santiago.
[210] Interview with Adil Brkovic, 8 April 2003, Santiago.
[211] Interview with Fanny Pollarolo, 21 April 2003, Santiago.
[212] Interview with Patricia Silva, 9 April 2003, Santiago.
[213] Interview with Hiram Villagra, 10 April 2003, Santiago.
[214] Interview with Patricia Silva, 9 April 2003, Santiago.

This last comment picks up on another theme identified throughout the interviews. Although I have argued that changes in the military were necessary for the cases to progress as far as they have, there was much more cynicism over any real commitment to human rights. The feeling, particularly within the human rights organisations, was that the military were no longer trying to prohibit investigations because they believed that once the facts of the case had been determined the Amnesty Law would be applied closing the case definitively. According to Reyna, 'the only thing they ask for during the procedure is parole for those accused'.[215]

Although this viewpoint is cynical, and, considering events since these interviews were held, perhaps overly so, it further supports the notion that the change in the military's attitude to trials was due to a complex interplay of political factors. Ultimately, it would seem that change within the military was caused by the retirement of General Pinochet, his replacement by a Commander-in-Chief more willing to cooperate, the impact of Pinochet's arrest abroad, and a generational change within the forces. However, what is also clear, is that this change was mediated, and to an extent forced, by changes within the judiciary and political society. This is demonstrated by the pressure created from the judiciary, rejecting both the application of the Amnesty Law and military jurisdiction, amid an ever increasing number of prosecutions and arrests. Political society too, which was pressurised by the domestic human rights organisations and, following Pinochet's arrest, the international arena, has tried to facilitate reconciliation through the *Mesa de Diálogo*, in addition to a number of other initiatives. Without the parallel development within these areas, it is doubtful that the military would have 'changed' as far as it has, nor that human rights prosecutions would have advanced to the stage that they are now at.

Political Society

The analysis so far has demonstrated that mutually supportive changes within the judiciary and the military have permitted the cases to advance. We have also noted the role of political society. In particular, many of those interviewed

[215] Interview with Veronica Reyna, 9 April 2003, Santiago.

believed the judiciary had been pressurised by the government and the political right as well as the military, to speed cases up. The government's changed discourse concerning the possibility of putting Pinochet on trial in Chile and the *Mesa de Diálogo* had important consequences for both the military and the judiciary.

According to the interviewees, the arrest of Pinochet reinvigorated the human rights issue. Francisco Bravo-López commented:

> The Pinochet arrest thrust the whole issue of human rights into the public forum. It was an issue that had gradually been forgotten and been reduced to something of interest only to the families of the victims and to the courts.[216]

This opinion was shared by former Deputy, Fanny Pollarolo, who stated that:

> Undoubtedly there is a before-and-after the arrest. In London it was as if they had put up a mirror so we could look ourselves in the face. Prior to this everything had taken place behind closed doors. The arrest brought everything out into the open.[217]

The government, according to Espinoza, was under pressure from the right and the military to secure Pinochet's release, as the arrest had created 'a lot of tension' which extended to the business community and was affecting Chile's relationship with Spain and Britain.[218] Although the military and the political right wanted Pinochet returned immediately, the parties of the *Concertación* were split over the issue. The PDC was in favour of Pinochet being returned to Chile, whereas the PS, believing that justice would not be possible in Chile, preferred him to be tried in Spain.[219] Nevertheless, at the outset the government of President Frei (himself a Christian Democrat) maintained a position of opposition to the arrest claiming that as a former Head of State, Pinochet had diplomatic immunity from prosecution.

Following successive rulings in Britain against him, it became clear that the process would not end quickly, and the government's policy changed. In January 1999, after the Law Lords in Britain had rejected Pinochet's diplomatic

[216] Interview with Francisco Bravo-López, 23 April 2003, Santiago.
[217] Interview with Fanny Pollarolo, 21 April 2003, Santiago.
[218] Interview with Victor Espinoza, 8 April 2003, Santiago.
[219] Interview with Fanny Pollarolo, 21 April 2003, Santiago.

immunity thus allowing extradition proceedings to commence, the Chilean Government requested permission to take part in the re-hearing of the Lords appeal in order to argue for the first time that Pinochet should be tried in Chile (Davis, 2000:42). This represented an important turn around in policy. We have already seen that, according to Quezada, the change in discourse apparently created further incentives for the judiciary to allow human rights cases to progress, and Pollarolo claimed that it also 'created greater pressure on the military to accept advances in human rights cases'.[220]

According to Espinoza the development of proceedings against Pinochet in Britain had led 'even some of the political right to recognise the legitimacy of allowing human rights cases to progress within the courts'.[221] This is supported, to a certain extent, by the first semester report of 1999 by the *Vicaría de Solidaridad.* It states that the human rights situation had been characterised during the first half of 1999 by 'the necessity, expressed by all political sectors, of finding a solution to the situation of the disappeared'(VS, 1999a:2). Although the report indicates ongoing disagreements over specific details, that there is any agreement at all over this issue represents an emerging consensus.

The government's proposals for the *Mesa de Diálogo* later in 1999 are a further example of this emerging consensus. The proposed talks were a measure through which the government could promote reconciliation by ending the ongoing dispute over the fate of the disappeared. It would seem that the military were persuaded to participate in part by the shift of their supporters, the political right, further indicating progress towards a consensual position within political society.

In itself, Pollarolo believed the decision to enter into the talks allowed the military and its supporters to begin distancing themselves from the image of Pinochet.[222] However, the human rights community were, perhaps understandably, suspicious of the motives behind these gestures. The majority of the organisations perceived the talks to be an attempt by the government, the

[220] Interview with Fanny Pollarolo, 21 April 2003, Santiago.
[221] Interview with Victor Espinoza, 8 April 2003, Santiago.
[222] Interview with Fanny Pollarolo, 21 April 2003, Santiago.

right and the military, to promote a false image of reconciliation in order to facilitate the return of Pinochet. For this reason the majority of human rights organisations refused to participate. Silva of the AFEP commented that the government had become 'very concerned of its perceived image', and wanted 'to be seen' as a government that was 'concerned about human rights'. She continued: 'Throughout the period of his [Pinochet's] arrest, there were amazing initiatives from the government, from the right-wing, and from the military'. She explained how the government had embarked upon new social projects designed to demonstrate its commitment to human rights, truth and reconciliation. She continued:

> The whole thing was an orchestration to show the world that Chile was capable of putting Pinochet on trial here... Because of this the *Mesa de Diálogo* was created. It had no other grounds than to bring Pinochet back to Chile.[223]

The sentiment was shared by Vivian Diaz of the AFDD, who stated that after Pinochet's arrest:

> [President] Frei was compelled to create the *Mesa de Diálogo* to show to the world that he was concerned about human rights in Chile, although before this he had never showed any concern. Frei was more concerned with bringing Pinochet back to Chile rather than about human rights.[224]

However, if these proposals were only designed to secure the release of General Pinochet, what explains the continuation of the human rights cases after his return? What explains why Pinochet was stripped of his senatorial immunity and eventually indicted within Case 3:'Caravan of Death'? One important factor was that during the time of his detention, there had been notable advances in many domestic human rights cases. Concerning solely the case studies of this thesis, by the end of 1999 around 43 military officers and officials had been indicted, including several generals; the number of lawsuits filed against Pinochet had steadily increased and many other cases had reopened. The Courts had refused to apply the Amnesty Law without a prior investigation, and many requests for jurisdiction of the cases to be transferred to military courts had been rejected.

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[223] Interview with Patricia Silva, 9 April 2003, Santiago.
[224] Interview with Viviana Diaz, 17 April 2003, Santiago.

Furthermore, at the end of 1999, presidential elections had been held; the two main candidates being Ricardo Lagos of the PS and the PPD, and Joaquín Lavín of the UDI.[225] Contrary to expectations, the fate of General Pinochet had not played a major role in either of the candidates' election campaigns. According to Hughes and Parsons (2001:645), 'both candidates sought to distance themselves from the Pinochet case, each favouring the swift return of Pinochet to Chile'. Huneeus explains this in party political terms; as the political right were keen not to lose a third election to the *Concertación*, Lavín realised that if he targeted voters of the more conservative centre party, the PDC, who were not keen to see a socialist take presidential office, he may gain the centre ground (Hunneus, 2004:169).[226] Likewise, Lagos (the first socialist to run for election since Allende) did not wish to appear too extreme by demanding Pinochet's prosecution (many still feared voting for the left), and thus both candidates distanced themselves from the ageing General.

Some evidence of a bridging of the political gulf on this issue was evident in the election campaign. Both the Socialist Lagos and the UDI Lavín recognised the need to move to the centre ground in order to appeal to the electorate (see Angell and Pollack, 2000). By the right distancing itself from Pinochet, it further served to marginalise him as a political force. Accordingly, upon his return in March 2000, after Ricardo Lagos had eventually won the election with 51.3 per cent of the vote to Lavín's 48.7 per cent, according to Espinoza 'Pinochet as a political force was over, politically he was dead'.[227] Combined with the changes in the judiciary and the military, it would seem this was why it was possible to later strip him of his senatorial immunity and indict him within Case 3: 'Caravan of Death', something that had been simply inconceivable several years previously.

Although the proceedings against Pinochet were eventually dropped, fuelling speculation that the solution had been a political exit, other cases continued to advance. An agreement was finally reached within the *Mesa de Diálogo* in June 2000, and a report was released by the military at the beginning of 2001

[225] Ricardo Lagos led both the PS and his own party, the PPD (*Partido por la Democracia*).
[226] The PDC was strongly represented in the *Concertación* government and was the party of President Frei.
[227] Interview with Victor Espinoza, 8 April 2003, Santiago.

revealing information on the fate of 180 of the disappeared. In June 2001, the Supreme Court appointed a number of judges of 'exclusive dedication' to investigate cases of human rights violations and this had an important effect on the progression of two of the case studies in addition to many others.[228] Although, the initiative originated within the judiciary, the government approved the proposal and allocated sufficient funds for its development.

It could thus be argued, that the new government (of President Lagos) actively promoted the prosecution of human rights violations. However, according to Brkovic, 'the advances made by these judges were quite unexpected even by the human rights organisations'. He and others believed that once again the government had approved a proposal with the aim to bring a close to the issue as quickly as possible; investigations would be carried out and then the cases permanently closed. He believed that the 'government had lost control of these judges' as they increasingly saw the opportunity to fully investigate the crimes that had been committed.[229] Whilst this demonstrates an increasing independence of the judges, we must also credit the government with again facilitating the progress of human rights prosecutions. The attitude of the government also explains the advances in the Soria case: in 2003, after so many other cases had progressed, and three years after the Inter-American Commission of Human Rights (IACHR) had condemned the government for the depravation of justice, the government finally agreed to recognise the international status of Carmelo Soria, thereby permitting a case to open.

As the Socialists had traditionally been in favour of human rights prosecutions, it was important to establish whether in the eyes of those interviewed the election of President Lagos had facilitated the continuing progression of human rights cases. The majority of those interviewed believed that the election of Lagos had brought no new developments, although they agreed that if Lavín had won, the same progress in human rights cases would not have possible. However, Alfonso Insunza thought that Lagos had brought 'a little more sensitivity' to the issue and

[228] According to those interviewed in Chile, it wasn't uncommon for judges to have several hundred cases.
[229] Interview with Adil Brkovic, 8 April 2003, Santiago.

Diaz believed that 'nothing would have happened under Frei'.[230] Nevertheless, even the former Socialist Deputy, Fanny Pollarolo, admitted that Lagos had 'given human rights a lower priority than we would have liked'. This, she continued, was 'in order to avoid conflict with both the other parties of the *Concertación* and the parties of the right'.[231] That the Socialists have moved towards the political centre over this key issue, is further demonstrative of a developing consensus.

SUMMARY

The advance in human rights cases has been possible due an increased degree of convergence between the judiciary, the military and political society over the need for at least the truth to be established, if not justice achieved. The impact of Pinochet's arrest abroad has been shown to be an important factor in forcing the pace and extent of change within this process. However, when we consider the prior changes in the judiciary and the military, the origins of this convergence predate the external factor.

Within the judiciary, the 1997 reform served to reduce and ultimately end the political bias towards Pinochet within the Supreme Court. That the reform was agreed to by the political right suggests that the consensus was already beginning to emerge. This view was supported by Fanny Pollarolo who was a deputy of the PS at the time. She revealed that by this time the government of President Frei had 'adopted a less confrontational position' in order to secure the unanimous support of the *Concertación* and secure agreement from the right. She explained:

> The (1997) law was part of a series of proposals that constituted a project of modernisation. The right were never interested in human rights, but they were interested in economics and modernisation. This is how the law was presented to them and how we achieved their support.[232]

The key, in essence, is the word modernisation. It would seem that the parties of the right had recognised that a new political era was about to begin.

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[230] Interviews with Alfonso Insunza, 16 April 2003, Santiago, and Viviana Diaz, 17 April 2003, Santiago.
[231] Interview with Fanny Pollarolo, 21 April 2003, Santiago.
[232] Interview with Fanny Pollarolo, 21 April 2003, Santiago.

Congressional elections were approaching and General Pinochet would soon step down as Commander-in-Chief of the army, creating a greater need for the parties of the right to demonstrate their independence from Pinochet. In the same vein, Pion-Berlin (2004:500) states that 'in collaborating in the crafting and passage of this historic legislation, RN and UDI were also distancing themselves from a High Court too closely associated with the Pinochet legacy'. Another example of this phenomenon is cited by Huneeus (2003) who refers to the 1997 constitutional accusation against the then President of the Supreme Court, Servando Jordán. Whilst impeachment proceedings ultimately failed, that they had been initiated by a member of the political right, UDI deputy Carlos Bombal, against the President of the Supreme Court, himself appointed by Pinochet, demonstrates a split between the old coalition of the Supreme Court and the political right. Huneeus (2003:186) comments, 'it made it clear that the UDI was at liberty to act against one of the "bastions of authority" most representative of the dictatorship'. Pion-Berlin (2004:500) adds that the damage caused to the reputation of the Supreme Court by the accusations, was one of the reasons that President Frei was able to win support from both the RN and the UDI for the reform.

Comparing the cause and nature of political changes within the judiciary, the military and political society, we can discern a complicated interplay of domestic and transnational factors. The judiciary underwent great change through a compositional change and that this permitted the emergence and development of a new jurisprudence concerning human rights. However, this change was accomplished with the unanimous agreement amongst the political parties for the need to modernise and professionalise the judiciary. This cross-party agreement therefore represents the beginning of an emerging consensus within political society about the need to move away from the legacy of Pinochet. The instigation for this consensus would seem to be the dawning of a new age with the retirement of General Pinochet at the beginning of 1998. This event marked the beginning of a new era for Chilean politics.

With a generational change and new commanders, the military began to move away from the politics of the past and to focus on a new professionalism. All of

this created a new political environment within which the renovated courts were able to make some progress within cases of human rights. However, the later arrest of Pinochet then acted as a catalyst upon the whole process. Although it initially (re)polarised political society, over time his detention led to a greater degree of consensus over the need to promote reconciliation. By the time of Pinochet's return, he had been significantly marginalised as a political actor. Cases then continued to progress as the judiciary consolidated jurisprudential changes and began to reclaim its independence.

Assessing the role of transnational justice within this process we can see that it has supported and helped to consolidate changes that were already in train. It seems highly unlikely that any evidence was discovered abroad and then used to benefit domestic cases and there were only tenuous links concerning the use of similar legal arguments. When we consider its political impact, however, it is clear that the transnational justice played an important role. It reopened the debate over the human rights issue and affected the judiciary, the military and political society. Whilst its impact was perhaps integral to the maintenance of case progression, it should be considered as one of the several interrelated, mutually reinforcing factors underpinning political change in Chile. As such, these findings support the more recent literature concerning the importance of independent domestic changes.

Chapter 7: Conclusions

The principal aim of this study has been to explain the similarities and differences in the way human rights trials have advanced in Argentina and Chile. At the outset of this thesis I argued that the increase in the quantity and quality of human rights prosecutions was evidence of an evolutionary process within the implementation and socialisation of human rights norms. By overcoming political and legal obstacles imposed as the price of transition and reinforcing the rule of law, I argued that the advent of human rights prosecutions was also intrinsically linked to advances within the process of democratic consolidation. In order to understand the internal dynamics of this phenomenon I adopted an ideational approach that presents a causal argument about the effects of 'transnational advocacy networks' as agents of change within processes of norm diffusion. I thus designed a research strategy with which to examine the impact of transnational justice alongside other domestic factors that were identified by the literature. In evaluating the impact of transnational justice, the findings of this study enable us to understand more precisely how transnational justice and domestic factors have interacted to create domestic political and legal opportunity structures that are favourable to human rights prosecutions. This in turn allows a more general reflection on how the transnational and domestic arenas interact within the process of norm implementation and socialisation and the implications for the democratic consolidation process.

Using the impact of transnational justice as an investigational basis, I have determined that in both Argentina and Chile progress within human rights cases has been due to a particular combination of transnational and domestic factors. To an extent, in both countries the pattern of transnational and domestic interaction has followed the conceptual models (boomerang and spiral) explored earlier (Chapter 2) about the effects of transnational advocacy networks in processes of norm diffusion. However, as well as confirming the existence of this transnational and domestic interaction process, the findings of this study stress the importance of *independent* domestic factors, and thereby allow us to build upon existing models of interaction. In both countries, independent domestic factors have been central to opening domestic political and legal

opportunity structures within which prosecutions have been able to advance. In both cases I have identified that this process was underway *prior* to any impact from transnational justice. Transnational justice has played an important part in this process, namely by interacting with domestic developments. Nevertheless, its role has been one of catalyst rather than cause. The findings of this study thereby confirms assertions within recent literature (Pion-Berlin 2004; Angell 2003a; Huneeus 2003) concerning the importance of institutional changes within the military and the judiciary, but it has been able to build upon that knowledge by providing in-depth analyses of individual case progression within a changing political climate. This approach has permitted a more detailed and fuller explanation of the development of human rights trials in these countries. In examining how, and the extent to which, legal and political obstacles to trials have been overcome, the research sheds light on the relationship between human rights trials, the rule of law and democratic consolidation and domestic/transnational interaction processes. I will return to that relationship later in this chapter. Firstly, however, it is necessary to compare and contrast the country-specific findings, permitting differences and commonalities to be identified.

THE IMPACT OF TRANSNATIONAL JUSTICE

The findings presented in Chapters 5 and 6 may be succinctly stated: in both countries transnational justice acted as a catalyst upon domestic proceedings. Transnational proceedings served to increase the range and pace of case development, but in neither country can it be said that the proceedings were the sole cause of such developments.

In Argentina, transnational proceedings acted as a continual source of external pressure upon government, parties, the military and the judiciary. Subsequent developments, including the trial of Adolfo Scilingo in Spain, have helped to maintain this pressure upon the domestic arena making it increasingly difficult to prevent the progression of the human rights cases.

With regards to Chile, the findings suggest that there has been a greater political impact from transnational justice than in Argentina. The arrest of General Pinochet, in Britain and the attempts to have him extradited to Spain created a renewed immediacy to resolve the human rights issue in Chile and in many eyes increased the legitimacy of the calls for truth and justice from within civil society. The prolonged detention of Pinochet ultimately led to his marginalisation as a political actor and produced a broader consensus than previously on the need to revisit the human rights issue.

In both countries, however, pressure from transnational proceedings was complemented by parallel developments at the domestic level. To a varying degree, changes were already underway within the military, the judiciary and political society; if not always strictly prior to the initiation of transnational cases, then certainly before they had developed sufficiently to generate any real sense of political pressure. By creating a political climate more receptive to human rights prosecutions, these domestic changes proved vital to the success of transnational campaigns.

In neither Argentina nor Chile has any new evidence discovered within transnational proceedings proved vital to the advance of the domestic cases. Previous investigations had been able to determine most of the key facts surrounding the crimes. As such, there was little 'new' evidence to be discovered within transnational proceedings, which for the main part relied on the testimonies of those who had already testified within domestic proceedings.

In terms of the domestic use of legal arguments utilised at the transnational level, for Argentina the use of international law abroad influenced its use within the domestic courts. Whilst there are isolated cases in Chile where international law has been incorporated, there has not been the same cross-fertilisation of judicial doctrine as in Argentina. To some extent this can be explained by the different legal systems in Argentina and Chile (monist vs. dualist), particularly Argentina's constitutional provision regarding the supremacy of international law. However, the adoption and success of international law arguments in Argentina represents less the success of a new legal argument *per se*, more the

willingness of the judges to adopt an argument in order to circumnavigate the Amnesty Laws.

Rather than transnational justice having a direct procedural effect, the adoption of international arguments is intrinsically linked to simultaneous changes within the judiciary. The same point can be made with respect to the increased acceptance in the Chilean courts of arguments relating to the 'ongoing and permanent' nature of the crimes of abduction or disappearance. The use of these arguments could not be considered to have been developed at the transnational level. In fact, the legal arguments that were utilised within the transnational cases against General Pinochet (including the accusation of genocide) have not been repeated at the domestic level.

The findings, therefore, support and strengthen the more recent literature with regard to transnational justice's role as a catalyst rather than cause. Reforms in both countries' judicial systems facilitated a more progressive jurisprudence. In both, the military had already undergone significant change independent of transnational justice. And in both countries a working consensus had developed within political society allowing it to respond to changing events without resorting to factionalism and conflict.

DOMESTIC FACTORS

In both countries, changes were in train prior to the peak period of transnational case activity, which were conducive to the advance of trials. These changes had not reached fruition when transnationalism struck, but they had certainly begun to have an impact. In line with the research strategy outlined in Chapter 2 and Appendix 1, I concentrated on developments in the judiciary, the military and political society (and its relationship with civil society). Interaction effects between these three sets of actors created political conditions that were ever more favourable to human rights prosecutions.

In Argentina, changes that affected the courts' ability and willingness to investigate past human rights crimes were set in motion prior to the main

transnational proceedings. The 1994 cross-party agreement made several amendments to the Constitution that affected the judiciary. International law was accorded constitutional supremacy over domestic law; a number of international treaties were incorporated into the Constitution; and a new procedure was formulated to incorporate later treaties. These amendments helped to create a legal system more receptive to the impact from transnational justice, providing the means to utilise international law to circumnavigate the Amnesty Laws and thereby prosecute those accused of human rights atrocities.

Similarly in Chile, judicial reforms, again the result of cross-party agreements, permitted the transformation of the Supreme Court from one dominated by Pinochet's appointees (many of whom were opposed to trials) to one whose interpretation of the Amnesty Law favoured investigations and prosecutions. The 1995 reform created a specialised penal chamber comprised of criminal law specialists and in 1997 a reform changed the composition of the Supreme Court by introducing a retirement age for judges and expanding the membership from 17 to 21. This facilitated the progression of human rights cases by promoting a climate of change within which judges were prepared to reject the application of the Amnesty Law prior to a full investigation and to reject it outright for crimes concerning the disappeared. It is clear in both cases that the cross-party agreements, negotiated between government and Congress, were the driving force permitting such changes to occur.

A parallel story was evident concerning developments in the military institution. In Argentina, the military underwent wide-reaching reforms that reduced its size and curtailed its operational ability. These reforms served to diminish institutional autonomy and increase dependence on the government. This was reinforced by the leadership of General Balza, who displayed a firm commitment to the civilian system. Ongoing restructuring and the retirement of the majority of those directly associated with the crimes of the past led to an increased professionalism and a more modern, internationalist outlook. These changes had the effect of bringing the military more effectively under civilian control. In addition, the advance in human rights cases was gradual, with the first cases involving child abduction. Although the very highest former military officers

were arrested, punishment for this particular crime was less opposed by much of the military. As cases increased in number and scope, the military was in no position to bring an end to the proceedings even had they been so inclined.

By comparison, the military in Chile has not undergone such a dramatic degree of change. The military institution was largely untouched following democratic transition, due to the high levels of autonomy derived from the 1980 Constitution and the Organic Law of the Armed Forces. The most important change occurred with the retirement of General Pinochet as Commander-in-Chief of the army in 1998, which was complemented by a large number of his fellow officers and supporters also retiring. This change brought with it the opportunity to modernise the armed forces and for the institution to begin distancing itself from the past. As human rights cases advanced, the military was faced with a changing political climate, one reinforced by the arrest of Pinochet. This led to a further distancing from Pinochet's legacy and the decision to enter into the government-sponsored *Mesa de Diálogo* in order to promote reconciliation with the relatives of the victims of the regime. This had its own impact on the military, and as human rights investigations continued to progress it became clear that the military would not take preventative action.

These findings demonstrate the interactions between developments in political society and military change. Whilst the degree of change in Argentina is perhaps the clearer of the two, the changes within the Chilean military were complemented by something of a political shift by their traditional supporters on the political right. This was partly due to the emergence of a new era without General Pinochet, partly due to his arrest in Britain, and partly due to developing dynamics within the electoral and party systems. In both countries, government and congressional politics have had an impact on the military institution and on its willingness to actively prevent human rights trials.

Given its impact on judicial and military politics, to what extent has the position of political society with regard to human rights trials itself changed? Judicial reforms in both countries were due to cross-party agreements. The changes to the military in Argentina were prompted by reforms supported by the PJ (who were

less inclined towards human right trials at transition) and in Chile the process of the military distancing itself from Pinochet was complemented by a notable parallel shift by their supporters, the RN and the UDI. What this suggests is that, within political society, there has been a gradual shift away from the political position of the past regarding human rights trials and a move towards a more reconciliatory position. This is more noticeable in Chile, where a greater degree of factionalism existed after transition.

HOW TRANSNATIONAL AND DOMESTIC INTERACTION PROCESSES AFFECT DOMESTIC OPPORTUNITY STRUCTURES

It is thus possible to return to the transnational/domestic interaction process and conclude on its effect on domestic opportunity structures. In Argentina domestic political opportunity structures were opened by a series of events, namely the confession of Scilingo and the *autocritica* of General Balza in 1995; the gradual subordination of the military throughout the 1990s and finally, with the arrest of several high-ranking generals within cases concerning child abduction (always excluded from the Amnesty Laws) in 1998. With political obstacles to trials all but removed alongside the diminished power of the military, only the legal obstacles, in the form of the Amnesty Laws, remained. It is within this sphere that the impact of transnational justice has been particularly important.

We saw that through the incorporation of international law within the Spanish proceedings, notably within the Pinochet Case in Britain and the Cavallo Case in Mexico, judges in Argentina became emboldened to use and accept international law arguments at the national level. This has been the most significant repercussion of transnational justice in Argentina; opening the legal opportunity structure by providing a means of circumnavigating the Amnesty Laws. Although it is possible to argue that this could have been achieved without transnational proceedings, we saw through the interviews that its use within transnational proceedings gave an impetus to Argentine judges to incorporate similar arguments. However, this was only possible due to the Argentine legal system with its monist approach to international law. Further changes to the legal system in 1994, according international law supremacy over national law, were

also important to facilitating the use of international law arguments. Had Argentina a dualist approach to international law, it is doubtful whether international law arguments could have been utilised.

It is thus necessary to recognise that by having a legal system with a monist approach to international law, existing domestic opportunity structures in Argentina were always more 'open' to outside (international) influence; further legislative changes in 1994 served to increase this 'openness'. Hence, 'relatively open' domestic legal opportunity structures apparent in Argentina permitted arguments adopted within transnational proceedings to be repeated at the domestic level. This further opened the domestic legal opportunity structures to human rights activists, and ultimately as we have seen, enabled a number of prosecutions to progress.

However, in Chile, with a dualist approach to international law, it is clear that transnational justice has not had the same effect of opening domestic legal opportunity structures as in Argentina. The dualist approach to international law does not allow international law to be enforced directly, other national legislation is required. It is for this reason that cases in Chile have not adopted international law and have not been able to successfully rule the 1978 Amnesty Law to be invalid or unconstitutional. However, what has happened has been a circumnavigation of the Amnesty Law using existing legal arguments which has allowed cases to progress in the meantime. Had Chile a monist approach to international law, it is possible that the Amnesty Law would have been overturned and prosecutions could continue unabated. However, because it has not the application of the Amnesty Law remains a question of interpretation of domestic law, and therefore the continuance of prosecutions remains dependent on the political arena.

We saw in Chapter 6 that the arguments used to circumnavigate the Amnesty Law were not new; openings within domestic legal opportunities in Chile reflect a changing judiciary rather than a changing law. This change in the judiciary was itself dependent on political factors. The initial opening of political opportunity structures in Chile occurred due to domestic political developments: the stepping

down of Pinochet as Commander-in-Chief in 1998; the change of composition within the Supreme Court in the same year; and a gradual convergence since that time over the issue of human rights, as the right and the military have sought to modernise and distance themselves from the policies of the past. However despite clear evidence of opening domestic opportunity structures from 1998 onwards, in Chile, the role played by transnational justice has been instrumental to this process. Through Pinochet's arrest in Britain, his subsequent detention and return to Chile, domestic political opportunity structures were opened sufficiently to allow challenges to the legal obstacles that had prevented trials. The military dare not intervene and within a changing political climate judges were emboldened by legal decisions abroad and felt as if they could begin to consider the legal arguments put before them on their own merits. There then followed a snowball effect, evident with the *Mesa de Diálogo*, that reinforced the political developments already underway. After initial polarisation, both sides of the political spectrum, including the military, increasingly accepted the inevitability of prosecutions and, as displayed by the 2000 presidential elections, have distanced themselves from Pinochet accordingly.

By comparing each country's experiences we can see that in both, openings within domestic political opportunity structures were initially due to domestic political developments. This is perhaps more so, or at least more clearly, the case for Argentina than for Chile. Initial openings in both countries allowed some limited progression in human rights cases. Through the later impact of transnational justice, space, or openness within domestic opportunity structures increased exponentially, but importantly, differently for each country. In Argentina, transnational justice opened up domestic legal opportunity structures, presenting a way of circumnavigating the Amnesty Laws through the adoption of international law arguments. In Chile, its main achievement has been opening up domestic political opportunity structures, where Chilean lawyers have been able to use national law to challenge the legal obstacles facing prosecutions. Although the nature of the openings within domestic opportunity structures caused by the impact of transnational justice varies, for both it has created a climate more conducive to prosecutions.

In addition to demonstrating how transnational/domestic interaction processes have affected each country differently, what the findings also show is that in both countries there was sufficient space or openness within domestic political opportunity structures for the transnational interaction process to have an impact. Essentially, for both countries there was sufficient domestic space to 'catch' the boomerang after it had initially been thrown. We have insufficient evidence to state that before the boomerang pattern can have an impact upon a democratizing society there must be some existing space within domestic opportunity structures. However, the findings of this study, by showing that in both cases where there has been a successful impact from transnational processes, there was prior existing space within domestic political opportunity structures, do suggest that there might have to be.

By comparing these findings we are able to build upon existing models of interaction propounded by Risse and Sikkink et al. Examining the effects of transnational processes on *authoritarian regimes* Keck and Sikkink (1998) argue that a 'closed' domestic opportunity structure is a requisite of the boomerang pattern of influence. The findings of this study suggest that within *democratizing regimes*, 'closed' may be oversimplifying the nature of domestic opportunity structures. There may be domestic obstacles and blockage, but essentially there may also be some political space for manoeuvre. Where the domestic opportunities are completely closed, it may be that boomerang patterns are not successful because there is insufficient space for them to take effect. However, domestic opportunity structures are theoretically only 'closed' within authoritarian regimes. The nature of democratizing societies suggests there has to be some openings within domestic opportunity structures. It would seem that the question of whether boomerang patterns of influence are effectual depends on the 'degree' of openness within domestic opportunity structures of the target country. But what 'degree' of openness is necessary and how are we to define it? It will no doubt vary in each country, as well as with each issue area. This leads us to reconsider that the causal relationship suggested by the boomerang/spiral models is not one of merely transnational processes opening space in the domestic arena. Within this study, *prior* domestic openings have allowed space for transnational interaction processes to occur. In turn, this interaction process

has broadened and increased the scope and pace of initial domestic openings. Whether prior openings in domestic opportunity structures are necessary for transnational interaction processes to have an impact cannot be answered by this study, but its findings suggest that they are.

The findings thus allow us to build upon the boomerang and spiral models of domestic/transnational interaction. The conclusions of this study suggest that not only is it important to take into account the existing domestic political and legal opportunity structures available in the target country, but also that prior openings within these may well be a necessary precondition before said interactions can have an impact.

Returning to the sphere of human right prosecutions, the impact of transnational processes on national human rights prosecutions varies according to the available domestic legal and political opportunity structures. We have seen that in Argentina, transnational justice was important in opening legal opportunity structures, whereas in Chile the impact was mostly, if not exclusively, within the political realm. These varying effects felt at the domestic level reflect the transitional and post-transitional settlements in Argentina and Chile that established the nature of political and legal obstacles to trials.

As we saw earlier, at transition power relations in Argentina were clearly in favour of human rights prosecutions and they initially proceeded with unqualified success. However, due to the mounting resentment of a still powerful military, prosecutions were brought to halt through legal measures designed to block any future trials. In Chile, the military dominated the transition process, and thus maintained political and legal obstacles to trials. However, due to the very strength of the military and its supporters, it was unnecessary to legislate further measures of amnesty in addition to the already existing 1978 Law.

Over time these conditions have changed; in Argentina, the military's power has waned and only the legal obstacles remained. In Chile, although the power of the military has not been eroded on the same scale as in Argentina, following his retirement, the power of Pinochet and the defenders of his regime, has. Without

having to face further legal obstacles (despite numerous attempts during the early 1990s), the political space enabled the legal obstacles to trial to be challenged. The conditions set at transition are thus not fixed; domestic political developments have led to space and openings within domestic opportunity structures. The findings suggest that this initial space has allowed transnational/domestic interaction to be effectual on impacting upon domestic political and legal opportunity structures. Before looking in more depth at the driving force behind these domestic political changes, by exploring recent developments in both countries the effects of political change can be more clearly discerned.

RECENT DEVELOPMENTS

The effects of domestic change, both institutional and political, are more evident when we consider developments within human rights cases from the middle of 2003. Political changes in Argentina have been especially significant. In August 2003, both the House of Deputies and the Senate voted to annul the Amnesty Laws. This agreement was in response to the more pro-human rights position taken by President Néstor Kirchner, who was elected in May 2003. Prior to the congressional votes, on 25 July Kirchner had repealed de la Rua's decree (which prevented the extradition of Argentines to face trial abroad for committing human rights atrocities) (Human Rights Watch, 2003a). New extradition requests from Spain among other countries quickly led to the arrest of a number of retired military officers. Although these were later released following the refusal of the Spanish government to support the extraditions, the vote to annul the Amnesty Laws led to many of them being rearrested only days later. In June 2005, by a majority of 7-1, the Supreme Court finally annulled the Amnesty Laws (Human Rights Watch, 2005b). Apart from allowing human rights trials to advance in Argentina, Human Rights Watch believe that the Supreme Court decision will have a significant impact in other countries where amnesty laws exist or are under debate, like Chile, Uruguay and Colombia. The annulment of the Amnesty Laws demonstrates change within the judiciary and political society, but we can once again see the supporting role played by transnational justice in providing external pressure and support for human rights trials to proceed.

In addition to the vote on the Amnesty Laws, both houses also voted to give constitutional status to the U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968). The treaty had been signed by Argentina in 1995, but was only incorporated into Argentine law on 11 August 2003 (Amnesty International, 2003b). The result of these actions has been to permit literally thousands of judicial investigations to reopen and progress throughout the country. A federal judge has also ruled that the pardons of former president Menem were unconstitutional, finally eliminating the last bastion of legal impunity regarding these crimes.

Overall, many hundreds of former military officers and officials are now under arrest, including all of the former *junta* leaders. In June 2006, within the first full trial to be held since the abrogation of the Amnesty Laws, Miguel Etchecolatz, the former chief of investigations of the Buenos Aires province police, faces charges of illegal arrest, torture and murder in eight cases-including five cases of disappearances (Human Rights Watch, 2006). Concerning the specific case studies, all cases are waiting to progress to the oral trial stage. In the meantime however, all those prosecuted remain either in prison or under house arrest.

These recent events support the view that the domestic political environment has undergone immense change since 1990, the cut-off point identified in Chapter 3. Although the position of the government and the political parties today contrasts sharply with the earlier period, these events are the culmination of political groundwork laid in that era. Whilst the reopening of the cases in the end has been due to the election of a president with a more pro-human rights agenda, his actions and those of Congress reflect the changes that have taken place within political society, the judiciary and the military over the past few years.

In Chile, recent developments paint a more ambiguous picture. On the positive side, in August 2003 for the first time a government sponsored body began investigations into the widespread use of torture throughout the military regime. Whilst many crimes had been documented previously, torture had remained a taboo subject. After hearing over 35,000 testimonies, 'The National Commission

on Political Imprisonment and Torture' published its findings in November 2004. The report found that more than 27,000 individuals had been systematically tortured between 1973 and 1990, demonstrating beyond doubt that torture was an institutionalised state practice (Human Rights Watch, 2004b). In June 2005, the Commission published an addendum on 1,204 further victims (Human Rights Watch, 2006b)

In September 2003, the government also formulated proposals for human rights legislation aimed at improving the effectiveness and speed of court investigations of past human rights violations and improving and extending symbolic and economic reparation for victims and their relatives (Human Rights Watch, 2003c).

Proposals establishing reparations for the relatives of the victims of human rights violations and the elimination of the criminal records of former political prisoners were approved almost unanimously in January 2004 (VS, 2004a:61). In May 2004, the House of Deputies approved by unanimity the transfer of all human rights cases from military to civilian courts, although cases that had already been suspended by military courts would be excluded from this provision. Agreement was also reached with regards to a reduction in penal liability for those bringing new information to the cases (VS, 2004a:61-66).

Concerning actual cases, since June 2003 many have continued to develop and many others have (re)opened. According to the *Vicaría de Solidaridad*, during the second half of 2003, 85 prosecutions were made within 28 cases; by the middle of 2004, 311 military officers, officials or civilians, including 21 generals, had been either indicted or condemned within cases of past human rights crimes concerning some 515 victims (VS, 2003b:3; VS,2004a:6). Perhaps the most striking development is that General Pinochet has once again been indicted. He now faces trial having had his immunity (as a former Head of State) removed within several cases (Human Rights Watch, 2005a; Human Rights Watch, 2006b).[233] Whether he will ever be brought to trial remains to be seen,

[233] These include Case 3: 'Caravan of Death'.

but in another development an investigation has been opened to look into accusations against Pinochet for alleged financial irregularities and these have progressed rapidly.

Since 2004, there has been notable progress within seven of the eight cases. Several more indictments and arrests, and even some convictions, have been made in Case 3:'Caravan of Death'; three more indictments have been made in Case 6:'La Moneda' (VS, 2003b:4-5; VS, 2004a:8-11; FASIC, 2005; FASIC, 2006). Proceedings in Case 1:'Operation Albania' have resulted in 15 convictions, including a life sentence for General (R) Wenzal (FASIC, 2005). The convictions within Case 2:'Jiménez and Alegría' have been confirmed by the Supreme Court, although in a surprise move President Lagos has since pardoned army sergeant Manuel Contreras Donaire (VS, 2004a:29-33, 50; Human Rights Watch, 2006b; FASIC, 2005; FASIC, 2006).[234] Within the Miguel Sandoval case (which is linked to Case 5:'Villa Grimaldi'), in November 2004 the Supreme Court confirmed the sentences of the lower court, refusing – in an historical decision - to apply the Amnesty Law for the crimes associated with disappearance (Human Rights Watch, 2004a). This was the first time that the argument concerning the ongoing nature of abduction had led to convictions. However, rulings on the applicability of the Amnesty Law remain inconsistent and more recently there have been attempts to have the crime of ongoing abduction reclassified (in law) as murder in order that the Law can be applied (FASIC, 2005; FASIC, 2006).

Investigations into the crimes associated with Case 5:'Villa Grimaldi', Case 4:'Pisagua', and Case 7:'Prats' have continued to progress. Only in Case 8:'Soria' have recent developments been retrograde. In 2004, Judge Valdovinos declared the case to be outside of her jurisdiction and in the case now remains suspended due to the prior application of the Amnesty Law in 1996 (VS, 2003b:27; VS, 2004a:49-50).

[234] The Supreme Court made some minor adjustments to the duration of sentences.

Concerning other developments, following the publication of the torture report mentioned in December 2004, the Chilean Congress voted to deny courts access to the testimonies of thousands of torture victims. The details of the testimonies will be kept secret for 50 years which will clearly undermine efforts to prosecute abuses committed under the military government (Human Rights Watch, 2004b). Even more serious was a resolution by the Supreme Court that would only allow judges investigating cases of past human rights violations up to six months to either charge those involved or close the cases indefinitely. The resolution would have had the effect of shifting the burden of reopening the cases to victims' relatives rather than the state, despite its international obligations to ensure that grave violations of human rights are investigated and those responsible held to account. Despite an endorsement by President Lagos, who commented that it complemented the government's efforts to find a formula to expedite the trials, after sustained attention by both local and international human rights groups, the court rescinded the measure in May 2005 (Human Rights Watch, 2004b; Human Rights Watch, 2006b; Amnesty International, 2005).

Despite these negative aspects, however, there have recently been a number of important amendments to the 1980 Constitution. In October 2004, the government reached a cross-party agreement within the Senate concerning a package of reforms. In August 2005, these eventually saw the removal of all unelected senators from the Senate, including the nine designated Senators and life-time seats for former presidents (Human Rights Watch, 2006b). The autonomy of the military has also been affected, as the President now has the power to replace the chiefs of the various armed forces so long as the Senate is informed of the reasons. The National Security Council can now only convene with the authorisation of President, the Senate or the Supreme Court. Whilst these reforms have resulted in the elimination of several of the 'authoritarian enclaves' left over by Pinochet's regime, no agreement has been reached over the bi-nominal voting system that has tended to favour the political right. The parties of the political right were opposed to the system of proportional representation put forward by the *Concertación* government.

These recent developments in Chile further demonstrate that there has been considerable progress made towards greater consensus and national reconciliation. In addition to the cross-party agreement over the constitutional amendments, it is noticeable that the discussion over the Lagos proposals focused not on whether human rights cases should be allowed to progress within the courts as previously, but whether sentences should be reduced for those voluntarily assisting the process. This represents a significant shift in attitude within political society from that outlined in Chapter 1, to one where it would seem that the majority of political actors recognise the legitimacy of human rights investigations.

The developments also reinforce the idea of institutional change within the military and the judiciary. The continued progression of the cases demonstrates that the military is no longer willing to intervene directly with the judicial process and, despite persistent complaints over the length of the process it would seem that the military as an institution has accepted in part its responsibility for the atrocities. Likewise the judiciary has continued to reject the application of the Amnesty Law for most cases (at least during investigations) and, as we have seen, this has led to convictions for the first time. The recent indictments of Pinochet emphasise the extent of political change across Chile.

Comparing the extent of development in Argentina and Chile, we can see that following the annulment of the Amnesty Laws in Argentina all human rights cases are now free to progress to the trial stage. In Chile, however, whilst the advances achieved within human rights cases is unprecedented, the continued existence of the Amnesty Law and an evident desire to see cases closed as quickly as possible, there remains considerable doubt over how far cases will eventually be allowed to proceed. Whilst the ongoing nature of the trials makes any predictions difficult, the recent developments suggest a more positive outcome for cases in Argentina than in Chile.

HUMAN RIGHTS, THE RULE OF LAW AND DEMOCRATIC CONSOLIDATION

What then does the nature and extent of the progression of human rights cases in Argentina and Chile reveal about the rule of law and democratic consolidation? In both countries human rights cases have been able to progress in part because of the subordination of the military to civilian rule. In Argentina, a combination of military reforms and the reinvigoration of the human rights issue, not to mention a strong commitment to democracy from the then chief of the army, have secured this subordination. In Chile, military subordination has been achieved through the retirement of General Pinochet and his replacement by successive Commanders-in-Chief more committed to democracy; a generational change within the armed forces; and the reinvigoration of the human rights issue, which led to an institutional distancing from the past. In both countries, the sheer number of prosecutions and convictions reinforce the idea that the military is no longer the dominant institution. In addition, there have been successive statements from the militaries of both countries condemning the repressive methods utilised during military rule.

It is more difficult to reach a definitive conclusion with respect to an independent judiciary. There have certainly been changes within the judiciary in both countries that have been favourable to the development of human rights cases. Particularly in Chile, the effect of Pinochet's attempts to 'pack' the court has gradually faded away. However, there is a suspicion that, rather than the courts now being independent, they are in fact merely responding to a different set of political imperatives (Domingo, 2004; Couso, 2004). In both Argentina and Chile we have seen that there is a greater willingness to allow investigations to proceed. Yet the human rights issue may be being used by political actors for their own benefit. In Argentina, there is a suspicion that President Kirchner is using human rights as a cover for other areas of governmental failure, notably the high levels of poverty and social conflict that have mushroomed following the 2001 economic crisis. It is conceivable that there is political pressure from the government upon the courts to allow human rights investigations to continue.

In Chile, the impact of politics on judicial decision making seems clearer. The government of Lagos proclaimed their desire to see the cases close as quickly as possible and, considering its attempt to establish a time limit on proceedings, the Supreme Court seems willing to oblige. Nevertheless, in my view the continual progress made in human rights cases demonstrates that the judiciary as a whole has been able to reclaim much of its independence. And this, I believe, is further underlined by the recent renewal and progression of criminal proceedings against General Pinochet.

There is substantial evidence, therefore, that human rights trials have positive implications for the rule of law. The subordination of the military and the increasing independence of the judiciary are principal causes of cases progression, but the fact that those cases maintain momentum, publicity and support helps to reinforce and sustain these very principles. In this way, the rule of law and democracy are strengthened. Of course, it must be remembered that these developments concern only elements of the wide range of factors associated with the rule of law. Although progress in these areas is conducive to further democratic consolidation, it is by no means clear that there is a unidirectional and linear path.

The gains within human rights cases also suggest progress towards complementarity between civil and political society. In both Argentina and Chile the human rights issue was reinvigorated by a number of domestic and transnational factors. In Argentina, the confessions of Scilingo; the *autocrítica* of General Balza; the 20 year anniversary of the military coup; the transnational proceedings abroad; and finally a number of high-profile arrests and prosecutions - the result of the persistent work of the human rights organisations - all served to increase civil society's demands for truth and justice. In Chile, the same process occurred following the retirement of General Pinochet; the development of the transnational cases, importantly leading to Pinochet's arrest and detention in Britain; and the increasing progress made within domestic human rights cases. In both countries these factors allowed for a re-evaluation of the past. By challenging the lie that atrocities had been an invention of the political left, the growing number of stories recounting brutal repression

increased the demands for justice within civil society. At the same time, developments within human rights cases at the domestic and transnational level served to increase and reinforce the legitimacy of these demands.

In political society, measures have been taken to address the demands of civil society. In Argentina, the government agreed to permit truth trials to determine the truth over disappearance; in 1998 Congress symbolically repealed the Amnesty Laws and then later (in 2003) annulled them. In Chile, the government created the *Mesa de Diálogo* to promote dialogue and reconciliation and it approved the appointment of 'judges of exclusive dedication' to investigate the fate of the disappeared. Although there have been governmental proposals designed to speed up cases in Chile, in neither country has political society acted to prevent the progression of domestic human rights cases. In fact, in both countries a consensus within political society over the human rights issue seems to have emerged. Whilst this is indicative of change within political society, by acting upon the demands of civil society the relationship between civil and political society *in this one area* has developed towards a state of complementarity.

The emergence of complementarity is linked to the subordination of the military and the increased autonomy of the judiciary. In Argentina the subordination of the military has been central to the development of an increased consensus over human rights. This was achieved predominately by the military reforms of President Menem who, during the majority of his two terms of office, was able to dominate much of political society. Whilst this allowed Menem to politicise the judiciary, his loss of an absolute majority within Congress in 1997 allowed the judiciary to reclaim some of its autonomy from the executive. With increased calls for justice within civil society, judges began to make progressive rulings and develop new jurisprudence over the prosecution of human rights crimes. This in turn created a greater incentive for political society to acquiesce to civil society's demands for justice.

In Chile, the subordination of the military was achieved through the same process that led to consensus within political society. At Pinochet's retirement

the military and its supporters within political society began to distance themselves from his legacy. As a result, the political right approved judicial reforms that would see the removal of the majority of Pinochet's appointees from the Supreme Court. The political shift away from Pinochet and the effects of the reform combined to create space within which the judiciary began to reclaim its autonomy. As human rights cases began to progress and calls for justice within civil society grew, political society was increasingly forced to take notice. When Pinochet was arrested abroad, this acted as a catalyst upon the whole process and necessitated a dialogue within political society over the need to bring him back to Chile, the result of which was the *Mesa de Diálogo*. This expanded the distance between the political right and Pinochet and further subordinated the military. As the judiciary continued to exercise and increase its autonomy the whole process has continued to the stage where the subordination of the military has been achieved and the legitimacy of the demands for justice within civil society has been recognised within political society.

What this tells us is that in both countries the development of complementarity between civil and political society has been intrinsically linked with establishing the rule of law. As the military has been subordinated to civilian rule and the judiciary become increasingly autonomous, political society has conceded to the demands of civil society. However, at the same time, the subordination of the military and progress towards an independent judiciary has only been achieved due to the changes within political society, in part responding to civil society's demands and in part responding to its own dynamic. This demonstrates the mutually reinforcing nature of the arenas of democratic consolidation. In this sense, the human rights issue has been transformed from being both symptom and cause in a vicious cycle of democratic non-consolidation, to being both cause and effect of a more virtuous cycle of democratic consolidation. Succinctly, for both countries progress in human rights prosecutions is indicative of progress towards consolidating democracy.

This change in fortune may be a product of nothing more radical than the gradual erosion of the authoritarian legacy. Although in both countries initial attempts to prosecute human rights crimes eventually ground to a halt due to political

circumstances, cases have been able to advance as the political conditions have changed. In Argentina this occurred with the gradual subordination of the military; in Chile with the retirement of General Pinochet and the movement away from him by part of the political right. These changes marked the beginning of new eras in both countries, within which the continual process of democratization arguably made the reinvigoration of the human rights issue inevitable. Nevertheless, we cannot ignore the importance of the external impetus from transnational justice. Although the findings suggest that this was not central to the origins of change, particularly in Chile it has played an important role in revitalising the issue and maintaining the momentum.

In more abstract terms, we can conclude that openings in domestic opportunity structures concerning the human rights issue represent advances in the democratic consolidation process. It is clear from this study that transnational interaction processes, by acting as a catalyst increasing the scope and pace of domestic change, have been integral to this process. In these terms, we can also see that advances within the democratization process, representing openings within domestic opportunity structures, had already been made prior to the impact of transnational interaction; as argued above, there had already been steps towards establishing the supremacy of the rule of law and towards the complementarity between civil and political society. Once again then we return to the question, in order for transnational processes to have an effect, in this case on the democratization process as a whole, is some initial domestic progress a necessary requirement? While not fully tested, the findings of this study suggest that prior domestic progress is necessary before external interactions are effectual. Although subsequent studies would be able to further probe this assertion, the conclusion that democratization needs to be nurtured at the domestic level before transnational and/or international interventions can be effectual, is of importance to those studying the democratization process and particularly its relationship with transnational movements and globalization.

As stated earlier, the conclusions of this thesis allow us to build upon exisiting models of domestic/transnational interaction. We have seen that it is necessary to take into account the causal role of domestic opportunity structures and that prior

openings within domestic opportunities may be a necessary precondition for transnational processes to be effectual.

In conclusion, it is clear that the human rights issue has played a critical role within democratic consolidation, acting as both symptom and cause. There are striking similarities in process and outcomes, regardless of whether the starting point is a 'classically free' or a 'democratically disloyal' transition from authoritarian rule. In addition to being an indication of the progression achieved towards establishing the rule of law and developing complementarity between civil and political society, in both countries the human rights issue has been central to strengthening and embedding these principles. Although external pressure from transnational justice has had a catalytic effect upon these processes, in each country, initial change was instigated at the domestic level and then bolstered by developments within other domestic areas. Transnational justice has combined with a complex process of domestic institutional and political change to reinforce progress towards the consolidation of democracy.

FINAL REFLECTIONS

Whilst studies of democratization have often focused on the human rights issue as a contentious issue during the transitional process, its relevance to ongoing democratic consolidation has not been analysed so frequently or systematically. The present findings indicate that the human rights issue is a useful prism through which to view consolidation issues.

Within this study we have seen that transnational processes have acted as a catalyst upon human rights prosecutions and the process of democratic consolidation in both Argentina and Chile. While we cannot surmise what might have happened had transnational proceedings not been initiated, the findings of this study suggest it would be useful to carry out a comparative study between countries where domestic openings already existed but only one country was subjected the effects of transnational proceedings. This would allow us to see the effect of transnational processes in a clearer light. As gauging where political space might or might not exist prior to transnational processes, an alternative

study would be able to explore two incidences of transnational justice, one that has been perceived as successful, perhaps Chile, and one where similar advances have not on the whole occurred, such as in Guatemala. Such a study may be able to explore in which cases transnational justice has an impact and where it does not. Such an investigation might, for example, discover that in Guatemala insufficient domestic openings were in existence for the impact of transnational justice to take effect, and thereby support the findings of this study.

Such an investigation might utilise a similar strategy to that incorporated within this study. It must be remembered, however, that the primary focus of this research was to understand the nature of the advance of the human rights cases and to determine the role of transnational justice alongside domestic factors, within that process. Since this project began, the literature seeking to explain human rights developments has increasingly stressed the importance of domestic factors. Although the findings of this study build upon that literature (and verify some of its conclusions), the methods adopted were primarily geared towards ascertaining the impact from transnational justice.

Any future project, looking at transnational processes and domestic opportunity structures would have to focus reflect the literature's growing recognition of the relevance of independent domestic factors. This would entail targeting a wider selection of participants to gain a deeper insight into the causes and interaction effects between domestic arenas. One drawback of this research, due to its primary focus, has been the relatively narrow interview base consisting predominantly of representatives from domestic human rights organisations and case lawyers. Within a study that focused principally on the domestic arenas it would be desirable to interview a number of judges, representatives of the government and all major parties, in addition to military personnel. This would enable a more detailed study of the nature and cause of institutional and societal change, as well as their interaction, and how it affects domestic opportunity structures.

However it must be noted, other than those in Spain concerning Argentina and Chile, transnational proceedings (as opposed to international) have not been able

to progress (in procedural terms) so readily; one must question why? Although this study, focusing on the domestic impact of transnational justice has not examined the impact of transnational proceedings on the international level, transnational developments are dependent on international openings (Keck and Sikkink, 1998; Risse and Sikkink, 1999; Sikkink, 1999). At the time of the Spanish proceedings (concerning Argentina and Chile), international opportunity structures were open to transnational advocacy networks in the field of human rights. The end of the Cold War and an increasing respect of the applicability of international law, developed through treaty ratification and a series of human rights tribunals, created the conditions where the transnational proceedings would prosper. It is interesting to note that an earlier attempt to open a similar case to that in Spain concerning Chile, failed in the Netherlands in 1994. While there were no doubt other factors involved, one that suggests itself is that the use of international law arguments had not received sufficient backing by this time. At the same time in Argentina and Chile, sufficient openings within domestic political and legal opportunity structures had taken place. In turn these ensured that the impact from the Spanish proceedings would prove effectual. The timing of the Spanish proceedings was thus vital to their progression as well as that of the domestic proceedings in Argentina and Chile.

Clearly openings within international opportunity structures are necessarily dependent on international events and global politics. Since the Spanish proceedings, global imperatives have altered significantly. With 9/11 in the US and the rise of global terrorism, the policies of real politick, so evident during the Cold War have once again started to remerge. For governments engaged in international conflicts, the exercise of universal jurisdiction within national courts by transnational advocacy networks represents an unwanted, possibly dangerous, distraction.[235] It is not a coincidence that since the arrest of General Pinochet in Britain, steps have been taken by numerous governments, including Spain, to prevent repeat cases.[236] There is a sense that what happened in Spain,

[235] The prisoners held unlawfully at Guantanamo Bay are a poignant example.
[236] There have been unsuccessful attempts to prosecute Ariel Sharon, Fidel Castro and Tony Blair in Belgium. Under pressure from the US, Belgium repealed legislation that had permitted national courts to claim universal jurisdiction over the crimes of genocide and crimes against humanity.

Britain, Mexico, Argentina and Chile may not be repeated. However, what has developed, in part due to transnational processes, is the increasing acceptance of human rights prosecutions. In the international arena, since this research started we have seen the prosecution of Slobodan Milosevic for war crimes and crimes against humanity committed in Bosnia, Croatia and Kosovo; we are today seeing the prosecution of Saddam Hussein for genocide and crimes against humanity committed against his own people. Nevertheless, these trials take on the guise of the Nuremberg model, justice is imposed from above (victor's justice) rather than the Pinochet Case, initiated by individuals from below. Now that the International Criminal Court is established with jurisdiction to prosecute any modern day atrocities, the type of transnational prosecutions we have seen throughout this study may themselves become a thing of the past.

* * *

In summary, it is evident from this study that transnational justice has played an important catalytic role on the advance of domestic cases in Argentina and Chile. Nevertheless, in both countries domestic factors also prompted case progression prior to, and alongside, transnational justice. This has allowed us to build upon present models of transnational/domestic interaction by identifying the importance of exisiting domestic political and legal opportunity structures within the causal relationship. The nature and extent of domestic political change also shows that human rights trials have been both cause and symptom of progress towards establishing the rule of law and developing complementarity between civil and political society over the human rights issue. The findings therefore show the human rights issue to be intrinsically linked with the process of democratic consolidation, allowing us to appreciate the mutually reinforcing nature of its arenas. I have thus suggested that the dynamics of the human rights issue and transnational/domestic interaction processes inherent within this study should be considered a useful approach with which to study the process of democratic consolidation, in the region and potentially beyond.

Appendix 1: Research Design: Methods and Strategy

This appendix sets out in more detail the research design adopted for the thesis. It is modelled on the five stages of the research process outlined in Chapter 2. The specific stages map onto particular chapters and parts of the thesis in a straightforward manner. The five stages represent the overall research strategy and for each stage I discuss here the methods, sources and issues involved in conducting the research.

> *Stage 1: Identify the extent of recent developments within domestic human rights cases; establish criteria for case selection and select a sample; recreate the procedural history of the cases; undertake preliminary analysis.*

Before identifying the extent of recent developments within domestic human rights cases, it was necessary to examine the human rights policies of the transitional period, as set out in Chapter 1. This relied predominantly on secondary sources of evidence (cited within the text in Chapter 1), but was supplemented by the study of a number of primary sources. Various reports and press releases published by the international human rights organisations Amnesty International (1996-2004) and Human Rights Watch (1989-2004) were particularly useful in providing a general outline of the human rights issue in each country as well as in-depth analyses of some of the cases. Although these organisations publish much of their work in hard-copy format, all documents cited within this study were obtained through the organisations' websites www.amnesty.org and www.humanrightswatch.org, where a wide range of sources are available. Additional use was made of the official truth commission reports published in the years after transition by the *Comisión Nacional sobre la Desaparición de Personas* (CONADEP, 1984) and the *Comisión Nacional de Verdad y Reconciliación* (or Rettig Commission, 1991) in Argentina and Chile respectively. Although the CONADEP report was first published in 1984, the version used throughout this study is the 6th Edition, 2003. The Rettig Commission Report was obtained online through the website of *Derechos Chile*, a Chilean NGO promoting human rights, funded by the Ford Foundation and part of the Chile Information Project.[237]

[237] The website is www.chipsites.com/derechos.

Defining the 'cut-off' point in Chapter 3

Although the approximate 'cut-off' point (when a 'line in the sand' was drawn through human rights trials) for each country is defined in Chapter 3, it is important to note that in Argentina, judicial investigations into the whereabouts of children that had disappeared (having been abducted with their parents) were continuing. These cases were not considered as ongoing human rights cases for the purpose of this study because their objective was to locate and identify the missing children and, should proceedings lead to prosecutions, these would be against the adoptive parents rather than those directly responsible for their abduction.

Extent of Case Progression after cut-off point

The extent of case progression was explored through a number of primary sources. For Argentina, of particular use were the annual reports (1997-2002) published by the domestic human rights organisation *Centro de Estudios Legales y Sociales* (CELS). CELS works with other domestic and international organisations to protect human rights in Argentina. In addition to its publications, it has filed numerous lawsuits with the courts in both Argentina and abroad. The annual reports include extensive coverage of developments within human rights cases in Argentina; electronic editions were obtained through the organisation's website www.cels.org.ar.

A number of documents published by the human rights organisation the *Abuelas de la Plaza de Mayo* provide considerable detail on cases concerning children were also of great use. The *Abuelas* focus on locating and identifying the children of the disappeared by conducting their own investigations as well as filing lawsuits to open cases in the courts. They have published several books and articles on the subject, some of which are cited directly in this study, and their website www.abuelas.org.ar provides numerous documents on the progression of related cases.

In Chile the twice-yearly publication *Informe de Derechos Humanos* of the human rights organisation *Vicaría de Solidaridad* (1995-2004) proved invaluable. The *Vicaria*, a church-based organisation, was established during military rule and focused on gathering details of human rights violations as well as filing writs of *habeas corpus* with the courts. The reports provide extensive detail and insight into the ongoing human rights cases in Chile and are available at www.vicariadelsolidaridad.

The monthly reports (1998-2002) and web-based resources of the *Fundación de Ayuda Social de Las Iglesias Cristianas* (FASIC) were also useful. FASIC has been active in filing lawsuits and has employed a number of lawyers to represent the relatives of the victims both during and after military rule. The organisation's reports give detailed accounts of developments within human rights cases and the www.fasic.org provides numerous legal documents, including a full list of the *querellas* filed against General Pinochet.

Additional sources were utilised: the archives (from 1979-2003) of the *Latin American Newsletter* published in London; the monthly *Boletin del Proyecto de Derechos Humanos* (1998-2003) published by the organisation *Memoria Viva* in London and available at www.memoriaviva.com; and back issues (1996-2003) of the journal the *Latin American Press*, published in Lima.

Additionally, I was able to gather further information on the progression of the cases by examining past editions of a number of Argentine and Chilean newspapers. For Argentina, *Pagina12* was chosen for its extensive coverage and analysis of the human rights issue. Through its website www.pagina12.com.ar it was possible to access all editions from 1998. The political stance of this traditionally left-wing paper was balanced by the more conservative *Clarín* and *La Nación*. Through their respective websites, www.clarin.com and www.lanacion.com.ar it was possible to access editions from 1997 onwards.

Of those operating in Chile, the conservative *La Tercera* provided substantial coverage and in-depth reports on the human rights issue, although access to past editions through it website www.tercera.cl was limited. The more left-wing *El*

Mostrador balanced the political equation and it provided detailed reports on the human rights issue at www.elmostrador.cl.

Ongoing case progression was monitored by the daily scrutiny (between January 2001 and June 2003) of the electronic editions of the newspapers *Pagina12* and *La Tercera*, and of the reports of the Spanish news agency *Europa Press* available at www.europapress.es. These sources were chosen for their almost daily coverage of the human rights issue, with *Europa Press* in particular providing 'up-to the minute' reports. This analysis was supported by a more general examination of international news sources: *El País, El Mundo,* CNN, and BBC World, again through their respective websites.[238]

The examination of the above sources permitted a detailed oversight of the progression of human rights cases, allowed me to record the extent of development since the 'cut-off' period identified, and remain up to date with events as they unfolded. The outcomes of this substantive analysis are synthesised in Table 3.1 within Chapter 3.

Establishing Criteria for Case Selection and Select a Sample

The three types of cases identified through the examination of the extent of case progression were categorised as either 'opened', 'reopened' or 'reinvigorated'. A case that 'opened' was opened for the first time by the filing of a new lawsuit. Although there may have been previous investigations into some of the individual crimes associated with the case, this would be the first time that an investigation had been made into the overall criminal 'episode'. Where a case 'reopened' there had been a previous investigation that had been suspended indefinitely or closed (either due to the application of an amnesty law or due to a lack of evidence). A 'reinvigorated' case was one that had remained open throughout the transition period (although may have closed temporarily) but had become stagnated for more than a two-year period, with no new indictments, prosecutions or arrests made. The case would be 'reinvigorated' through renewed case activity, defined as favourable court rulings that permitted case

[238] www.elpais.es; www.elmundo.com; www.cnn.com; www.bbc.co.uk.

progression. These included the rejection of an amnesty law; the transference of a case from military to civilian jurisdiction; indictments; prosecutions and arrests.

As the advance of any one particular case is insignificant when placed alongside the potential number of cases (given the scale of repression), it was important to select cases whose progression would have a significant impact on the development of human rights prosecutions in general. Therefore cases were chosen that challenged either 'political' or 'legal' impunity.

'Political impunity' in both countries was the result of the democratically elected governments having to share power *de facto* with the military. A challenge to this would be the progression of any case that would have previously led to military dissent, in other words a 'politically sensitive' case. As an example of this, I incorporated a number of cases that involved the prosecution of a large number of military officials (more than ten) and/or high-ranking military officers. The ranks chosen were the highest of the respective branches of the armed forces: a general for the army and an admiral for the navy. The air force was not included within the scope of the research due to the relatively low number of its officers accused.

'Legal impunity' resulted from the introduction of legal obstacles in both countries in the form of amnesty laws that inhibited case progression. A challenge to this therefore consists of judicial rulings that circumnavigate, reinterpret, or even revoke these legal obstacles. I thus sought to include cases that had advanced despite the associated crimes being (arguably) covered by a domestic amnesty law.

Examining each country's amnesty laws I determined that in Argentina crimes concerning the 'abduction and concealment of minors' and the 'appropriation, through extortion, of property' were the only crimes excluded.[239] In Chile all crimes committed after 10 March 1978 were excluded from amnesty.[240] To

[239] See Article 5 of *Ley* 23.492, 24 December 1986; and Article 2 of *Ley* 23.521, 8 June 1987.
[240] See Article 1 of *Decreto Ley* 2.191, 18 April 1978.

identify the cases covered by amnesty laws in Argentina I thus ascertained the precise nature of the crimes involved; for Chile I established the precise date of their commission.

The final consideration for case selection was the need to include a cross-selection of cases that involved differing numbers of victims. Clearly, if all selected cases concerned crimes committed against single individuals the reasons for case progression might be very different than if they included hundreds of victims.

The case variables were recorded and a selection was made that emphasised the importance of securing a representative, but politically significant sample of cases. The cases selected are presented in Table 3.1 in Chapter 3.

Recreating the Procedural History of the Cases

After the selection of the sample, I recreated and examined the procedural history of each case. Particular attention was paid to identifying the names of victims involved within proceedings; the identity of investigating judges; the date, content, and administrating court of legal decisions allowing the case to progress; the identity (including rank) of those indicted; the dates that these occurred; and (where possible) the use of specific court evidence. Through analysis, it was possible to discern the precise timing of, and reasons for, each case's advance. A summary of the procedural history for each case is provided in Chapter 3.

In addition to the sources already cited (particularly the reports published by the domestic human rights groups), this data was gathered using a number of legal sources. For cases in Argentina I examined judicial rulings from *Juzgados de Primera Instancia en lo Criminal y Correccional Federal de la Capital Federal* (Federal Courts of First Instance); the *Cámara Federal del Apelaciones* (Federal Appeals Chamber); the *Corte Suprema* (Supreme Court); and a number of *querellas* (lawsuits).[241] Documents were available through the official website of

[241] In Argentina, lawsuits are accepted and looked into by an investigating judge within a Court of First Instance (for all cases discussed in this study, these are the Federal Courts of First

the Argentine judiciary, www.pjn.gov.ar and the legal database LexisNexis www.lexisnexis.com. An additional number of key legal documents were available through the website of the international human rights organisation *Equipo Nizkor* www.derechos/nizkor/index which also provided links to a number of other non-official websites. Of these www.nuncamas.org was particularly useful.[242] Legal material for cases in Chile comprised a number of *querellas* and rulings by the *Corte de Apelaciones de Santiago* (Santiago Appeals Court) and the *Corte Suprema* (Supreme Court).[243] The majority of these were available through the websites of the domestic human rights groups, FASIC and the *Vicaría de Solidaridad* cited above; others were published by the *La Tercera* newspaper. Some were obtained through the FASIC archives in Santiago.

Period of Crucial Case Activity

The period of crucial case activity for each country was created by examining the date that arrests (the clearest sign of case progression) had been made in each individual case. For each case the first and last arrest was recorded and used to define a general time-frame of case activity. This information is presented in the tables below.

Table A.1 Dates of Arrests in Argentine Cases

Cases	Arrests Made
1:'Videla'	06/1998
2:'Vildoza'	11/1998
3:'Nicolaides'	12/1998-08/2000
4:'Poblete'	11/2000
5:'Gómez'	10/2001
6:'Scagliusi'	07/2002

Source: Constructed by the Author

Instance located in Buenos Aires). The case then passes to the Federal Appeals Chamber, before finally passing to the Supreme Court.

[242] Equipo Nizkor is part of the umbrella organisation *Derechos Humanos*.

[243] In Chile, the cases examined here (those under normal civilian jurisdiction) are looked into by an investigating judge of the Santiago Appeals Court. Once this investigation is complete, the case passes to the Supreme Court who can either confirm, reject, or make recommendations on the decisions of the lower court.

From the table we can see that the first arrests made in the Argentine cases studied were in Case 1:'Videla' in June 1998. The last arrests were made in July 2002 within Case 6:'Scagliusi'. These dates thus show the period of crucial case activity in the Argentine cases to be between June 1998-July 2002.

Table A:2: Dates of Arrests Within Chilean Cases

Cases	Arrests Made
1: 'Operation Albania	07/1998-06/2002
2: 'Jiménez and Alegría'	06/1999-04/2001
3: Caravan of Death'	06/1999-09/2000
4: 'Pisagua'	04/2000
5: 'Villa Grimaldi'	07/2001-10/2002
6: 'La Moneda'	01/2003-06/2003
7: 'Prats'	02/2003
8: 'Soria'	-

Source: Constructed by the Author

From the table we can see that the earliest arrests were made in July 1998 and the last in June 2003. This shows the period of crucial case activity to be between July 1998 and June 2003.

Stage 2. Identify the procedural development of transnational proceedings, cross-reference case details between domestic and transnational proceedings; preliminary analysis of the findings

For Argentina, transnational proceedings studied took place in France, Germany, Italy, Spain, Sweden, and the USA. For Chile, I examined proceedings in Belgium, France, Germany, Italy, The Netherlands, Spain, and Switzerland. In gathering procedural details of the cases, particular attention was paid to ascertaining the identity of victims and the accused; the crimes; the date and content of legal rulings (specifically regarding the domestic amnesty laws); and, finally, the date, target, and progress of indictment orders, prosecutions, and extradition requests.

Of the sources already cited, the website of Equipo Nizkor was extremely useful in providing information on many transnational cases and substantial legal documentation, particularly on the cases in Spain. Documents utilised from this

site include, which is much quoted in published works, include: lawsuits; indictment, prosecution and arrest orders; extradition requests; and judges' rulings over jurisdiction, amongst others. Additionally, the decisions of the British government and House of Lords concerning the detention of General Pinochet and several documents from the Italian *Corte di Assise di Roma* were also available and were utilised. The site also contained links to other human rights organisations involved with different transnational cases, notably *The Coalition Against Impunity* based in Germany, where a number of documents detailing transnational cases in Germany were available.

The reports and press releases of Amnesty International and Human Rights Watch cited earlier were also particularly useful, as were a number of publications by Redress (1999-2003). Redress, a British based human rights organisation, was involved with the Pinochet case in Britain and actively promotes human rights prosecutions both domestically and internationally.

The examination of these sources, in addition to those described earlier, permitted the recreation of the procedural history of all transnational proceedings concerning Argentina and Chile. Using the dates that the transnational cases 'opened' and progressed in terms of 'extradition/arrest requests', 'arrests', and 'trials', a period of plausible influence could be ascertained for each case. Taking the case concerning Argentina in Spain as an example: the case opened in 1996; extraditions were requested in 1997, 1999, 2001 and 2003; arrests were made in 1997 and 2000; and trial commenced in 2005. As such, it could be said that between the period 1996-2005, the Spanish case could have affected the progression of domestic cases in Argentina. The variables and dates of each case are presented in Table 4.1 and Table 4.3 in Chapter 4 for cases concerning Argentina and Chile respectively.

Process of Cross-Referencing

The associated domestic and transnational time periods were then cross-referenced to identify the transnational cases most likely to have caused an impact at the domestic level. For transnational proceedings to have caused the advances at the domestic level, it was vital that developments preceded those

within the domestic cases, and thus the period of crucial case activity. However, the timing between transnational and domestic advances could not be so far apart as to be considered unrelated. For example, a transnational case in which a trial *in absentia* occurred ten years prior to domestic advances could not be considered to have had an impact. If we compare the period of crucial case activity in Argentina (1998-2002), for example, with the period of plausible influence from the case in Spain (1996-2005) we can discern an overlap between proceedings. Additionally, as the case in Spain precedes those in Argentina, temporal order permits a claim of causality. Although the identification of chronological links between developments in both domestic and transnational proceedings did not necessarily indicate a causal relation, by isolating those proceedings most likely to have caused an impact, it allowed the scope for further investigation to be significantly narrowed, particularly concerning the plausible procedural impact.

The development of a legal argument at the transnational level that circumnavigated or reinterpreted amnesty laws, or other prohibiting legal obstacles, and its subsequent use at the domestic level, might be indicative of a causal relationship. This would be especially so if the transnational ruling was specifically cited within a domestic ruling in order to support an argument. Additionally, investigations at the transnational level might have led to the discovery of new evidence that could then be used to open or advance domestic cases. Evidence that facilitated the discovery of the location and identification of an abducted child, thereby permitting a domestic case to open, would be particularly relevant to cases in Argentina.

I thus cross-referenced the procedural details of the selected cases with those of their transnational counterparts to identify any overlap in investigative scope. As the examination of all legal case material, including the thousands of testimonies, was not possible due to constraints of feasibility and accessibility, the categories for cross-reference were limited to the names of the victims concerned, the nature of the crimes committed, and the use of legal arguments that circumnavigated or reinterpreted amnesty laws. Concerning the first of these, lists were made of all victims included within transnational cases. These were

then cross-referenced with the lists of victims included in the domestic case studies. This process identified a degree of overlap between several domestic and transnational cases. The results of this process are presented in Tables 4.2 and 4.4 in Chapter 4 and the names of the victims included in both domestic and transnational cases are listed in Appendix 4.

Similarly the nature of the crimes and particularly the criminal episodes investigated within transnational proceedings, such as the Caravan of Death or Operation Condor, were listed and cross-referenced with the nature of the crimes under investigation within the domestic cases studied. This allowed any overlap in investigational focus between domestic and transnational cases to be identified. The results of this process are also presented in tables 4:2 and 4:4 Chapter 4.

Finally, as a legal argument based in a country's domestic law (where the transnational case was held) would not facilitate the circumnavigation or reinterpretation of the amnesty laws in Argentina and Chile, it was important to identify which proceedings incorporated international law as a legal basis for prosecution. Within the transnational cases, I examined the legal basis on which jurisdiction was claimed and the arguments used to prosecute those accused and identified those which incorporated international law. The outcomes of this process are described in Chapter 4. The content of the legal arguments was then examined in more detail to identify precisely which arguments could have been later used in Argentina and Spain.

Stage 3. Design and conduct field research in Argentina and Chile.

A number of factors were taken into consideration when designing the interview schedule within field research. Accepting that the sample of interviewees would be limited, I focused on the most important objective of the field research, to understand how the specific domestic human rights cases had progressed within a previously unfavourable political environment and to assess the role of transnational justice within this process. As such, the most important individuals

to speak with were those closely involved with the domestic legal proceedings themselves.

Interviews were secured with the majority of the domestic human rights organisations targeted. For Argentina, this included CELS (Centre for Legal and Social Studies), SERPAJ (Service for Peace and Justice), the *Abuelas de la Plaza de Mayo* (Grandmothers of the disappeared), and the *Madres de la Plaza de Mayo* (Mothers of the disappeared). For Chile, interviews were arranged with the AFDD (Families of the Disappeared), AFEP (Families of Executed Prisoners), FASIC (Foundation of the Christian Church Social Aid), *Hijos* (Children of the Disappeared), CODEPU (Corporation for the Promotion and Defence of Human Rights), and *Memoria y Justicia* (Memory and Justice). Through these organisations, the majority of lawyers involved with the selected cases were contacted, in addition to a number of politicians and academics closely associated with human rights prosecutions; interviews were arranged accordingly.

Ethics and Risk

Prior to conducting the field research, I considered the ethical implications of the work and carried out a risk assessment. Of particular importance was assessing risk in the fieldwork site. At the time, Argentina presented a particular concern because of the severity of its economic and political crises, which had produced increased poverty and crime, and widespread popular protest. However, it was noted that the situation was much calmer than a year previously amid signs of a nascent economic recovery, and that local contacts had reported no undue risks or threats to researchers arising from the crisis. Although reactivated political activity was expected due to the presidential election in April, all reports indicated that these would pass off peacefully. Nevertheless, to mitigate further any possible risk, political demonstrations were avoided and daily contact was maintained with my Director of Studies.

The risks posed to both respondents and myself in conducting the research were also considered. As the targets for interviews were activists in human rights organisations, lawyers and politicians (rather than military officials) it was felt

that I would not be exposed to any inherent dangers from the respondents. Although previous tensions between human rights advocates and supporters of the military in Chile were considered, it was noted that human rights groups were now able to operate openly, without fear of violence or reaction. Concerning the risks posed to the respondents themselves, the need for sensitivity was noted considering that certain respondents would have been active during the political struggles and might have lost friends or relatives. However, it was felt that prior contact in order to establish the terms of the content of the interview would resolve any associated difficulties.

The final concern involved the confidentiality of the interview data. The nature, aims and objectives of the research were explained to all interviewees. I ensured that the respondents were fully aware of how the interview material would be used. All respondents consented to the interviews being recorded, and all agreed to speak 'on the record'; I thus refer to all interviewees by their real names throughout this thesis. This is in accordance with the use of the real names of all victims and the accused throughout the study. This follows accepted pratice within works concerning human rights prosecutions conducted by both human rights organisations and academics.

Interviews

Having arranged a series of interviews in Argentina and Chile and completed a full risk assessment, I conducted 23 interviews in Buenos Aires and Santiago between February and May 2003. The names and dates of those interviewed are presented below.

Argentina

Interviews conducted in 2003 in Buenos Aires, Argentina.

18 March, **Juan D. W**, representative of SERPAJ (human rights organisation).

20 March, **Carolina Varsky**, lawyer for the *Centro de Estudios Legales y Sociales* (CELS) involved in Case 4:'Poblete' and lawyer in Case 6:'Scagliusi'.

26 March, **Margarita Gropper**, member of *Las Madres de Plaza de Mayo* (human rights organisation)

22 April, **Sebastian Brett**, researcher for Human Rights Watch (human rights organisation.[244]

28 April, **Dr Alcira Rios**, lawyer for *Las Abuelas de la Plaza de Mayo* and active in Case 1:'Videla' and Case 2:'Vildoza'.

29 April, **Eduardo Freiler**, Public Prosecutor active in Case 3: 'Nicolaides'

30 April, **Alberto Pedroncini**, lawyer in Case 3: 'Nicolaides'

Chile

Interviews conducted in 2003 in Santiago, Chile.

8 April, **Victor Espinoza**, representative of CODEPU (human rights organisation)

8 April, **Adil Brkovic**, lawyer in Case 4:'Pisagua'.

8 April, **Jorge Mario Saavedra**, lawyer in Case 2:'Jiménez and Alegría'.

9 April, **Patricia Silva**, President of AFEP (human rights organisation).

9 April, **Yuri Gahona**, member of HIJOS (human rights organisation).

9 April, **Veronica Reyna**, Director of the Legal Department of FASIC (human rights organisation).

10 April, **Juan Subercaseaux**, lawyer in Case 3:'Caravan of Death'.

10 April, **Hiram Villagra**, lawyer in Case 3:'Caravan of Death'.

11 April, **Nelson Caucoto**, lawyer in Case 1:'Operation Albania', Case 6:'Moneda', Case 5:'Villa Grimaldi'.

14 April, **Hernan Quezada**, lawyer in Case 7:'Prats'.

16 April, **Alfonso Insunza**, lawyer in Case 8:'Soria' and Case 3: 'Caravan of Death'.

17 April, **Viviana Diaz**, president of AFDD (human rights organisation).

21 April, **Fanny Pollarolo**, ex deputy Socialist Party (PS).

22 April, **Elizabeth Lira**, Academic and Psychologist.

22 April, **Jorge Insunza**, official of the Communist Party (PC).

23 April, **Francisco Bravo-López**, lawyer for the *Programa de Derechos Humanos* and active in Case 8:'Soria'.

It must be noted that, although the primary focus of all the human rights organisations listed above was the human rights issue in their own country, all

[244] Interview conducted in Santiago, Chile.

have played an active role within transnational proceedings. As such, the respondents had knowledge of both sets of proceedings. Additionally, all of the lawyers interviewed were involved with numerous human rights cases. This enabled them to comment authoritatively on the overall progression of human rights cases as well as in the specific cases listed above.

The interviews themselves, conducted in both English and Spanish, entailed a mix of specific and general questions within a semi-structured framework. The majority of interviews lasted approximately one hour and, although similar in nature for both countries, differed according to whether the interviewee was a lawyer, and thus directly involved with one of the selected cases, or whether the respondent was from another background.

The non-lawyer interviews were initiated by discussing the relevant country's transitional period and how much progress towards justice had really occurred. In addition to enabling me to discover the interviewee's impressions of this period, the background introduction to the interview sought to relax the interviewee and allow me to gauge the respondent's particular area of expertise. Where the respondent was a representative of a human rights organisation this also provided an opportunity for them to describe the nature of their group's work and its role during the transitional period. I then moved on to discuss transnational proceedings and their effect on domestic prosecutions and the issue of human rights atrocities in general. The questions focused on the specific group, or actor's role within these proceedings. I then returned to discuss the situation and progression of domestic prosecutions, asking the interviewee questions related to possible changes within the judiciary, military and political society and the potential effect they may have had on the advancement of these cases. Throughout the interview, the questions allowed a certain amount of reflection on the topic. This allowed the respondent to end the interview with their own synopsis of the progression of cases and the present situation, discussing issues that had arisen from the interview. A typical structure used during interviews with Chilean non-lawyers follows:

Introduction

Transitional and post transitional justice 1990-1998

- 1978 Amnesty Law
- Judges and judiciary
- Military justice
- Policies of the *Concertación* and the right

The year 1998

- Attempted impeachment of Pinochet
- *Querellas* filed against Pinochet
- Pinochet steps down as Commander-in-Chief of the army
- Change in judicial system
- Pinochet arrested in Britain

Transnational Justice and case in Spain

- How much was organisation/interviewee involved?
- New evidence, legal arguments, military confessions, etc
- Pinochet's negotiated return to Chile

Chile after Pinochet's arrest

- What changed in Chile?
- Cases advancing
- *Mesa de Diálogo*
- Judges and judiciary
- Military
- Policies and attitudes within Political Society

Summary on advance of human rights cases

End of interview

The interviews with lawyers took a slightly different, more precise, form and were more orientated towards gathering data regarding specific case details. As I also wanted to confirm many of the case details that I had collated through numerous sources, I asked the lawyer to give an account of the case's history up to the present. As they recounted a detail of particular significance to the study, I would interject with specific questions formulated before hand, asking them to expand on particular details. An example might be asking the interviewee to expand on the details of a particular legal ruling. This enabled me to confirm and clarify the chronology of the material that I had already gathered whilst expanding on other case details particularly the status of the case at present. This

process was particularly important considering the research's focus on causation and the timing of specific events. I then discussed the impact of transnational justice with particular reference to the use of international law and whether evidence and testimonies from transnational proceedings had been shared with the legal teams conducting domestic investigations. Finally, I discussed whether changes within the judiciary, military and political society might have assisted the cases' progression, focusing on particular details according to the interviewee.

A sample of the questions used as a guide within an interview with a lawyer (in Argentina) is provided below:

Eduardo Freiler. Buenos Aires, 29 April 2003

Introduction: Including a description of the research project and myself.

Case Details

- From 1990 until 1997, there were only cases concerning the abduction of children open in the courts. These cases were investigated on an individual basis until 1997 when the Abuelas de la Plaza de Mayo filed a complaint with the courts concerning the systematic plan of child abduction. A case was open and Judge Bagnasco and yourself have investigated those alleged crimes. Firstly, does the case of systematic child abduction concern all the children and minors abducted during the military regime or only some of them, those abducted and taken to ESMA or other detention centres for example?

- How and why are the cases divided between Judges Bagnasco, Servini de Cubría, Marquevich. Why was there not a single case and were there disputes over jurisdiction?

- In 1998 and 1999, Judge Bagnasco processed and ordered the arrest of many military officials including Admiral Massera. Why was General Videla, as ex-chief of the army not prosecuted in the case concerning the systematic abduction of children (although I know that he was within the case under Judge Marquevich)?

- Who decided to widen the scope of the case to include the crimes of hiding the systematic plan of child abduction that led to the prosecution of Bignone, Nicolaides, Franco and Hughes?

Transnational Proceedings: Spain

- Did the case in Spain present new information concerning the abduction of children, perhaps through new testimonies, witnesses, the discovery of documents, Garzón's investigation into Operation Condor?

- Adolfo Scilingo testified before Judge Garzón about crimes committed at ESMA where many children passed through. Again, do you know if any new information was discovered and was it later used in cases in Argentina?

- Do you believe that the case in Spain gave more force to the use of international law in Argentina? For example, when the Cámara del Apelaciones approved the detention of

Videla, Massera, and others, and found that there were no statutory limitations for crimes against humanity.

- Also, I believe that Judge Bagnasco asked the US for documentation concerning the systematic plan of child abduction as part of Operation Condor. Was this information of use to the Argentine investigation?

Truth Trials

- Has the process of the right to know leading to truth trials in La Plata, Bahía Blanca, Córdoba, La Capital Federal and others, helped to advance the case you are involved with? Has there been new information discovered about the systematic plan of child abduction?

Military

- General Balza sent to the courts information about an order by General Nicolaides concerning the destruction of documents pertaining to the systematic plan of child abduction. Did this represent a change in the politics of the military, cooperating with investigations of human rights crimes? If yes, is there a difference now, with General Brinzoni as Commander-in-Chief of the army?

- Within the case, have the accused confessed or not, have other military officials accused them, and have they testified?

- In 1998, General Videla, Admiral Massera, General Mason and others were all arrested. Do you agree that to arrest these had been impossible in 1992 for example? What had changed in Argentina during these years?

Judiciary

- Do you believe that there has been a change in the courts and that now there is more determination from investigating and appeals judges to find a solution to the problem of impunity over the crimes of the dictatorship?
- Do you feel that the courts are independent from the government?
- Is this the same with the Supreme Court?
- What is your analysis of a possible change?

Political Society

- Have any of the presidents since 1990 had a different approach to the human rights issue?
- Has the progression of cases been easier since the departure of President Menem?

Case at Present

- Where is the case procedurally now?
- Are those accused still under house arrest?

Summary and end of interview

Stage 4. Analysis of the data, supplementary investigation into findings, assessment of role of transnational justice and domestic factors.

The recorded interview material was transferred to computer format where it could be repeatedly examined without the risk of incurring damage to the original recordings.[245] Following this a detailed contents structure for each interview was created, where the subject of conversation and time were noted. Each interview was then subdivided into a number of categories according to content. For example all interview sections concerning the reinterpretation of the Amnesty Law in Chile were grouped together within the category 'Reinterpretation of the Amnesty Law'. As another example all sections of the interviews regarding the use of case evidence from transnational proceedings were placed together within the category 'Evidence from Transnational Proceedings'. This process was facilitated by the semi-structured nature of the interviews and the thematically-based questions put to the respondents.

Although the precise categories used varied from interview to interview, they could be regrouped under broader thematic headings according to their content. As an example, for Chile the categories regarding the reinterpretation of an amnesty law, a change in investigating judge, particularly important legal rulings/decisions, and any other related events, would be placed under the thematic heading 'Position/Attitude within the Judiciary'. A list of the thematic headings used to codify the interviews for both Argentina and Chile is presented below:

- Specific Case Details
- Transitional Politics and general case progression
- General Case Progression after identified 'cut-off' point
- Transnational Justice
- Position/Attitude within the Military
- Position/Attitude within the Judiciary
- Policies/Position/Attitude of Political Society

[245] The interviews were originally recorded onto mini-disc format. They were later recorded onto a PC as a WAVE file and then converted into MP3 format.

The interview content was then analysed according to these headings. The specific choice of these reflected both the primary and secondary objectives of the research. The first section contained material on the specific case details and allowed answers to the specific questions regarding the possible procedural links between domestic and transnational proceedings that had arisen following the preliminary analysis to be addressed. As an example, it was determined whether a piece of evidence used at the transnational level had been previously available in the domestic country. This permitted the assessment of transnational justice's procedural impact. The second and third sections contained largely background information on the domestic political situation associated with the progression of human rights case during the period up to, and after the cut-off date identified earlier. The fourth section focused exclusively on the process of transnational justice and how it had impacted upon the progression of the domestic cases. The final three sections concerning the military, the judiciary and political society contained information related to institutional changes, developments, their causes and effects. The analysis of the interview content under these sections, and particularly their interaction, permitted conclusions to be drawn over how the domestic human rights cases had been allowed to progress and what role transnational justice had played within the overall process.

Supplementary Analysis

Further examination drew upon primary evidence in the form of official documentation, specifically legal reforms obtained from the Chilean Congressional Library; statistics on military budgets and expenditures available through the World Military Expenditures and Arms Transfers (WMeat) reports published by the US Department of State; as well as secondary material through the newspaper sources already listed and other academic texts. This supplementary examination enabled me to probe the findings of the field research and thus more fully answer the research question. As such, a final analysis of the data was made, and the relative role played by transnational justice and domestic factors in each country was assessed. The detailed analysis of Argentina and Chile is contained in Chapters 5 and 6 respectively.

Stage 5. Comparison of case studies, discussion of research findings

The examination of developments since the overseas fieldwork was conducted via the latest human rights reports published by the *Vicaría de Solidaridad* (2003-2004), Amnesty International (2003-2005), and Human Rights Watch (2003-2005). Of additional use were a number of electronic updates sent via subscribed email by Amnesty International, Human Rights Watch and *Equipo Nizkor*.

Appendix 2: Procedural Details of the Argentine cases

CASE1:'VIDELA'

Victims:
Mariana Zaffaroni Islas
Carlos Rodolfo D'Elía
The child known as María Sol Tetzlaff Eduartes
The child known as Pablo Hernán
The child known as Carolina Bianco Wehli

Indictments:
General Jorge Rafael Videla (ex-president) – July 1998

CASE 2: 'VILDOZA'

Victim:
Javier Penino Viñas
(although charges were for systematic operation)

Indictments:
Admiral Emilio Massera (ex-chief of the navy) – November 1998

CASE 3: 'NICOLAIDES'

Victims:
Over 300 abducted women and children

Indictments:
Admiral Emilio Massera (ex-chief of the navy)– December 1998
Rear Admiral José Suppich (ex-chief of ESMA) – 9 December 1998
Hector Antonio Febres – 17 December 1998
Ruben Franco – 28 December 1998
Jorge Eduardo Acosta – 29 December 1998
General (R) Cristino Nicolaides (ex-chief of the army) – 13 Janurary 1999
General (R) Reynaldo Benito Bignone (ex-president)– 21 January 1999
General (R) Guillermo Suárez Mason – 17 December 1999
General (R) Juan Bautista Sasiaiñ – 3 April 2000
General (R) Santiago Omar Riveros – August 2000

CASE 4: 'POBLETE

Victims:
José Poblete Roa
Gertrudis Hlazik
Claudia Victoria Poblete Roa

Indictments:
Julio Simón – 1 November 2000
Juan Antonio Del Cerro – 1 November 2000

CASE 5: 'GÓMEZ'

Victims:
Conrado Gómez

Indictments:

All 1 October 2001
Jorge Alfredo Radice
Juan Carlos Rolón
Jorge Eduardo Acosta
Francis Williams Whamond
Aldo Roberto Maver
Admiral (R) Emilio Eduardo Massera
Jorge Enrique Perren

CASE 6: 'SCAGLIUSI'

Victims:
Julio César Genoud
Verónica María Cabilla,
Jorge Oscar Benitez Rey
Ángel Servando Benitez
Lía Mariana Ercilia Guangiroli
Ángel Carvajal
Matilde Adela Rodríguez de Carvajal
Raúl Milberg
Ricardo Marcos Zucker
Ernesto Emilio Ferre Cardozo
Miriam Antonio Fuerichs
Horacio Domingo Campiglia
Mónica Susana Pinus de Binstock
Marta Elina Libenson
Ángel Horacio García Pérez.
Lorenzo Ismael Viñas (later excluded from the investigation)
Jorge Adur (later excluded from the investigation)
Carlos Guillermo Fassano
Lucila Adela Revora de Pedro
Eduardo Enrique de Pedro
Silvia Noemí Tolchisnky (survived)

Indictments:

July 2002
General (R) Leopoldo Fortunato Galtieri (ex-president) – died January 2003
General (R) Carlos Guillermo Suárez Mason,

Luciano Adolfo Jáuregui
Jorge Ezequiel Suárez Nelson
Juan Ramón Mabragaña
Antonio Herminio Simón
Pascual Oscar Guerrieri
Carlos Gustavo Fontana
Edgar Gustavo Gomar – released September 2002
Julián Marina
Juan Carlos Gualco
Waldo Carmen Roldan
Carlos Alberto Gómez Arenas
Nedo Otto Cardarelli
Carlos Alberto Roque Tepedino
Francisco Javier Molina
Hermes Oscar Rodríguez – released September 2002
José Ramón Pereiro
Arturo Enrique Pelejero
Santiago Manuel Hoya
Carlos Alberto Barreira
Rubén Alberto Graziano
Oscar Edgardo Rodríguez - released September 2002
Juan Carlos Avena
Raimundo Oscar Izzi – released September 2002
Pablo Armando Gimenez
Humberto Eduardo Farina
Juan Antonio del Cerro
Julio Héctor Simón
Miguel Ángel Junco
Sergio Raúl Nazario
Claudio Scagliusi (extradited from Spain December 2002) – released April 2003

Appendix 3: Procedural Details of the Chilean cases

CASE 1: 'OPERATION ALBANIA'

Victims:
Ignacio Valenzuela Pohrecky
Ricardo Acosta Castro
Juan Henríquez Araya
Wilson Henríquez Gallegos
Julio Guerra Olivares
Ricardo Silva Soto
José Valenzuela Levy
Elizabeth Escobar Mondaca
Patricio Quiroz Nilo
Manuel Valencia Calderón
Ester Cabrera Hinojosa
Ricardo Rivera Silva
José Carrasco
Felipe Rivera
Gastón Vidarrázaga
Abraham Muskatblit

Indictments/prosecutions:

27 July 1998
Lieu. Col. Krantz Johans Bauer Donoso
Capt. Luis Arturo Sanhueza Ros
Lieu. Col. Ivan Leopoldo Cifuentes Martinez - died November 2001.
Maj. Rodrigo Pérez Martinez
Lieu. Col. (*Carabineros*) Iván Raúl Belarmino Quiroz Ruiz

30 July 1998
Inspector Gonzalo Mass Del Valle
Inspector Rodrigo Guzmán Rojas

2 December 1998
Maj. Alvaro Corbalán Castilla
Lieu. Jorge Vargas Bories

June 1999
Sub-off. (*Carabineros*) Manuel Morales Acevedo
Brig. Gen. Humberto Leiva Gutiérrez - charges dropped in Jan 2000).
Brig. Marcos Spiro Derpich Miranda - charges dropped in Jan 2000).
Maj. Emilio Enrique Neira Donoso
Sub-off. René Armando Valdovinos Morales
Sub-off. Fernando Remigio Burgos Díaz
César Luis Acuña Morales
Inspector José Miguel Morales Morales

29 October 1999
Maj. Gen. Hugo Iván Salas Wenzel

November 1999
Capt. Hernan Miguel Carmona

October 2000
20) Lieu. Col. Erich Silva Reichart

April-June 2002
Sergio Mateluna Pino
Víctor Ruiz Godoy
Juan Jorquera Abarzúa
Luis Santibañez Aguilera
Mauricio Lobos
Carlos Pino Soto
Manuel Ramírez Montoya
Fernando Burgos Díaz
Heraldo Veloso Gallegos
Sub-Off. César Acuña Luengo

CASE 2: 'JIMÉNEZ AND ALEGRÍA'

ALEGRÍA CASE

Victim:
Juan Alegría Mundaca

Indictments/prosecutions:

July 2000
Maj. Carlos Herrera Jiménez – sentenced to life imprisonment
Maj. Álvaro Corbalán Castilla – sentenced to life imprisonment
Sub-off.(*carabineros*) Armando Cabrera Aguilar –sentenced to life imprisonment
Osvaldo Pincetti Gac -sentenced to 10 years

JIMÉNEZ CASE

Victim:
Tucapel Jiménez Alfaro

Indictments/prosecutions:

30 March 1999
Maj. Carlos Herrera Jiménez - sentenced to life imprisonment
Gen. Ramsés Arturo Álvares(Z) Scoglia -sentenced to 10 years reduced to 8 by appeals.
Brig. Víctor Pinto Pérez- sentenced to 8 years

Lieu-Col. Maximiliano Ferrer Lima- sentenced to 8 years
Capt. (Lieu-Col?) Raúl Descals(Z)I Sporke - indictment revoked June 2000.
Humberto Calderón Luna - prosecution rejected April 2001
Galvarino Ancavil Hernández - prosecution rejected April 2001.
Jorge Fernando Ramírez Romero - charges revoked June 2000.
Raúl Lillo Gutiérrez - charges revoked 2000.
Nelson Edison Hernández Franco - charges revoked June 2000.
Misael Galleguillos Vásquez - charges revoked June 2000.
Valerico Orrego Salas - charges revoked June 2000.
Maj. Arturo Silva Valdés (ex CNI and DINE agent) prosecution rejected April 2001.

June 1999-June 2000
Sub-off. (*Carabineros*) Luis Rolando Pino (Moreno) - prosecution rejected April 2001.
Maj. (*Carabineros*) Miguel Hernández Oyarzo - absolved.
Julio Olivares Silva - absolved.
Sgt. (*Carabineros*) Héctor Lira Aravena - charges revoked June 2000.
Gen. Humberto Gordon Rubio – died 2000
Brig. Roberto Schmied Zanzi - absolved
Sub-off. José Cáceres Castro - released without charge.
Sub-off. Humberto Olmedo Álvarez - released without charge.
Sub-off. Leonardo Quilodrán Burgos - released without charge.
Sub-off. Manuel Contreras Donaire – sentenced to 6 years raised to 8 by appeals
Sub-off. Miguel Letelier Verdugo –sentenced to 6 years raised to 8 by appeals
Gen. Hernán Ramírez Rurange –sentenced to 800 days
Maj. Juan Silva Magnere
Maj. (Capt.?) Juan Carlos Arraigada- sentenced to 3 years

November 2000
Gen. Fernando Torres Silva –sentenced to 800 days
Gen. (Humberto) Hernán Ramírez Hald –sentenced to 800 days

2001
Maj. Álvaro Corbalán Castilla – absolved
Gonzalez prosecution rejected April 2001.
Col. Enrique Ibarra Chamorro sentenced to 541 days absolved by appeals
Victor Galvez - prosecution rejected April 2001.
Jorge León Alessandrini sentenced to 3 years absolved by appeals

CASE 3: 'CARAVANA OF DEATH'

Victims:
Claudio Arturo Manuel Lavín Loyola
Miguel Enrique Muñoz Flores
Manuel Benito Plaza Arellano
Pablo Renán Vera Torres
Oscar Aedo Herrera
Carlos Alcayaga Varela

José Eduardo Araya González
Marcos Enrique Barrantes Alcayaga
Jorge Abel Contreras Godoy
Hipólito Cortés Alvarez
Oscar Armando Cortés Cortés
Victor Fernando Escobar Astudillo
Roberto Guzmán Santa Cruz
Jorge Mario Jordán Domic
Manuel Jachadur Marcarian Jamett
Jorge Osorio Zamora
Jorge Washington Peña Hen
Mario Alberto Ramírez Sepúlveda
Gabriel Gonzalo Vergara Muñoz
Winston Cabello Bravo
Fernando del Carmen Carvajal González
Agapito Carvajal González
Maguindo Antonio Castillo Andrade (still disappeared)
Manuel Cortazar Hernández
Alfonso Gamboa Farías
Ricardo Hugo García Posadas (disappeared)
Raúl del Carmen Guardia Olivares
Raúl Leopoldo Larravide López
Ricardo Mancilla Hess
Adolfo Mario Palleras Norambuena
Pedro Emilio Pérez Flores
Jaime Ivan Sierra Castillo
Benito de los Santos Tapia Tapia
Atilio Ernesto Ugarte Castillo
Leonelo Nestor Vincentti Cartagena
Luis Eduardo Alaniz Alvarez
Mario del Carmen Arqueros Silva
Dinator Segundo Avila Rocco
Nelson Guillermo Cuello Alvarez
Marcos Felipe de la Vega Rivera
Segundo Norton Flores Antivilo
José Roselindo García Berríos
Darío Armando Godoy Mancilla
Miguel Hernán Manríquez Díaz
Danilo Alberto Moreno Acevedo
Washington Rodamil Muñoz Donoso
Eugenio Ruiz-Tagle Orrego
Héctor Mario Silva Iriarte
Alexis Alberto Valenzuela Flores
Mario Arguellez Toro
Carlos Berger Guralnik
Haroldo Cabrera Abarzua
Jerónimo Carpauchay Choque
Bernardino Cayo Cayo
Carlos Alfredo Escobedo Cariz
Luis Alberto Gahona Ochoa

Daniel Garrido Muñoz
Luis Alberto Hernández Neira
Manuel Segundo Hidalgo Rivas
Rolando Jorge Hoyos Salazar
Domingo Mamani López
David Ernesto Miranda Luna
Luis Alfonso Moreno Villarroel
Hernán Elizardo Moreno Villarroel
Rosario Aguid Muñoz Castillo
Milton Alfredo Muñoz Muñoz
Victor Alfredo Ortega Cuevas
Rafael Enrique Pineda
Carlos Alfonso Pinero Lucero
Sergio Moises Ramirez Espinoza
Fernando Roberto Ramirez Sanchez
Alejandro Rodríguez Rodríguez
Roberto Segundo Rojas Alcayaga
José Gregorio Saavedra González
José Ruben Yueng Rojas

Indictments/prosecutions:

8 June 1999
Gen. Sergio Arellano Stark
Maj. Marcelo Moren Brito
Brig. Pedro Espinoza Bravo
Col. Sergio Arredondo González
Col. Patricio Díaz Araneda - revoked July 2001.

25 August 1999
Maj. Armando Fernández Larios (living in US)

20 March 2000
Daniel Rojas Hidalgo

September 2000
Gen. Augusto Pinochet Ugarte (suspended in 2001)

CASE 4:'PISAGUA'

Victims:
Juan Calderón Villalón
Marcelo Guzmán Fuentes
Luis Lizardi Lizardi
Nolberto Cañas Cañas (mentioned in the Mesa report)
Juan Jiménez Vidal (mentioned in the Mesa report)
Michel Nash Saéz (mentioned in the Mesa report)
Nicholás Chanez Chanez
Luis Manríquez Wilden

Manuel Sanhueza Mellado
Mario Morris Barrios

Indictments/prosecutions:
12 April 2000
Gen. Carlos Forestier Haensgen (ex vice commander in chief of the army)
Mario Sergio Acuña Riquelme (ex military prosecutor) - died June 2000.
Sub-off. Miguel Aguirre Álvarez

CASE 5:'VILLA GRIMALDI'

Victims:
Jaime Ignacio Ossa Galdámez
Roberto Merino Jorquera.
Sergio Requena Rueda
César Arturo Negrete Peña-complaints
Guillermo Beausire Alonso
Alan Bruce Catalán
Manuel Carreño Navarro
María Teresa Eltit Contreras
Jorge Fuentes Alarcón
María Isabel Joui Petersen
Ricardo Lagos Salinas
Carlos Lorca Tobar
Exequiel Ponce Vicencio
Claudio Silva Peralta
Claudio Thauby Pacheco.
Humberto Menanteau Aceituno
Marta Neira M
Jacqueline Drouilly Y.
Alfredo Rojas C.
Jaime Vásquez S.
Juan Molina M.
Alejandro Ávalos D.
Sonia Ríos P.
Elías Villar Q.
María Isabel Gutiérrez M.
Horacio Carabantes O.
Fabián Ibarra C.
Carlos Rioseco E.
Alfredo García V.
Abel Vilches F.
René Acuña R.
Carlos Carrasco M.
Hugo Ríos V.
Martín Elgueta P.
Agustín Martínez M.
Juan Mc Leod T.
María Julieta Ramírez G.
Luis Palomino R.

Miguel Ángel Sandoval Rodríguez

Indictments/prosecutions:

9 July 2001
Gen. Manuel Contreras Sepúlveda
Brig. Miguel Krassnoff Marchenko
Col. Marcelo Luis Morén Brito
Sub-off. Basclay Zapata Reyes
Osvaldo Romo Mena

June 2002 (Miguel Ángel Sandoval Case)
Gen. Manuel Contreras Sepúlveda - sentenced to 15 years and a day
Col. Fernando Laureani Maturana - sentenced to 5 years and a day
30 October 2002
Brig. Miguel Krassnoff Marchenko - sentenced to 10 years and a day
Col. Marcelo Morén Brito - sentenced to 15 years and a day
Lieu. Col. (*Carabineros*) Gerardo Godoy García - sentenced to 5 years and a day

CASE 6: 'LA MONEDA'

Victims:
Jaime Barrios Meza
Daniel Francisco Escobar Cruz
Enrique Lelio Huerta Corvalán
Claudio Jimeno Grendi
Georges Klein Pipper
Oscar Reinaldo Ríos
Juan José Montiglio Murúa
Julio Hernán Moreno Pulgar
Arsenio Poupin Oissel
Julio Fernando Tapia Martínez
Oscar Enrique Valladares Caroca
Juan Alejandro Vargas Contreras

Indictments/prosecutions:

January 2003
Gen. Luis Ramírez Pineda
Col. Servando Maureira Roa
Col. Pedro Octavio Espinoza Bravo
Maj. Jorge Iván Herrera López
Sub-off. Eliseo Antonio Cornejo Escobedo
Sub-off. Jorge Ismael Gamboa Alvarez
Sub-off. Teobaldo Segundo Mendoza Vicencio
Sub-off.Juan de la Cruz Riquelme Silva
Sub-off. Bernardo Eusebio Soto Segura

June 2003 (illegal exhumation)
Lieu. Col. Hernán Ricardo Canales Varas
Maj. Luis Antonio Fuenzalida Rojas
Sub-off. Eliseo Antonio Cornejo Escobedo
Sub-off. José Nelson Canario Santibáñez
Sub-off. Darío Ernesto Gutiérrez de la Torre

February 2004
Gen. Herman Brady

CASE 7: 'PRATS'

Victims:
General Carlos Prats
Sofia Cuthbert

Indictments/prosecutions:

February 2003
Brig. José Zara Holger
Gen. Raúl Iturriaga Neumann;
Gen. Manuel Contreras Sepúlveda
Col. Pedro Octavio Espinoza Bravo
Jorge Iturriaga Neumann

September 2003
Mariana Callejas
Col. Chistoph Georg Paul Willeke Floel

CASE 8: 'SORIA'

Victim:
Carmelo Soria

Appendix 4: Victims Included in Domestic and Transnational Investigations

ARGENTINA

Italian Proceedings:
Maria Rosa Tolosa Reggiardo – included in Case 3:'Nicolaides'
Susanna Pegoraro – included in Case 3:'Nicolaides'
Giovanni Pegoraro– included in Case 3:'Nicolaides'
Daughter of Susanna Pegoraro – included in Case 3:'Nicolaides'
Laura Estela Carlotto - included in Case 3:'Nicolaides'
Guido Carlotto (Jr.) - included in Case 3:'Nicolaides'
Lorenzo Viñas – included in Case 6:'Scagliusi'

Spanish Proceedings:
Cecilia Marina Viñas Penino - included in Case 2:'Vildoza'
Javier Viñas Penino – included in Case 2:'Vildoza'
Patricia Julia Roisinblit – included in Case 3:'Nicolaides'
Simon Antonio Riquelo – included in Case 3:'Nicolaides'
José Liborio Poblete Roa (Chilean Case in Spain) – included in Case 4:'Poblete'
Conrado Higinio Gómez – included in Case 5:'Gómez'

CHILE

French Proceedings:
Georges Klein Pipper – included in Case 6:'La Moneda'

Spanish Proceedings:
Michelle Peña Herros- included in Case 8:'Villa Grimaldi'
Antonio Elizondo Ormacetea- included in Case 8:'Villa Grimaldi'
Carmelo Soria Espinosa – included in Case 8:'Soria'

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