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# Human Rights Trials in Chile during and after the ‘Pinochet Years’

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## Abstract

This article reflects on the recent Chilean experience of accountability actions, particularly the attempted prosecution of perpetrators of past human rights violations. While acknowledging the undoubtedly substantial impulse provided by the dramatic October 1998 UK arrest of former dictator Augusto Pinochet, it focuses on domestic actors and drivers in a post-1998 revival of such attempts. The article examines the extent and limitations of recent change in the area of prosecutions in Chile, noting that these have been undertaken at the insistence of private actors rather than the state. It also notes that the self-amnesty law of 1978 is still textually intact despite advances in restricting its application with regards to certain categories of internationally proscribed crimes. Finally, the article examines some explanatory factors for both recent advances and remaining blockages in the Chilean human rights accountability scenario.

## Introduction

Even a cursory examination of the ‘memory landscape’ of present-day Chile shows that the country is experiencing a reemergence of contestation over human rights violations associated with the 1973–1990 military dictatorship. In the past decade, campaigns to reclaim and rehabilitate former clandestine detention centres have sprung up in various parts of the capital, Santiago. Memorials to those killed or disappeared have been inaugurated around the country. Groups such as *La Funa* have taken outstanding claims to the streets, carrying out ‘popular justice’ actions that involve confronting former torturers in their homes or workplaces. Former dictator Augusto Pinochet’s December 2006 funeral provoked a series of street demonstrations, while 2008 and 2009 commemorations of the coup anniversary were perhaps the most varied ever in terms of the range of sites and forms adopted to denounce the regime’s lasting legacies. One notable feature was widespread and explicit references to justice demands.<sup>1</sup>

This renewed attention to justice on the part of relatives’ groups, human rights organizations and some political groupings on the left has gone hand in hand with

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<sup>1</sup> Slogans spray painted on 11 September 2008 and 2009 on the walls of the national stadium in Santiago, a former torture centre and the focus of an annual candlelight vigil for victims, read ‘Punishment for the murderers’ and ‘No forgiveness, no forgetting.’ Speeches and artistic interventions at many commemoration sites exhorted those present to press for renewed efforts in legal cases going through the courts.

a demonstrable reinvigoration of formal justice efforts after years of apparent stasis. Thus, as of August 2009, 554 former regime agents were under formal investigation for human rights crimes committed between 1973 and 1990. A further 276 had already been sentenced, 54 of them to definitive custodial sentences.<sup>2</sup>

This article analyses the extent to which the current wave of judicialization represents a significant evolution in formal human rights accountability in Chile since 1998. First, it describes the situation of accountability during and immediately after the dictatorship. It argues that the post-1998 period represents a qualitatively as well as a quantitatively distinct phase. The triggers and limits of recent change are then discussed, and accountability change is situated in its broader national context. The final section attempts to draw conclusions that may be suggestive for future comparative work. It should be noted that the article's focus is primarily on recent developments in the domestic domain. The undoubtedly significant interaction between these and concurrent regional and international changes has been examined by other authors, and by this author in previous and forthcoming work.<sup>3</sup>

## Justice during the Chilean Dictatorship (1973–1990)

In dictatorship-era Chile, as in neighbouring Argentina and Uruguay, the formal justice system was infertile ground for individuals seeking protection or redress for crimes of repression. Chilean courts in the 1970s and 1980s were unable, or at least unwilling, to defend the rights of thousands of citizens executed, tortured and/or 'disappeared' by state agents.<sup>4</sup> After an initial purge, most Chilean judges proved to be highly reliable regime collaborators.<sup>5</sup> Habeas corpus writs were rejected in their thousands, with rote denials by security forces taken at face value. Crimes involving military or police activity were turned over to the military justice system, where investigations were abandoned. In early 1978, a self-amnesty law gave an official stamp to this dereliction of judicial duty.<sup>6</sup> Cases were routinely closed or suspended by the invocation of the new decree.

<sup>2</sup> Statistics supplied by the Human Rights Programme of the Chilean Ministry of the Interior in August 2009 to the Human Rights Observatory of the Universidad Diego Portales, Chile. Private correspondence, on file with author.

<sup>3</sup> For these dimensions, see, Cath Collins, 'Grounding Global Justice: International Networks and Domestic Human Rights Accountability in Chile and El Salvador,' *Journal of Latin American Studies* 38(4) (2006): 711–738; Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (University Park, PA: Pennsylvania State University Press, forthcoming); Sebastian Brett, 'The Pinochet Effect' (report of a conference held at Universidad Diego Portales, Chile, 8–10 October 2008); Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia, PA: University of Pennsylvania Press, 2005); David Pion-Berlin, 'The Pinochet Case and Human Rights Progress in Chile: Was Europe a Catalyst, Cause or Inconsequential?' *Journal of Latin American Studies* 36(3) (2004): 479–505.

<sup>4</sup> See, *inter alia*, Chile's first official truth commission report, *Report of the Chilean National Commission on Truth and Reconciliation* (Notre Dame, IN: University of Notre Dame Press, 1993).

<sup>5</sup> See, Mateo Gallardo Silva, *Intima complacencia: Los juristas en Chile y el golpe militar de 1973: Antecedentes y testimonios* (Santiago: El Periodista/Frasis, 2003).

<sup>6</sup> Decree Law 2.191/1978.

Given this unpropitious setting, it may seem counterintuitive that the courts were used at all as a site for attempted human rights defence, but post-1973 Chile saw the rise of a rapidly organized civil society human rights response with a distinctively legal character. The readiness at least to attempt to access the justice system was partly rooted in habit, as the civil law system prevalent in much of Latin America theoretically empowers private individuals, particularly victims of crime, to trigger investigations by lodging complaints directly with a judge. Although motives for taking legal action in this period were varied, they generally did not include any genuine belief in the likelihood of punishment of perpetrators. Dictatorship-era legal strategies are instead best understood as an effort to protect individual victims and to raise the domestic and international costs for the regime of prolonging its terror tactics.

For example, lawyers believed that a writ of habeas corpus, while unlikely to lead to the immediate release of a detainee, might reduce the chances that the individual concerned would never reappear. In the immediate aftermath of the coup, defence lawyers in summary 'war council' trials tried to avoid death sentences and/or have them commuted to enforced exile. Lawyers submitted reports of 'presumed misfortune' directly to investigating magistrates<sup>7</sup> on behalf of victims of suspected disappearance and extrajudicial execution.<sup>8</sup> Legal action was also used to generate national and international attention, as court activity could be reported, whereas direct allegations about clandestine police activity would fall foul of press censorship. The stream of official paperwork generated by habeas corpus writs, even when these were rejected, also served as the basis for meticulous reporting of the Chilean situation to regional and international bodies such as the UN.

The emerging human rights community was coordinated by the Catholic Church under the umbrella of the specially founded Vicariate of Solidarity, *Vicaría*.<sup>9</sup> The *Vicaría's* legal department took action over a high proportion of extrajudicial executions and suspected disappearances, giving rise to an unparalleled contemporaneous archive documenting state terror. It also had some notion of 'storing up' evidence for a future in which justice would become possible or, at least, history could be rewritten. Finally, although legal action was certainly not cost-free in Chile, the relatively protected space provided by Church sponsorship encouraged the emergence of other organizations.<sup>10</sup> As the dictatorship drew to a close at the

<sup>7</sup> The direct access of relatives' and victims' representatives to investigating magistrates has been a key feature in the recent revival of accountability efforts in Chile, Argentina and elsewhere. Where gatekeepers exist, in the form of public prosecution services with discretion to recommend or discontinue criminal charges, progress seems to be more difficult (see, Collins, *supra* n 3, forthcoming, on the example of El Salvador). Although the Chilean judicial system is in the process of transition to a system led by public prosecutors, past human rights crimes will continue to be dealt with under the old system.

<sup>8</sup> Relatives of absent victims, often desperate to leave no stone unturned, were generally more ready to lodge legal complaints than were survivors, who are vulnerable to revictimization.

<sup>9</sup> See, Pamela Lowden, *Moral Opposition to Authoritarian Rule in Chile, 1973–90* (Basingstoke, UK: Macmillan, 1996).

<sup>10</sup> Certainly when compared with the dangers associated with similar activities in settings such as El Salvador. See, Margaret Popkin, *Peace Without Justice: Obstacles to Building the Rule of Law in El*

end of the 1980s, Chile had a vocal human rights community clustered around three or four main organizations.<sup>11</sup> All offered some kind of legal services, and lawyers attached to each had accumulated substantial experience – albeit little immediately identifiable success – in the judicial framing of human rights-related demands. Hundreds of open, or at least formally unresolved, case files existed somewhere within the judicial system.<sup>12</sup> Most were virtually moribund, however, as the regime had made strenuous efforts in its last years to transfer human rights cases to the military justice system for suspension or closure.<sup>13</sup> Perhaps only 100 or so cases still showed some activity, shared among a dozen lawyers known for their longstanding involvement. This caste of human rights lawyers proved indispensable as institutional case sponsorship became increasingly scarce.

## Accountability in the Long Chilean Transition (1990–1998)

Chile's return to formal democracy in 1990 ought to have opened up a more benign accountability panorama. Human rights had, after all, become the touchstone of international and national opposition to the Pinochet regime.<sup>14</sup> The multiparty, centre-left Coalition of Parties for Democracy (*Concertación de Partidos por la Democracia*, referred to as *Concertación*) that was about to take office contained many former exiles, and incoming President Patricio Aylwin's manifesto explicitly promised a repeal of the amnesty law that constituted the single biggest legal roadblock to accountability.<sup>15</sup> Democracy could therefore be expected to bring about an end to foot-dragging and obstruction, while many of the practical requisites – witness statements and documentary proof – already existed. Some were even lodged within the judicial system. Thanks to the Herculean labour of the *Vicaría*, the constant efforts of lawyers to keep cases active had often compensated for the deficiencies of investigative magistrates. Case files from the 1970s or 1980s

*Salvador* (University Park, PA: Pennsylvania State University Press, 2000); Cath Collins, 'State Terror and the Law: The (Re)judicialization of Human Rights Accountability in Chile and El Salvador,' *Latin American Perspectives* 35(5) (2008): 20–37.

<sup>11</sup> The *Vicaría*, *Corporación de Promoción y Defensa de los Derechos del Pueblo* (CODEPU), *Fundación de Ayuda Social de las Iglesias Cristianas* (FASIC) and *Comisión Chilena de Derechos Humanos*. See, Lowden, *supra* n 9; Mario Garcés and Nancy Nicholls, *Para una historia de los DDHH en Chile: Historia institucional de la Fundación de Ayuda Social de las Iglesias Cristianas* (FASIC), 1975–1991 (Santiago: FASIC/LOM, 2005); Elizabeth Lira and Brian Loveman, *Las ardientes cenizas del olvido: Via Chilena de reconciliación política, 1932–1994* (Santiago: LOM, 2000).

<sup>12</sup> In this period, judges could open investigations based on hearing of an incident (via press reports, etc.), notification by the police or a complaint from a direct victim or relative. The majority of human rights violation cases were of the third type. Some cases were started because of police-initiated investigations; however, these tended to be Kafkaesque affairs where victims or potential witnesses were accused of terrorist crimes.

<sup>13</sup> Fortunately for future accountability prospects, most cases were suspended rather than definitively closed – a tactic designed to give military courts a claim over any future legal actions concerning the same incidents.

<sup>14</sup> See, Mark Ensalaco, *Chile under Pinochet: Recovering the Truth* (Philadelphia, PA: University of Pennsylvania Press, 2000).

<sup>15</sup> *Concertación* campaign manifesto of 1989, entitled 'Programa de Patricio Aylwin,' on file with author.

characteristically bulge with reams of lawyers' submissions amounting to painstaking private detective work. Witnesses and even suspects are suggested and possible avenues of questioning spelt out.<sup>16</sup> Most relatives and lawyers assumed that regime change would lead to the speedy resolution of these cases via the apprehension and punishment of known perpetrators.<sup>17</sup>

These improved expectations also generated differences of opinion amongst lawyers and relatives. While some wanted to see perpetrators made to pay for their individual sins, others wondered whether systemic criminality and structural complicity could really be best addressed through the medium of criminal justice. While some relatives were set on punishment, others were equally adamant about the need to know the fate and/or final resting place of a loved one.<sup>18</sup> Pressing practical dilemmas about a missing person's marital relationship, goods and estate also had to be resolved. What was needed from the state, and from the justice system, became a question with many possible answers. The relative priority assigned to changing official behaviour, establishing truths or attempting to obtain official validation of long-denied facts through litigation was different in each particular case.

The limits of what was really on offer in the transition soon became apparent. On the 'demand' side, the *Vicaría*, which had carried out, sheltered or bankrolled most legal work relating to human rights in Chile, decided to close its doors. The official logic was that this had always been an exceptional ecclesial response to exceptional circumstances. As civil society was now free to organize openly, it was thought this role should become redundant. The practical effects were devastating to the existing accountability enterprise. Lawyers previously employed by the *Vicaría* had to earn a living elsewhere. The *Vicaría's* open caseload was divided between CODEPU (Corporation for the Promotion and Defence of the People's Rights) and FASIC (Christian Churches' Social Assistance Foundation), two historic human rights organizations that continued their operations. International financial support for Chilean human rights causes began to diminish. Exiles who had staffed or sustained overseas solidarity committees began to trickle back into the country. President Aylwin appealed to outside donors to reroute assistance through official channels, further reducing direct resource flows to nongovernmental organizations.

On the 'supply' side, new authorities, whatever their personal preferences, soon came up against the hard edges of what was actually possible in Chile's extremely

<sup>16</sup> One file seen by this author that graphically illustrates this tendency is the ongoing investigation into the disappearance of Pedro Poblete Córdoba, missing since the early 1970s. The file consists of thousands of painstaking submissions by lawyer Sergio Concha, stretching over decades of personal involvement with the case, interspersed with occasional terse one- or two-line orders from the judge of the day.

<sup>17</sup> Personal interview, Adil Brkovic, legal director of CODEPU during the transition, Santiago, Chile, 9 April 2003.

<sup>18</sup> The traditional demand of the movement of relatives of the disappeared was and remains '*Aparición con vida*' – restitution, alive, of the missing. The sometimes uneasy coexistence of this demand with the equally emblematic '*Donde están?*' (Where are they?) – usually understood to refer to physical remains – and the gradual eclipse of the former by the latter are topics worthy of much more sustained investigation and treatment than currently exists.

controlled transitional setting. The authoritarian regime did not fall from power or from grace, unlike its Argentine counterpart earlier in the decade. The outgoing Chilean dictatorship had a substantial portion of the electorate still behind it,<sup>19</sup> and enjoyed a widespread, albeit possibly undeserved, reputation for sound economic management.<sup>20</sup> Incoming authorities were hamstrung by the inherited 1980 constitution and by 17 years of authoritarian practice in public life.<sup>21</sup> Concessions negotiated with the outgoing dictatorship in 1989 and 1990 became known, with good reason, as *leyes de amarre*, mooring or binding laws. A series of measures enshrined outgoing authoritarian preferences in a range of areas. Higher court appointments would be left untouched for a substantial period. Pinochet was to continue as commander-in-chief of the army until 1998 and, it was widely rumoured, specific guarantees had been sought and given that neither he nor anyone from his immediate personal circle would be touched by any sort of criminal investigation.<sup>22</sup> Further rumours about the removal or reburial of human remains, plus Pinochet's own pronouncements – including the infamous, 'The day they touch any of my men, the rule of law is over' – added up to a grim panorama for pro-accountability actors.<sup>23</sup>

It was therefore perhaps only a limited surprise when Aylwin's campaign promise to repeal the 1978 amnesty law vanished from his programme. Next, fraud investigations involving one of Pinochet's sons produced military unrest amounting to outright threats of authoritarian reversal.<sup>24</sup> This bleak scenario perhaps explains why the Aylwin presidency became identified with truth and reparation, rather than justice, initiatives. The National Truth and Reconciliation Commission (*Comisión Nacional de Verdad y Reconciliación*), known as the Rettig Commission, was set up to investigate cases of disappearance or fatal political violence between 1973 and 1989. The Commission certainly offered cold comfort to regime apologists, as it documented 2,279 cases of execution or disappearance and found that state agents were responsible in the vast majority of cases.<sup>25</sup> The Commission was not,

<sup>19</sup> Pinochet obtained 43% of the vote, against the *Concertación's* 54.7%, in the 1988 plebiscite that paved the way for democratic elections.

<sup>20</sup> See, for example, Alan Angell, 'The Pinochet Regime: An Accounting,' openDemocracy, 12 December 2006, <http://www.opendemocracy.net/democracy-protest/pinochet%20regime.4174.jsp>. Carlos Huneeus, however, draws a more positive long-term balance sheet in *El régimen de Pinochet* (Santiago: Sudamericana, 2005).

<sup>21</sup> The constitution was written by the former regime and enshrined a model of 'protected' – meaning highly restricted – democracy. See, Huneeus, *supra* n 20; Alan Angell, *Democracy after Pinochet* (London: Institute for the Study of the Americas, 2007).

<sup>22</sup> Personal interview, Enrique Correa, former aide to President Aylwin (1990–1994) who led the liaison with the armed forces during transition, Santiago, Chile, 22 January 2003. See also, Ascanio Cavallo, *La historia oculta de la transición: Chile 1990–1998* (Santiago: Grijalbo, 1998).

<sup>23</sup> Although the incoming authorities did achieve one concession that would later prove useful for accountability, Article 5 of the constitution was modified to recognize the validity of human rights protections contained in international treaties to which Chile had subscribed. Huneeus, *supra* n 20.

<sup>24</sup> Troops in full battle dress were mobilized in the capital's streets in an uneasy echo of the 1973 coup.

<sup>25</sup> This number later rose to 3,195. This remains the officially recognized victim total for Chile, although errors discovered in 2008 and 2009 should bring the figure down to 3,186. For the uncorrected original figures, see, National Corporation for Reparation and Reconciliation, *Informe sobre calificación de víctimas de violaciones de derechos humanos y de la violencia política* (1996).

however, allowed to name perpetrators. Aylwin did transmit Commission findings to judicial authorities, requesting that the 'proper measures' be taken and the prevailing interpretation of amnesty narrowed,<sup>26</sup> but his pleas were largely unheeded. Rulings on amnesty in the period surrounding the Rettig Commission report's release in 1991, while erratic, tended if anything to harden the maximalist interpretive practice.<sup>27</sup>

Although some cases were reopened and a little progress was made, amnesty was usually invoked. Where it was not, delay and evident official disinterest did the same job, and the pretransition transfer of cases to military jurisdiction was not reversed. Reparation initiatives were launched under the aegis of a new agency set up to classify additional cases and locate the remaining disappeared,<sup>28</sup> the National Corporation for Reparation and Reconciliation (*Corporación Nacional de Reparación y Reconciliación*). The legal mandate of this agency showed that it was not, however, designed as an accountability conduit: legal action could be taken only for the purposes of recovering remains, and it was not empowered to bring or to sponsor legal complaints against perpetrators.<sup>29</sup>

The accountability scenario continued to consist of a reduced<sup>30</sup> and scattered<sup>31</sup> case universe, overseen by a handful of committed but poorly resourced human rights lawyers. One senior lawyer feels that opportunities were missed:

Just after Rettig . . . was when we should have gone at them hard, when people were still reeling from the impact . . . That would have been the time to make allegations against

<sup>26</sup> The 1978 amnesty, until this point, had been taken to permit the immediate suspension of investigations if it seemed likely that military or other state agents were involved. The new doctrine, rejected at this time but which would finally take root at the end of the 1990s, held that amnesty had to be applied to named individuals rather than whole episodes. In other words, an incident first needed to be investigated to the point of determining what crimes had been committed and by whom.

<sup>27</sup> See, Lisa Hilbink, 'An Exception to Chilean Exceptionalism? The Historical Role of Chile's Judiciary,' in *What Justice? Whose Justice?: Fighting for Fairness in Latin America*, ed. Susan E. Eckstein and Timothy P. Wickham-Crowley (Berkeley, CA: University of California, 2003). See also, Jorge Correa Sutil, "'No Victorious Army Has Ever Been Prosecuted": The Unsettled Story of Transitional Justice in Chile,' in *Transitional Justice and the Rule of Law in New Democracies*, ed. A. James McAdams (Notre Dame, IN: University of Notre Dame Press, 1997).

<sup>28</sup> See, Elizabeth Lira, 'Legado de las violaciones de derechos humanos: Políticas de verdad, justicia, reparación y memoria en Chile, 1990–2007,' in *La 'nueva izquierda' en América Latina: Derechos humanos, participación política, y sociedad civil*, ed. Cynthia J. Arnson, Ariel C. Armony, Catalina Smulovitz, Gastón Chillier and Enrique Peruzzotti with Giselle Cohen (Washington, DC: Woodrow Wilson International Center for Scholars/Universidad Torcuato di Tella/CELS, 2009).

<sup>29</sup> Moreover, the mandate was scrupulously respected by the agency's first head, former *Vicaría* legal director Alejandro González. The new agency existed until December 1996, when it was renamed the *Programa de Continuación de la Ley 19.123 del Ministerio del Interior*. Since 2003, the institution is usually referred to by the more recognizable name, *Programa de Derechos Humanos* (Human Rights Programme), or simply *Programa*. Although the restrictions regarding independent legal action theoretically have not changed, restructuring after González's retirement has given the *Programa* a much more active role in recent years.

<sup>30</sup> Cases only existed for the crimes of fatal violence or disappearance, and did not cover all the possible instances of either.

<sup>31</sup> Existing cases generally originated from a complaint brought at the time by relatives. If it was not known where alleged crimes had taken place, the complaint was usually registered in the victim's home jurisdiction. The effect was to obscure the connections between clandestine operations involving multiple victims. A decline in formal coordination between lawyers with the end of the *Vicaría* meant that lawyers, like judges, were often unable to recognize links between related cases.

[Pinochet] directly; I don't know why we waited so long. Everyone had just bought into the notion that something like that was unthinkable.<sup>32</sup>

While it may be true that creative strategizing could have achieved more, the signs of the times were not favourable. The first direct challenge to the amnesty law after transition, which alleged the law's unconstitutionality, produced, if anything, a hardening of prevailing higher court doctrine on the issue.<sup>33</sup> Most lawyers felt that pushing for more would merely drive the courts to hand the dilemma over to Congress, where right-wing representatives had effective veto power and anti-amnesty legislation had no chance of prospering.<sup>34</sup>

Movement on accountability was therefore muted and inconsistent, coming about through chance combinations of actors and circumstance. Predictably, the first advances occurred in cases not covered by the amnesty law, either because they had been committed after the 1978 enactment date or through specific exemption. The former was the basis for the 1994 sentencing of 15 police officers.<sup>35</sup> The latter was the basis for the major set-piece victory for justice claims in this period: the conviction of former secret police chief Manuel Contreras and his second-in-command. In 1993, they were given jail sentences of seven and six years, respectively, for crimes related to the 1976 assassination of ex-Chilean Chancellor Orlando Letelier and an aide in Washington, DC. The trial was televised and its public impact substantial, as testimony revealed how the regime had indulged in espionage and forgery in order to pursue and eliminate its ideological enemies across borders.

Even here, though, justice was somewhat muted and its possible multiplier effects carefully controlled. First, the Letelier assassination was an operation of the Directorate of National Intelligence (*Dirección Nacional de Inteligencia*, or DINA), which operated only for a relatively short period early in the regime (1974–1978).<sup>36</sup> Indeed, the DINA's dissolution was in large measure a damage limitation exercise, designed to allow the regime to distance itself from supposedly 'rogue' elements after the Letelier operation.<sup>37</sup> Second, the verdict exposed the precariousness of civilian authority over the armed forces. Sentences were not

<sup>32</sup> Personal interview, Adil Brkovic, Santiago, Chile, 9 April 2003.

<sup>33</sup> In an August 1990 ruling, amnesty was effectively declared not only legitimate but of 'compulsory application.' Universidad Diego Portales, *Informe anual sobre derechos humanos en Chile* (2003), 141.

<sup>34</sup> This is due to the convoluted 'binominal' electoral system, designed in 1980. The Senate also contained 'designated' (unelected) senators, all of them senior former regime figures.

<sup>35</sup> The agents were convicted for their part in the notorious so-called *degollados* murders of the mid-1980s. Interservice rivalry played a large part in the reason this particular case was eventually resolved, with the help of informants, when others were not. The verdict led President Frei to request the resignation of the police chief, General Rodolfo Stange. Stange nonetheless stayed on for another 18 months, adding to the prevailing climate of tension over human rights legacy questions.

<sup>36</sup> The DINA was a secret police force founded in late 1973 by Manuel Contreras. Its legal status was ambiguous (it was created by secret decree), and its existence was sometimes denied in official responses to judicial enquiries about disappeared individuals.

<sup>37</sup> The DINA's temerity in carrying out unlicensed operations of this kind on US soil eventually drew strong protests even from sympathizers within the US administration. At their insistence, the case was specifically exempted from the reach of the 1978 amnesty law drawn up as part of the 'clean-up' operation. See, Taylor Branch and Eugene M. Propper, *Labyrinth* (New York: Viking Press, 1982).

confirmed until 1995, by which time *Concertación* President Eduardo Frei Ruiz-Tagle had replaced Aylwin. Frei was forced to go head to head with new military authorities, who refused to have the pair sent to anything other than a specially built military prison staffed by their peers. The army spirited Contreras away to a military medical facility, refusing to hand him over until all had been arranged to their liking.

Thus, although having Contreras finally behind bars was a considerable achievement, the costs imposed on civilian politicians were substantial. Successive executives seemed persuaded that the 'human rights question,' at least in its judicial aspect, was difficult terrain best avoided. Punishment for perpetrators had in any case quickly become a minority demand, or at least not a high public priority.<sup>38</sup> As Alex Wilde describes, the 'memory issue' in Chile's transition accordingly became a secondary concern, managed reactively whenever unexpected 'irruptions' thrust it periodically back to the surface of public life.<sup>39</sup> Very few people, it appeared, cared enough to enter the fray against implacable military and right-wing opposition. Those who did still care – mainly relatives and their lawyers – scored the occasional small victory but did not make substantial inroads.

## Post-Transitional Justice? 1998 to the present

The year 1998 ushered in a substantially new phase of justice seeking for past human rights crimes in Chile. First, accountability efforts began to affect high military ranks, including Pinochet himself. Previous efforts had only reached triggermen or the occasional individual whom the regular armed forces could disown. Second, the post-1998 period saw a gradual, although still incomplete, dismantling of the application of the 1978 self-amnesty to certain categories of internationally proscribed crime.<sup>40</sup> Third, the range of crimes for which former agents are today being charged and convicted expanded from an almost exclusive focus on deaths and disappearances to include torture and forced exile. New organizations grew up around this expansion that regrouped relatives, survivors and sympathizers according to overlapping identity categories such as political affiliation, repressive episode and date or place of detention.<sup>41</sup> Fourth, and perhaps most obvious, accountability activity in Chile since 1998 has become more successful. Even in the

<sup>38</sup> Poll data meticulously compiled since 1990 by political scientist Carlos Huneeus shows that truth and justice issues have declined in political salience over time, with occasional 'spikes' at moments such as the 1998 Pinochet arrest. Nonetheless, when specifically asked for an opinion on the matter, most respondents prefer options that include some prosecutions to ones that privilege forgetting or blanket amnesty. See, Carlos Huneeus, *Chile, un país dividido* (Santiago: Catalonia, 2003).

<sup>39</sup> Alex Wilde, 'Irruptions of Memory: Expressive Politics in Chile's Transition to Democracy,' *Journal of Latin American Studies* 31(2) (1999): 473–500.

<sup>40</sup> The change has been purely interpretive to date. No legislative modification or judicial review of the legality or constitutionality of the initial decree has occurred. This makes change potentially reversible. Additionally, in practice the new interpretation is less than universal and far from consistent.

<sup>41</sup> Anecdotally, during the 2008 commemoration of the 35th anniversary of the coup, organizers were perplexed when confronted with dozens of floral tributes to be classified according to organization. The veritable 'alphabet soup' of new acronyms finally defeated them and a public appeal had to be made for new groups to come forward and identify themselves.

absence of the kind of detailed statistical mapping that would make a systematic comparison possible,<sup>42</sup> both complainants and defendants clearly perceive that the circle of impunity has been definitively interrupted. In comparison to the early 1990s, cases today are many times more likely to be brought at all, to be admitted and fully investigated once brought and to be brought to a conclusion that includes sentences.

## Reasons for the Post-1998 Change

Explanations for this shift in justice outcomes range from the so-called ‘Pinochet effect’ – the fallout of the UK arrest of the former dictator in October 1998 – to domestic factors, including the simple passage of time, gradual democratization and judicial change. Each of these elements has played a part. On the domestic front, various created and ‘accidental’ circumstances conspired to make 1998 a year charged with particular significance. Early in that year, Pinochet was due to retire as army commander-in-chief, the post that had done so much to maintain his influence in posttransition political and institutional life.<sup>43</sup> According to the terms of the 1980 constitution drawn up by the regime, this would not, however, signal his retirement from public life. Instead, he would be entitled to take up a seat as a lifetime senator. This would give Pinochet a place in the same parliament he had suppressed years before, alongside politicians he had sent into exile for representing parties he had outlawed. It would also make him entitled to parliamentary immunity, making subsequent legal action a more difficult prospect.

With this in mind, the Chilean Communist Party and a group of victims’ relatives instigated the first-ever direct complaints against Pinochet for repressive crimes, in January 1998. Neither group harboured particularly high expectations. They said their initiatives were motivated mainly by the desire to express their disgust at the prospect of Pinochet being ceremoniously received into the heart of the supposedly democratic political establishment.<sup>44</sup> It was generally presumed that the legal actions would be rejected, alongside equally unsuccessful efforts at impeachment prepared by a handful of dissident parliamentarians. This pessimism had to do with the particularly daring nature of any assault on Pinochet himself, who was imbued with an aura of untouchability. It also rested on the meagre pickings obtained to date, even after eight years of sustained efforts to erode judicial impunity.

Nonetheless, the occasional successes described above served as a stimulus to further strategic fine-tuning by those lawyers who still persisted in testing the

<sup>42</sup> Universidad Diego Portales is currently working on a project to produce comparable case statistics and related analysis across a network of Southern Cone countries experiencing a revival of accountability efforts.

<sup>43</sup> It had certainly ensured his continued visibility, as had a habit of suing public figures who criticized him or his legacy in the first years of the transition. See, Sebastian Brett, *Los límites de la tolerancia: Libertad de expresión y debate público en Chile* (Santiago: Human Rights Watch, 1998).

<sup>44</sup> Personal interviews with lawyers and protagonists of both complaints. For more detail, see, Collins, supra n 3, 2006; Collins, supra n 10.

judicial route. Héctor Salazar, a former *Vicaría* lawyer later associated with FASIC, explained:

There was a whole strategy in getting our cases seen by the right judges, the ones we wanted . . . We practically earned ourselves doctorates in keeping alive cases that should have died a death. We were like an intensive care team for legal cases . . . We invented new procedures, requested paperwork . . . If a case was going to be closed, we'd open a new one for the same crime in a different court . . . We told ourselves: 'As long as the thing is open we might get some information that we can use.'<sup>45</sup>

Lawyers began to offer veiled incentives for confession, which had some cumulative effect by the late 1990s in penetrating the wall of military silence surrounding past crimes. Even lowly civilian ex-functionaries of repressive agencies had until then largely subscribed to the prevailing culture of *omertà*, a potent mixture of threats and appeals to 'honour.' However, the passage of time and the effects of ageing seemed to awaken a confessional impulse in some.<sup>46</sup> According to Salazar, others were induced to make a more direct calculation of cost and benefit:

If someone showed signs of being willing to cooperate, we would take the pressure off a bit. Not impunity, but a better class of treatment . . . We sent out signals, and that's been a big help in getting hold of information.<sup>47</sup>

Registering these muted overtures, former agents began to talk, resentful over a perceived lack of support from their former paymasters. The armed forces, having embarked on a mission to renew their image, were forced to walk a difficult line between defending the previous regime and repudiating its ugliest manifestations.<sup>48</sup>

While each of these personal and institutional changes can be explained with reference to particular circumstances and causes, they had a cumulative effect in the public imaginary by 1998. Something could potentially give, although it was by no means certain or inevitable that it would. That was, in any case, the conclusion arrived at by Hugo Gutierrez, the lawyer who represented the relatives of illegally executed political prisoners in their January 1998 complaint against Pinochet:

[The complaint] really had a political objective, it was the only channel open to civil society to try and do what the political class had failed to do: prevent Pinochet becoming a senator . . . The Supreme Court was still insisting on applying amnesty and the statute of limitations . . . [but] legal channels were starting to work. I was confident that we were getting close to breaching the wall of impunity . . . but it was a slow road, and the [UK] Pinochet detention allowed us to get there faster.<sup>49</sup>

<sup>45</sup> Personal interview, Hector Salazar, Santiago, Chile, 17 October 2002.

<sup>46</sup> See, Leigh A. Payne, *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence* (Durham, NC: Duke University Press, 2007).

<sup>47</sup> Personal interview, Hector Salazar, Santiago, Chile, 17 October 2002.

<sup>48</sup> For discussions of the complex soul-searching that is ongoing within military structures, see, Claudio Fuentes, *La transición de los militares: Relaciones civiles-militares en Chile, 1990–2006* (Santiago: LOM, 2006); Patricia Politzer, *Chile: ¿De qué estamos hablando?* (Santiago: Sudamericana, 2006).

<sup>49</sup> Personal interview, Hugo Gutierrez, Santiago, Chile, 14 November 2002.

Eduardo Contreras, the Communist Party lawyer responsible for the second, almost simultaneous, January 1998 complaint, was slightly less sanguine about the signs of judicial *glasnost* visible at the time. He nonetheless pointed to a few 1996 and 1997 instances of sentences being imposed where amnesty clearly did not apply.<sup>50</sup> Other rulings had begun to push the point of application for amnesty closer to the end, rather than the beginning, of the investigative progress. This did not produce accountability, but it did help establish ‘judicial truths,’ such as the true identity and present whereabouts of agents who appeared in many witness accounts under nicknames. This in turn served to augment the knowledge base of the still small group of historic human rights lawyers, perhaps the human rights movement’s best asset in those straitened times.

## The Contribution of Judicial Change

In 1998, these almost imperceptible shifts were already improving prospects for success in existing cases. The January complaints also proved to be only precursors of an entirely new wave of complaints, which were to transform the Chilean accountability scenario beyond recognition. First, though, the new complaints needed to survive and, ideally, to prosper. Their survival, already considered a bonus even by some of their direct protagonists, was finally assured a few months later. An initially sceptical and historically conservative judge, assigned the submissions by rote, found them admissible, at least in principle. Even as Pinochet ceremoniously prepared to enter the Senate, the first citations were taking place in what was to become his biggest and longest-lasting national legal headache. Judge Juan Guzmán began what would develop into a huge investigation, with hundreds of alleged victims and an unwieldy number of lawyers, survivors and relatives eager to clamber on board.

Much about the initial investigation made it clear that such allegations faced a still hostile environment. Guzmán lacked awareness of even the most basic facts about the notorious repressive episode to which the first complaint referred. His instinct was not to turn to the supposedly official version contained in the Rettig Commission’s 1991 report. Instead, he summoned a well-known investigative journalist who had published a seminal exposé of the incident almost a full decade earlier. Somewhat surprised by the gaps in Guzmán’s knowledge, the journalist drew the conclusion that others would later reach: in the new phase of Chilean accountability that was taking shape, judges, even and perhaps particularly those of long standing, would be amongst those with the most to learn.<sup>51</sup>

The particular personal odysseys of certain Chilean magistrates after 1998 did not happen in an institutional vacuum. Quite the reverse: judicial reforms rumoured since the first transitional presidency of 1990–1994, but which did not take full shape until the middle of the second democratic administration, were a crucial factor. In addition, as if to emphasize how little of Chile’s later accountability

<sup>50</sup> Personal interview, Eduardo Contreras, Santiago, Chile, 18 December 2002.

<sup>51</sup> Personal interview, Patricia Verdugo, Santiago, Chile, 18 November 2002. Her colleague, Monica Gonzalez, would later have the same experience.

turnaround was due to official will or design, the reforms had nothing at all to do with an explicit rights agenda.

The Frei government (1994–2000) launched a major reform initiative under the title 'modernization of justice' – a phrase deliberately chosen to appeal to the right, as the dictatorship had declared the updating of the justice system to be one of its great 'unfulfilled tasks.'<sup>52</sup> The initiative's declared goals were eminently technical, and a broad civil society coalition was formed to generate ideas for 'rationalization' and 'streamlining.' The aspects of the reform that would prove most significant for future accountability prospects included the specialization of existing Supreme Court *salas*, or judicial benches. Each would henceforth receive only criminal or only civil cases. The number of Supreme Court judges was also increased, with openings created for noncareer judges. Finally, a retirement age of 75 was to be enforced for the first time – a move that would allow the removal of various hard-line Pinochet-era appointees. The price paid to secure right-wing support for the package was the introduction of Senate ratification of Supreme Court appointments. This particular modification would eventually keep certain judges identified with progressive human rights doctrine out of the Court. An overall effect favourable to accountability was nonetheless almost immediately apparent. In September 1998, the new Supreme Court criminal bench upheld the application of the Geneva Conventions to invalidate amnesty in disappearance cases, ordering the reopening of 74 such cases previously suspended by military courts.

It was against this far from static domestic backdrop that the diplomatic and legal drama of Pinochet's UK detention and attempted extradition to Spain unfolded.<sup>53</sup> The putative demonstration effect of Spanish judicial zeal, supposedly stimulating Chilean judges to act with more of an eye to international law and their own reputation, almost certainly contributed to later change.<sup>54</sup> The fact remains, however, that without the minor but real levelling of the domestic legal playing field provided by the reform measures, the 'Pinochet case' might well have ended with the ex-dictator's triumphant disembarkation from the air force jet that brought him home to a rapturous military reception in March 2000.

Instead, while Pinochet was detained in London at the request of a Spanish judge, the two existing national complaints against him were joined by a flood of new ones. Numbering around 60 by December 1998, new complaints were often a repackaging of old cases. Relatives and lawyers who had seen decades-long investigations stumble along in lower courts seized the opportunity to transfer to the apparently more dynamic Guzmán investigation. This could be achieved by the simple artifice of explicitly naming Pinochet as a suspect.<sup>55</sup> The October–December

<sup>52</sup> See, Correa Sutil, *supra* n 27 at 14.

<sup>53</sup> For detailed accounts of the 'Pinochet case' in Spain, see, Brett, *supra* n 3; Roht-Arriaza, *supra* n 3; Pion-Berlin, *supra* n 3; Mónica Pérez and Felipe Gerdzen, *Augusto Pinochet: 503 días atrapado en Londres* (Santiago: Los Andes, 2000); Ernesto Ekaizer, *Yo, Augusto* (Buenos Aires: Aguilar, 2003).

<sup>54</sup> Described by Roberto Garretón and discussed by Naomi Roht-Arriaza as the 'Garzón effect.' See, Roht-Arriaza, *supra* n 3.

<sup>55</sup> This because under Chile's old investigative system, accusations of particular sensitivity or transcendence are seen not by first instance judges but by magistrates of appeal court rank or above, such as Guzmán.

wave of complaints therefore represented an attempt to seize new opportunities. It was also in part a strategic political decision by pro-accountability actors to force the government's hand. While Pinochet was in London, the executive vigorously opposed his extradition to Spain, claiming, amongst other arguments, that he could be tried properly in Chile. The January 1998 complaints were adduced as evidence. Lawyers and organizations in Chile, not convinced by the government's sudden conversion to domestic accountability, decided to generate hopefully unstoppable momentum in the form of a whole array of national cases.

## The 'Pinochet Case' and Beyond in Chilean Judicial Practice since 2000<sup>56</sup>

When Pinochet returned from the UK, having extricated himself from the Spanish accusations on medical grounds, Guzmán's investigations took their course. Pinochet was encouraged to resign from the Senate and effectively from public life, perhaps to bolster the credibility of the tale of his failing health. Guzmán, meanwhile, divided the by now unwieldy investigation into various episodes, concentrating on those with the best prospects. Pinochet's subsequent juridical fate became a rollercoaster ride, with each set of charges needing to be separately defended on the grounds of his putative immunity (as a former president)<sup>57</sup> and supposed unfitness to stand trial. Guzmán, denouncing political interference at every turn, got as far as processing Pinochet (a precharging status) on a couple of occasions. Full charges were always averted by pleas of medical unfitness, however, until a birthday interview, televised abroad in early 2004, appeared to give the lie to Pinochet's advanced dementia. A Supreme Court ruling due just days after the spectacle went against Pinochet, and in the same month the so-called Riggs Bank scandal exploded. This scandal, triggered by the discovery that Pinochet held millions of dollars in secret US accounts, prompted an immediate Chilean Senate enquiry and, in September 2004, the first criminal complaint against him for fraud and tax evasion.

This latest twist proved too much even for diehard Pinochet supporters, whose championing of him became notably more muted when it came to allegations of personal financial gain.<sup>58</sup> Human rights lawyer Carmen Hertz went so far as to describe Pinochet as a 'political corpse,' and by the time of his death in

<sup>56</sup> For a more technical jurisprudential analysis of this period, see, Universidad Diego Portales, *Informe anual sobre derechos humanos en Chile* (2006, 2007, 2008).

<sup>57</sup> Parliamentary and presidential immunity in Chile do not completely rule out criminal prosecution, but they do introduce the requirement of a hearing to suspend immunity for each set of charges.

<sup>58</sup> Early indications from elsewhere in the region support the suggestion that corruption charges may help, and certainly do not hurt, the prospects for eventual success in holding former heads of state to account before the law. See, Jo-Marie Burt, 'Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations,' *International Journal of Transitional Justice* 4(3) (2009): 384–405; Ronald Gamarra Herrera, 'El caso Fujimori: Juzgando a un jefe de estado,' Working Paper no. 4, Human Rights, Global Justice and Democracy Series (Arlington, VA: Center for Global Studies, George Mason University, 2009).

December 2006, he had been processed in various cases.<sup>59</sup> Importantly, Pinochet's legal troubles were only the clearest manifestation of a much deeper and broader reopening of the judicial accountability question. Despite Pinochet's demise, all the relevant cases continued to be actively investigated with regard to other suspects. The large portion of the new and reopened case universe that did not involve Pinochet directly also benefited greatly from the post-1998 reinvention of human rights activity.

In 1999, while Pinochet was still in London, the government attempted one of its periodic nonjudicial 'solutions' to the problem of outstanding disappearances, using the case to persuade the military that some new gesture on its part was necessary. The resulting *Mesa de Diálogo*, or roundtable dialogue, was an effort to elicit new information about disappearances under protection of anonymity. The data finally produced was handed to the courts in January 2001.<sup>60</sup> Although extremely limited – and, it later proved, highly unreliable – the information catalyzed a much more comprehensive reorganization of judicial activity. Not content with merely processing the new data on disappearance, the Supreme Court ordered the 'stock-taking' of all existing human rights cases in the civilian and military justice systems. In March 2001, 60 special judges were designated to take over the majority of the civilian system investigations.<sup>61</sup> Three additional judges were appointed in October 2002 to cover a portion of Guzmán's by now unmanageable Pinochet caseload. When Guzmán retired in mid-2005, a further two Appeals Court judges were assigned, along with his replacement, to oversee around 200 cases then outstanding before the Santiago Appeals Court alone.

Activity should not necessarily be confused with enthusiasm. Guzmán and others claimed that a number of these changes were designed more to hinder than to help. Some of the new judges, including Guzmán's direct replacement, Victor Montiglio, proved to be devotees of old-style broad amnesty, and the 2005 reorganization initially carried with it a peremptory six-month deadline after which cases were to be closed. (Criticized as an attempted 'full stop law,' the measure was eventually reverted.) Thus, progress towards accountability was continually contested, and occasionally halted or reversed. Nonetheless, the overall tendency of judicial activity in Chile since 1998 has been an incremental rollback of impunity. The handful of successful mid-1990s investigations made blanket denial impossible, even though they left amnesty intact.<sup>62</sup> Subsequently, a swathe of pre-1978 disappearance cases was successfully removed from the reach of the amnesty statute. Lawyers argued that the crimes involved had not been committed, at least not in their entirety,

<sup>59</sup> Pinochet was actively processed in the Riggs (tax evasion) and Grimaldi (torture, disappearances and illegal executions) cases. He was processed in the Caravana and Condor cases, but these cases had been suspended on medical grounds. His immunity had been removed, and charges were pending, in the Colombo and Llidó cases.

<sup>60</sup> For some *Mesa* documentation, see, [http://www.ddhh.gov.cl/mesa\\_dialogo.html](http://www.ddhh.gov.cl/mesa_dialogo.html), although, interestingly, the flawed list is not included.

<sup>61</sup> However, only nine were assigned full time (*dedicación exclusiva*). The others took on human rights cases alongside their existing caseloads.

<sup>62</sup> They were cases that went ahead precisely because the 1978 amnesty law clearly did not apply, usually because the crimes had been committed after the date of passing of the law.

before the March 1978 cutoff date. This theory came to be known as the ‘ongoing crime’ thesis, leading to the redefinition of disappearance as kidnap. Far from being a novel invention, this argument had been regularly attempted by human rights lawyers since 1973. But the Poblete Córdoba verdict of September 1998 marked a turning point in judicial acceptance of this logic. By 2003, it had become a stable, although not invariable, judicial doctrine.

Next, juridical obstacles such as double jeopardy and statutes of limitations had to be overcome in order further to shrink the range of crimes to which domestic amnesty was considered applicable. For this to happen, principles such as the preeminent status and/or direct justiciability of international treaty law had to be recognized by judges. This process – to date incomplete – was begun by the special judges appointed in 2001. The applicability of the Geneva Conventions to political prisoners was eventually largely recognized by the courts, while their practical implications – dissolving the possibility of amnesty – were almost universally established by 2003. From around the same date, judicial acceptance and investigation of broader categories of repressive crime also became noticeable. These include torture, which is still not widely penalized by judges, however, as they tend to give priority to cases of fatal violence. Investigative techniques for dealing with torture survivors also leave much to be desired.<sup>63</sup>

Other limitations of the undoubtedly more benevolent judicial scenario include a late 2008 cluster of unduly lenient sentences. The Supreme Court began to invoke a discretionary sentencing formula, available to judges when any criminal case is concluded a substantial time after the event.<sup>64</sup> The practice originated as a ‘gentlemen’s agreement’ to resolve a doctrinal impasse between pro- and anti-amnesty judges on the Supreme Court’s criminal bench. In early 2009, it sparked representations from relatives’ groups and international organizations to the UN Human Rights Committee and the Inter-American Commission on Human Rights.

## The Political Context of Accountability Change in Post-Pinochet Chile

The political backdrop to recent accountability change in Chile shows, like the judicial one, mixed signals after 1998. Once Pinochet successfully avoided extradition to Spain, the incoming *Concertación* administration of Ricardo Lagos (2000–2006) seemed content to proceed, in the words of jurist José Zalaquett, ‘like a card dealer,’ sending controversial issues to other branches of the state

<sup>63</sup> Judges generally sent survivors to forensic psychiatrists, who, more used to dealing with suspects, applied ‘lie detector’ tests. The psychiatrists also recommended that only complainants presenting clear-cut clinical symptoms of posttraumatic stress be believed.

<sup>64</sup> Known as ‘half prescription,’ the figure allows judges to discount sentences in direct proportion to the time that has elapsed between crime and sentencing. In September 2008, it was used to reduce an 18-year custodial sentence, for the murder of 15 peasant farmers, to three years’ probation. Supreme Court ruling, Rol. 2182–98/Rol. 4.662–07, episode ‘*Liquiñe*’ (25 September 2008). See, Karinna Fernández Neira and Prieto Sferazza Taibi, ‘La aplicación de la prescripción gradual del delito en las causas sobre violaciones de derechos humanos,’ in Universidad de Chile, *Anuario de Derechos Humanos* 5 (2009): 183–192.

to be resolved.<sup>65</sup> Lagos repeatedly declared himself a fervent believer in judicial independence, particularly, it seemed, where the hot potato of Pinochet's legal future was concerned. Denunciations in the liberal press painted a less neutral picture, however, as certain judges alleged that the executive had intervened repeatedly to protect Pinochet from prosecution. The armed forces opted mainly for circumspection, punctuated by occasional expressions of displeasure at the 'parade' of serving and retired officers through the courts. The cumulative effect of new sentences nonetheless eventually made further protestations of unsullied institutional honour unsustainable. The Riggs Bank scandal seemed to seal military determination to put clear blue water between themselves and the dictatorship, leading them to declare 'we are not the inheritors of any particular regime.'<sup>66</sup>

This modulation of previous military bravura had demonstrable effects in the judicial sphere. After repeated outcries over lax conditions in specially run military facilities, judges increasingly insisted that newly convicted former officers serve their sentences in regular jails. A levy on military salaries, used to fund the defence of accused repressors, was officially discontinued after attracting adverse publicity. Privately, some high officials admit that the era symbolized by Pinochet has become a burden to be lived down rather than a repository of past glory.<sup>67</sup>

## Actors and Strategy in Chilean Post-Transitional Justice

Who are the actors principally responsible for recent changes in Chilean accountability? Although improved judicial disposition has been key, it has operated as a necessary but apparently insufficient condition for successful prosecution of any particular case.<sup>68</sup> Other justice system actors, including investigators, have played a more sympathetic and active role than ever before. Designated special judges have been greatly assisted by the diligence of detectives from a specialized department of the civilian investigative police. Finally, the oft-reinvented state *Programa de Derechos Humanos*, relegated for so long to a secondary role, began after 2003 to associate itself directly with privately triggered prosecutions. Currently the single entity with the best overview of the active case universe in Chile, the *Programa* has actively driven judicial progress via a creative, decidedly maximalist interpretation of its official mandate. Nonetheless, the cases that advance most satisfactorily are still those triggered and then actively pursued by capable private lawyers representing engaged and motivated relatives or survivors. The state has not in its own right instigated a single one of the presently active cases, and the post-1998 expansion of the case universe has in fact made it easier for cases without vigorous private sponsorship to fall by the wayside.

<sup>65</sup> Personal interview, José Zalaquett, Santiago, Chile, 28 November 2002.

<sup>66</sup> Open letter by then Army Commander-in-Chief Juan Emilio Cheyre, January 2003.

<sup>67</sup> See, Politzer, *supra* n 48, for an account of how individual military reverence for Pinochet coexists with the gradual removal of portraits of the former strongman from Chile's main military academy.

<sup>68</sup> Successful prosecution is defined here as progress through full investigation to verdict and, where relevant, proportionate sentencing.

Practically and strategically, the continuing need for private activity has stimulated the perfection of arts such as the *alegato de pasillo*, or, literally, arguing cases in the lobby or hallway. Lawyers attempt to trade on or shift the preferences of individual judges and/or to have their case relocated altogether, venue shopping.<sup>69</sup> From a rule-of-law perspective, this highly discretionary state of affairs is as unsatisfactory for defendants as for relatives or survivors. It means that the chances of a former agent being prosecuted for a past crime depend less on the availability of evidence or gravity of the offence than on whether there happen to be survivors or relatives interested in actively pursuing a case. It also means that when crimes are investigated, the likelihood of conviction and the probable leniency or otherwise of sentencing also depend to a large extent on which lawyers act in the case.

The supply side of the accountability equation, represented by judicial activity, is also configured according to these essentially subjective factors. Despite an oft-cited 'corporatist' character to Chilean judicial behaviour, norm transmission and judicial 'socialization' are essentially personalistic. As precedent is not binding, individual courts and judges are free to come to radically different conclusions in almost identical cases. In former times, this arrangement meant the occasional liberal judicial pronouncement on human rights matters could quickly be 'rectified' at the next stage of appeal.<sup>70</sup> In the present day, progressive jurisprudence regarding international law and the applicability of domestic amnesty has begun to make some inroads in less predictable quarters. The proportion of 'anti-' to 'pro-impunity' judges is accordingly higher,<sup>71</sup> and their distribution more even between lower and higher courts. In a sense, however, this has not changed the underlying pattern whereby the fate of a case can be accurately predicted as soon as the names of the judges to whom it has been assigned are made known.

## Other Limitations of Recent Change: Questions about State Attitudes

Beyond the judicial arena, Chilean political and public life has, to an extent, become habituated to the new accountability scenario. Major milestones, such as the 2008 conviction of Pinochet confidante General Sergio Arellano Stark, continue to make headlines, as do nonjudicial 'irruptions' such as the unprecedented reappearance

<sup>69</sup> As mentioned above, this became a particularly popular stratagem from 1999, when Guzmán's new case against 'Pinochet and others' seemed to be the only one with genuine potential. Old complaints were reframed in an effort to give them a new lease of life.

<sup>70</sup> Thus, two progressive rulings in August 1994, finding amnesty inapplicable through invocation of the Geneva Conventions, were immediately overturned by the Supreme Court. The jurist responsible was removed from the list of court-approved substitute magistrates (who replace judges during temporary absences).

<sup>71</sup> Some judges are, of course, not reliably classifiable as either. One example, Judge Victor Montiglio, is an implacable advocate of applying amnesty only after full investigation. Since he has also gained a reputation as a dogged and capable investigator, some lawyers prefer to take their chances with him, trusting that amnesty can be overturned on appeal. Conversations with four human rights lawyers, Santiago, Chile, October 2008 and August 2009 (names reserved on request).

of an individual included in the official register of the disappeared.<sup>72</sup> On the whole, however, since around 2006, cases have tended to advance out of the public eye. Current President Michelle Bachelet has privileged other aspects of Chile's human rights legacy since taking office in 2006. Daughter of a constitutionalist air force general who died in prison after the coup, herself briefly imprisoned and later exiled by the dictatorship, Bachelet made a point of cultivating warmer personal contacts with relatives' and survivors' groups than had either of her immediate predecessors. She inaugurated a number of privately initiated but publicly financed memorials to victims, and in 2008 announced the construction of a state Museum of Memory and Human Rights, which seems set to become her main personal legacy. Here again, however, the picture has been decidedly more mixed as regards justice. Implacable state opposition to demands for civil compensation has continued. A promised 'interpretive law,' which would revert the amnesty law's acknowledged illegality, had simply failed to materialize by September 2009, three and a half years into Bachelet's four-year presidency. Only political pressure from the left dissuaded Bachelet from attending the inauguration of a monument to assassinated right-wing ideologue Jaime Guzmán in late 2008, while initial plans for a national Human Rights Institute were derailed for almost a year by left-wing criticism and right-wing opposition.<sup>73</sup>

Some of this ambiguity has its roots in broader political weaknesses. The *Concertación* has begun to look like a spent electoral and political force. The prospect of a right-wing victory in the late 2009 presidential elections raises questions about the reversibility of recent symbolic and judicial change. The right has repeatedly declared its intention to cease signing human rights treaties and block promulgation of treaty obligations once in office.<sup>74</sup> Events surrounding Pinochet's 2006 funeral betrayed a desire by some to challenge recent tactical defeats.<sup>75</sup> Many accountability actors express fears that recent gains in memory and accountability policy may be reversed.<sup>76</sup>

<sup>72</sup> German Cofré returned to Chile in November 2008, having established a new life and family in Argentina during the 34 years since his 'disappearance.' Another eight similar errors were subsequently discovered.

<sup>73</sup> A completely reworked proposal was finally approved by both houses of Congress in August 2009, despite renewed controversy over alleged limitations on the institute's power to initiate legal action. As of 11 September 2009, the proposal was awaiting agreed modifications and presidential approval before being passed into law.

<sup>74</sup> This declaration was the only official right-wing response to the 2003 announcement of a new truth commission on torture and political imprisonment.

<sup>75</sup> Placards at the funeral declared 'History will absolve him' and 'Pinochet: Hero of the war on Marxism.' The parliamentary leader of the main right-wing party, the Independent Democratic Union (*Unión Demócrata Independiente*, or UDI), lambasted the decision not to give Pinochet a state funeral, declaring that 'when this country has a real ['serious'] government again, Pinochet's life and work will be properly recognized.' Another senior party figure lamented the loss of 'the great statesman, the liberator, the founder of modern Chile.' Mónica González, 'Murió el ex dictador Pinochet, un símbolo del terror en Chile,' *Clarín*, 11 December 2006.

<sup>76</sup> Personal interviews, Santiago, Chile, 2007 and 2008.

## Conclusions: Publicly versus Privately Impulsed Justice in Chilean Accountability

Very different outcomes in Chilean accountability in each of the three periods examined above – 1973 to 1990, 1990 to 1998 and 1998 to the present – clearly respond to distinct configurations of interaction between judges and human rights lawyers in each phase. This shifting constellation of forces in the juridical sphere must be understood, however, in the context of the broader institutional and political forces at work. Accountability has been both a marker of broader trends and a vector of change in the constant interplay between actors and systems in the justice field as a whole. This field has admitted external influences and produced external reverberations, and yet explanations for major shifts in post-1990 practice seem to be quite readily available if a sufficiently long and detailed look is taken at developments in the domestic sphere.

One important conclusion that can be drawn from such close observation is that the present phase of prosecutions was not sparked by any renewed state determination to act against past impunity. Instead, as in Argentina, justice developments in Chile since 1998 have been instigated and driven by minority civil actors. State responses in Chile generally have oscillated between indifference and active dissuasion,<sup>77</sup> while in Argentina executive enthusiasm only emerged after the fact (during the administration of Néstor Kirchner, 2003–2007). This effective state disengagement means that post-transitional justice, unlike its immediate transitional counterpart, is largely the sum of private endeavours.

Where these endeavours are diverse and uncoordinated, as in Chile, the result is a patchwork of individual actions that respond to a host of internal and external drivers: individual possibilities, interest and life cycle; opportunity; access to resources; and perceptions of likely success. In the present day, the reawakening of interest in accountability has given a new impulse to cases. Keenness to act is not always reflected in necessary knowledge and skill, however. Competition and disputes have arisen amongst lawyers keen to ‘sign up’ relatives so as to be able to act in cases. Recently, the consolidation of this uneven pattern of representation, plus an equally uneven pattern of accountability outcomes, has led to dissatisfaction on all sides. Relatives and lawyers would like more predictability in the inapplicability of amnesty and the application of penalties commensurate with the gravity of crimes. Defendants, meanwhile, make representations about the apparent ‘lottery’ character of the process. Chile’s ‘late accountability’ phase is accordingly proving to be no less controversial than the preceding period of inaction. It seems that delayed justice, though one possible answer to the longstanding problem of impunity, is not necessarily a panacea. At least for Chile, more thoughtful state engagement may be necessary if this phenomenon is to contribute in a stable manner to broader rule-of-law progress, as well as to individual demands for justice.

<sup>77</sup> Although, as discussed above, more welcoming reactions can be detected in certain niches of the state.