

Lawyers,
Conflict  Transition



Lawyers & Transition in Chile

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LAWYERS & TRANSITION IN CHILE

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Preface

This report was commissioned as part of the *Lawyers, Conflict & Transition* project – a three-year initiative funded by the Economic & Social Research Council.

The wider project explores the role of lawyers during conflicts, dictatorships and political transitions. Despite the centrality of the rule of law to the contemporary theory and practice of transitional justice, there is little emphasis in the relevant literature on the role of lawyers outside the courts – or indeed as ‘real people’ at work in the system.

Drawing on six key case studies (Cambodia, Chile, Israel, Palestine, Tunisia and South Africa) we set out to establish a comparative and thematic framework for lawyering at historic stages in conflicted and transitional societies. Taking a holistic approach to the role and function of law and lawyers, the project is intended as a bridgehead between transitional justice and the sociology of the legal professions.

Project staff members are based at the School of Law, Queen’s University Belfast, and the Transitional Justice Institute, Ulster University.

This project has at its core a ‘real-world’ dimension and seeks to make a difference both to theory and practice. In addition to academic outputs, we were determined to produce a body of work that will assist the societies we have researched. We were also conscious from the outset that academic fieldworkers are sometimes guilty of ‘parachuting in’ and then moving on, with little demonstrable benefit for participants. As part of our ethics policy we thus developed this series of practice-orientated reports, specifically tailored for each jurisdiction under scrutiny, as well as briefing papers for international audiences.

The individuals interviewed for the wider project (more than 120) were each invited to suggest research topics and themes that are of direct relevance to them and the organisations and networks with whom they work. The core team sifted and analysed these suggestions and commissioned two key reports per jurisdiction. In some instances the work was completed in-house; in other cases we drew on the resources and talents of our international consultants.

The reports are designed to be of immediate value to practitioners and as such we have sought to avoid complex academic terminology and language. We have made the texts available in English and relevant local languages.

The anticipated readership mirrors the diverse range of interviewees with whom we engaged:

- National and international legal professionals (including cause / struggle lawyers and state lawyers)
- Scholars interested in the role of lawyers as political and social actors (with a particular focus on transitional justice)
- Government officials
- International policymakers
- Civil society activists
- Journalists and other commentators

The entire series will be made available on our website (www.lawyersconflictandtransition.org) and will be circulated via our various networks and twitter account (@lawyers_TJ).

We hope that you will enjoy reading this report and encourage you to disseminate it amongst your networks.

For further information about the wider project please feel free to contact us at:
www.lawyersconflictandtransition.org/contact



Kieran McEvoy PhD
Director, *Lawyers, Conflict and Transition* Project

March 2015

Acknowledgements & Disclaimer

This report was prepared by Professor Cath Collins (*Observatorio Justicia Transicional DDHH, Universidad Diego Portales, Santiago de Chile* and Transitional Justice Institute, Ulster University, cath.collins@mail.udp.cl) in association with the *Lawyers, Conflict and Transition* project.

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All views expressed, and any errors, remain the responsibility of the authors.

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Cover image: mural to commemorate 40 years since the Chilean coup, by Chilean artist Heri Tapia (bilateral Belfast-Santiago mural project, 2013).

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Executive Summary

This paper provides a history of the unique contribution made by Chilean lawyers to processes of political and social change during the past four decades. Chile is widely recognised as one of the classic cases of democratic transition after authoritarian rule: its experience was a forerunner for truth, justice, reparations and amnesty decisions in later transitions including the South African one. But the specific influence of members of the legal profession on Chilean transitional mechanisms has been understudied. The paper demonstrates that Chilean lawyers were pivotal in steering legal and political responses to the dictatorship, and they have played a key role in post-authoritarian transitional justice processes and in recent reform and rights debates.

Chile's long republican tradition since formal independence from Spain in 1810 includes a strong commitment to the notion of law, which helps explain why lawyers and legal framings were symbolically and practically important during and after authoritarian rule (1973-1990). Chile's gradual and cautious approach to dismantling the legacies of dictatorship has relied heavily on law and legal arguments for both progressive and conservative purposes. As a case study, it can serve as a useful illustration of both the immediate benefits and the mid- to long-term drawbacks of a risk-averse transition that takes authoritarian legality as its starting point and avoids radical early innovation.

The paper highlights how law was used in key periods since 1973, and assesses the prospects for democratic understandings of the rule of law to win out over authoritarian ones in the immediate future. Part one explains why law and legal culture are so important in this strongly legalistic society. The next three sections correlate with three main phases in Chile's recent political history; a chronology of key events is provided at the end.

Part two describes legal challenges created by 17 years of military dictatorship and the systematic human rights violations carried out by the Pinochet regime. Part three assesses the advantages and drawbacks of a strictly controlled transition that valued stability more highly than radical reform in building a new democracy. It also analyses how a domestic stalemate over questions related to dealing with the past was challenged by the 1998 Pinochet case, leading to renegotiation of Chile's truth and justice balance.

Part four assesses Chile's transitional justice challenges nearly two and a half decades after the transition began. Criminal trials for past crimes have been reactivated, and there are moves to replace the country's undemocratic constitution and modify its self-amnesty law. Longstanding promises to improve forward looking rights guarantees on a range of issues have started to be kept, now that part of the political right has softened its opposition to human rights language and ideas. A new generation of 'cause lawyers'¹ or human rights lawyers seems to be emerging, though still in the minority in what remains a largely conservative legal profession.

1 Defined here as a lawyer whose practice, or part thereof, is motivated by ideological or political considerations including the desire to promote social change. Cause lawyering is not, therefore, necessarily carried out on behalf of 'progressive' or liberal causes, although much discussion of it has this bias. See, eg, A Sarat and S Scheingold (eds), *Cause Lawyering* (OUP 1998).

Dictatorship and Transition in Chile

Between 1973 and 1990, a right wing military dictatorship used largely one-sided repressive violence against political opponents overthrown in the 1973 coup. In response, a human rights movement with a strong legal orientation appeared. 'Cause lawyers', or human rights lawyers, challenged state terror in domestic courts, but the courts failed to respond. Around 3,000 victims were killed or disappeared; upwards of 40,000 people survived torture or political imprisonment, and thousands more fled or were forced into exile.

In 1990, General Augusto Pinochet stepped down and an elected civilian president took over. Early action over human rights legacies was cautious, though there was an official truth commission and some reparations were extended to relatives of the dead and disappeared. However, there were no perpetrator trials, and a 1978 self-amnesty declared by the Pinochet regime was allowed to stand.

After transition, 'cause lawyers' lost social visibility and human rights questions were put on hold until 1998. In that year, domestic and external legal actions including the Pinochet case in Spain put past crimes, and human rights lawyers, back in the spotlight. Since 1998, a mix of traditional and newer cause lawyers, acting on behalf of relatives, have reactivated criminal cases for past atrocities in national courts. A moderately reformed but still highly traditional judiciary has shown increased receptivity to these cases and related principles of international law.

Despite relatively weak civil society or official leadership, a newer and broader human rights agenda (i.e. not focused exclusively on past abuses) has also emerged and some professionalization of human rights work can be seen. Changes in right wing political circles, including some conscious distancing from the legacy of the Pinochet years, have been key in allowing a new human rights institutionality. Recent change includes the creation of a national human rights institute and vice ministry (subsecretariat). These offer at least the promise of more widespread acceptance of 'rights talk' as a component of democratic rule of law. Although systematic and widespread human rights violations did largely cease in Chile after 1990, recent student and indigenous protests have exposed continuing authoritarian practices and legacies. Current social and political debate about the need for economic, constitutional and legal change is focused on the need to rethink these legacies.

Structure of Main Text

The paper begins with a discussion of legal culture in Chile. Next, legal developments and the role of lawyers are analysed in three major time periods between the 1973 coup and the present day. Each period has an identifiable group of legal professionals associated with it, and represents a phase when a distinct purpose can be seen for legal activity around concerns related to 'dealing with the past'.

The three time periods are:

- i) 1973-1990 (military dictatorship)
- ii) 1990-1998 (early transitional period)
- iii) 1998- present day

In the first period, human rights defence work was largely reactive and sought to ameliorate the worst excesses of repression by generating national and

international publicity that would raise the political costs to the regime of continued brutality. Few lawyers sincerely believed that they would achieve individual criminal accountability of state agents – and indeed, no agent was successfully convicted before 1990 of any repressive crime – but some lawyers already viewed the presentation of habeas corpus writs or official criminal complaints as the laying of a ‘paper trail’ that might facilitate a historical and judicial accounting at some later date.²

In the second period, the issues of how the new government should deal with inherited authoritarian features of the legal system in general, and the ‘human rights question’ related to past crimes in particular, were at their sharpest. The approach to this legal legacy should be seen as part of a broader political and cultural resistance to institutional and normative change. In regard to past crimes, the period most notably produced a 1991 truth commission and the 1998 Pinochet case.

In the third period, from 1998, the political agenda was dominated by other matters but the human rights legacy issue continued to create tensions and periodic ‘irruptions’.³ Recently, widespread student, social and indigenous mobilisations and the violent, largely inept, policing response to them have put institutional legacy questions back in the frame. These include debates about persistent inequality despite macroeconomic growth, reform of the authoritarian-era constitution, public order policing, and the use of anti-terror laws against indigenous activists. A central thread running through these various issues is a contest (sometimes though not always viewed in right/left terms) about the acceptability of human rights norms as a shared democratic language.

A larger issue which the Chilean case illustrates is that of the contribution, and perhaps the limitations, of a formal, rule-based approach to transition and subsequent political development. The substantive issues which Chilean political elites of all stripes agreed not to address, as the price of transitional continuity, have presented themselves in the next generation. They have, arguably, accentuated the Chilean version of a more generalised disillusion with formal politics and helped produce a small, but growing, current of anti-systemic thought.

2 C Collins, ‘Human Rights Trials in Chile during and after the “Pinochet Years”’ (2010b) *International Journal of Transitional Justice* 67.

3 See A Wilde, ‘Irruptions of Memory’ (1999) 31 *JLAS* 473 and chapter in C Collins, K Hite and A Joignant. *The Politics of Memory* (Lynne Rienner Press 2013).

I. Lawyers and Legal Culture in Chilean Society

Chile is often, and rightly, characterised as a legalistic society which generally respects principles of law, or at least predictable order. While the malleability of legal outcomes is recognised, law itself is perhaps not regarded, to the same extent as it can be elsewhere in Latin America, as a completely fickle, corrupted and largely fictitious restraint on the behaviour of the powerful. Serious questioning of the intrinsic legitimacy of the legal paradigm is therefore reasonably scarce. This is true even though much of the legal, legislative and constitutional architecture of the Pinochet era persists. Only recently (since 2011), have calls for a new Constitution become mainstream, largely through the actions of student and popular protest. Indigenous leaders in the country's south evoke some popular sympathy, but there is little appetite for strong legal pluralism in Chile, one of few remaining countries in the region not to enshrine indigenous identity rights in its Constitution.

Belief in law, and in a strong unitary state, is as likely to come from a conservative as a liberal or libertarian perspective. During the transition, Chileans who had just voted against the perpetuation of the authoritarian regime nonetheless gave high approval ratings to judges and the police as 'people who could be trusted to solve the nation's problems.'⁴ This is striking, as courts and the police had been directly complicit in the outgoing dictatorship. The key may lie in a point made by Carlos Huneeus in his magisterial book *The Pinochet Regime*: the regime, though personalised, was not arbitrary. The authoritarian state carefully built a legally framed and rule-bound edifice, complete with a new constitution. To some extent, the rules were complied with even when they brought about the regime's own demise.⁵ The regime clearly believed in 'rule by law' rather than 'rule of law'. Nonetheless, having used defence of law as part-justification for the 1973 coup, the regime never shut down the courts. Law was a useful device with which to pretend or to believe that nothing essential had changed after the coup, except for the better. The regime managed to construct and promote the view that direct military rule represented the rescuing of Chile's honoured traditions. In this version, the socialist government of 1970-73, rather than the authoritarian one of 1973-90, represented anarchy and lawlessness.

Historical Roots of Chilean Legalism

Chile's national self-image includes the notion that its republicanism and constitutionalism set it apart from many of its neighbours. A strongly centralising, law-bound state emerged soon after independence, constructed by Diego Portales, a highly influential statesman, after the 1829-30 civil war. The Portalean state was decidedly republican and more than somewhat repressive. It has been described as a 'legal dictatorship' or 'presidential authoritarianism', prefiguring the Pinochet regime.⁶

4 See Collins, Hite and Joignant (n 3). Business people scored even more highly; civilian politicians, poorly.

5 The Constitution dictated the timing and terms of the 1988 plebiscite. Though Pinochet wanted to disregard the results when he lost, his subordinates and political allies refused to allow him to do so.

6 Pinochet was a fervent admirer of Portales.

The Legal Profession: From Statesmen to Hired Hands?

Iñigo de la Maza describes lawyers as Chile's 'statesmen par excellence' from the mid-19th century right through to the second half of the 20th century, when the profession went into relative decline. Between 1843 and 1950, 18 of 20 national presidents, most ministers, and most Senators were lawyers.⁷ Law, seen as a respectable and at the same time a modern profession, was in higher demand than medicine among students from emergent, middle-class families. It was considered synonymous with public service. A Bar Association was formed in 1925, and affiliation to it and its code of ethics was made compulsory in 1941.

However, modernisation, industrialisation, and the professionalisation of statecraft began to displace lawyers from the high offices of government. Lawyers instead set up private firms or chambers, reinventing themselves as a professional service sector for commercial interests rather than as the natural arbiters of national life. This seemed to come as something of a blow to their collective sense of self-worth. Law ceased to be a civic vocation and became 'a business like any other'.⁸ The 'socialist experiment' of Salvador Allende's Popular Unity government, from 1970, accentuated the displacement of previous elites from state administration. The anti-privilege, 'pro-poor' thrust of the new government's rhetoric and actions was anathema to part of the existing legal establishment, both judicial and legal-professional (but see below).⁹

Although the 1973 coup may have pleased many legal professionals, in the end it did nothing to reverse their professional or public decline. Economists, rather than lawyers, became the new policy mandarins. Legal education reforms initiated in the 1960s – aimed to reverse the increasing marginalisation of the profession by broadening legal training – were abandoned. The profession returned to a narrower technical understanding of its role. Further legal training innovations had to wait until the 1990s, and were a modestly minority affair.¹⁰ They introduced legal clinical education, in which students undertook public interest litigation. However, according to de la Maza, even these changes sought to prepare lawyers for the realities of private practice – a market, rather than a public, logic. Lawyers certainly continued, and continue, to play their part in the business of government, but de la Maza claims they do so as one more 'service corps' within a complex state bureaucracy.

Law remains a relatively high status occupation, though a rapid market-led expansion of higher education since the 1980s has led to an overpopulation of recent law graduates. The fact that Bar Association affiliation is no longer obligatory – a consequence of the neo-liberal impulse to break up professional

7 I de la Maza, 'Los Abogados en Chile' (n/d) 10.

8 *ibid* 15.

9 The judicial profession has long been a separate career path in Chile, and since the late 1990s has had its own specific initial training academy. A law degree is a requirement for entry, and the academy increasingly prefers candidates to have also had some subsequent work experience in legal practice. It is however relatively rare for established or senior lawyers to transfer into the judicial profession or (even rarer) vice versa. Some permeability, without changing track, was introduced when mid-1990s judicial reforms provided for senior lawyers to sit as replacements on Supreme Court benches. The aim was to bring an 'outside view' to judicial reasoning rather than to merge the two professions.

10 Espoused only by the Universidad Diego Portales and Universidad de Chile law schools.

'closed-shops' – reduces possibilities for tight corporatist control. A de facto professional hierarchy nonetheless persists, given a highly class stratified society that still defers to graduates of one or two, particularly prestigious, law schools.¹¹ As one example, the National Human Rights Institute, constituted in 2010, somewhat inexplicably reserves a place on its board for a member designated by the deans of the law schools of an inner circle of Chile's traditional universities.¹² There is no formal requirement for knowledge or interest in human rights. The Museum of Memory and Human Rights does likewise, although the circle is at least restricted to those few law schools that have active human rights centres.

11 Particularly the law schools of the Universidad de Chile and the Pontificia Universidad Católica. Graduates of 'less prestigious' schools may find themselves working as local notaries public or in modest individual or group local practice. Substantial judicial reforms after 1995 also in effect introduced for the first time the role of public prosecutor, the fiscal. (Previously, the title 'fiscal' was used for a quite different role, in effect an internal legal advisor to the judiciary.) A state prosecutor's office, the Ministerio Público was introduced in 2000 and given prosecutorial discretion and investigatory powers (previously held by investigative magistrates, who now switch to a guarantor and oversight role). The Ministerio Público has accordingly become a new professional outlet for ambitious young lawyers in the public sector.

12 This circle, whose chancellors are grouped together in the 'Consejo de Rectores', is the equivalent of the UK's 'redbrick' or 'Russell Group' designation of universities inasmuch as it refers to a group of universities of relatively long standing, considered to have high academic standards and traditions. It includes five universities in Santiago and 20 in the country's provinces, and excludes most of the newer private universities founded after the 1980s' deregulation of higher education.

II. Law and Lawyers during the Dictatorship (1973-90)

Background: The Allende Government and the 1973 Coup

The military coup on 11 September 1973 toppled an avowedly socialist-Marxist government. Chile's particular version of the revolutionary fervour sweeping the region at the time was radical, but it had followed electoral rather than insurrectionary tactics, building on a long history of home-grown union organising. Chile was seen and saw itself as the democratic alternative to the Cuban model. There was significant domestic and international opposition to the 1970 election of Salvador Allende (including by the US) and Congress demanded assurances about his intended mode of governing before ratifying his victory. Allende's lack of an overall majority meant he increasingly relied on presidential decree to push through nationalisations and other radical measures. The right appealed to the Constitution, and judicialised the legislative process in a way that set Allende at odds with the Supreme Court (and therefore, apparently, with the established legal order) more often than with his direct political adversaries. The Bar Association meanwhile opposed him over plans to reform state legal aid.

The coup, which many expected would lead to a swift handover to the Christian Democrats, instead ushered in seventeen years of military rule. Human rights violations occurred throughout, ranging from an initial complete suspension of civil and political liberties to a total of just over 3,000 officially recognized disappearances or extra-judicial executions and 40,000 cases of torture and political imprisonment. Most killings or disappearances took place in the early period, during which a state of 'internal war' was decreed. The war was however fictitious: there was little credible armed resistance to the coup, nor had guerrilla violence preceded it. A semi-clandestine political police, the DINA (*Dirección de Inteligencia Nacional*), dedicated itself to the physical extermination of left-wing militants. Overseas operations were coordinated through *Operación Cóndor*, a region-wide conspiracy amongst South American armed forces. Prominent exiles were targeted for assassination, including ex-Chancellor Orlando Letelier, killed by car bomb in Washington in 1976. The Letelier assassination, in which a US citizen also died, severely tested previous US sympathy for the regime. Denunciations by vocal, well-organised Chilean exiles also began to generate international censure. The DINA was disbanded. Clandestine burial sites were dug up, files and other physical evidence were destroyed, and Decree Law 2.191 of April 1978 conceded amnesty for crimes committed between 11 September 1973 and 10 March 1978.¹³ Though torture and other abuses continued, only 30 disappearances are attributed to the post-1978 period unprotected by amnesty.

Legal Responses and Cause Lawyering during the Dictatorship

Legally framed mobilisation against violations began almost immediately, and repression was documented as it happened.¹⁴ The Catholic Church became the major umbrella organisation for human rights defenders via the specially created *Vicaría*, founded in 1976. The *Vicaría* provided social, medical and legal assistance to victims and relatives. Habeas corpus writs (*recursos de amparo*) were submitted to still functioning, though de facto complicit, national courts. Almost

¹³ The Letelier case was specifically excluded, at US insistence.

¹⁴ See Collins (n 2).

every case of disappearance or detention was documented and then denounced, at home and abroad.¹⁵ At transition, the domestic justice system therefore contained a large universe of unresolved cases sidelined or shelved during the dictatorship, often by military courts. They nonetheless represented a pool of official information. The work of the *Vicaría* and others had also produced human rights lawyers with knowledge of repressive patterns and long experience of legal case strategy. Both these legacies would be significant in a later revival of accountability, and the notion of a 'human rights lawyer' became almost synonymous with the profile and activities of those individuals.

Lawyers who chose to oppose the regime did so largely from one of two positions. Some were principled rule-of-law stalwarts, essentially lawyers by vocation as well as training. Sometimes affiliated to the centrist Christian Democrat party, solidly opposed to Allende, these individuals formed the core of early human rights-focused opposition, representing victims or their families and often affiliated to the *Vicaría*, the ecumenical church non-governmental organisation (NGO) FASIC, or the civil society network the *Comisión Chilena*. Alliances between lawyers and elements of the church suited religiously-inspired organisations seeking a non-partisan (non-leftist) basis for their work.¹⁶ Another group opposed the regime from a political and ideological standpoint. Here the lawyer's professional identity chimed with explicit political, moral and ideological opposition to the regime. This group embraced a more openly political discourse, and included adherents of the Communist Party and of the Revolutionary Left Movement (MIR, *Movimiento de Izquierda Revolucionaria*). CODEPU, a human rights organisation with a more radical profile, was founded in 1980. It defended those accused of armed resistance, i.e. crimes of violence committed by left-wing guerrilla movements, since the *Vicaría* declined to do so.¹⁷ These two groups were, respectively, tolerated and reviled by the respectable legal establishment. Both organisations had to decide whether legal engagement with the regime was being abused to legitimate the regime. Occasional victories, such as the commutation of death sentences to forced exile, convinced many to continue.¹⁸ Such lawyers were arguably marginal to, and increasingly actively marginalised from, the wider profession. Although they formed their own associations, these generally did not outlive the 1980s.¹⁹

Reaction from the Broader Legal Profession

Although law had at one time been a 'public profession', it began to decline as such even before the coup. The regime, once in place, was strongly legalistic, and

15 Testimonies and evidence were presented to regional and international human rights monitoring bodies (the UN and the Inter-American Commission on Human Rights), press sources, and international solidarity networks and NGOs. See M Ensalaco, *Chile Under Pinochet* (U Pennsylvania 2010).

16 The *Vicaría* at one time debated, but later abandoned, a preference for humanitarian rather than rights language.

17 The *Vicaría* believed that this would lead to direct attacks on it and/or compromise its perceived legitimacy, after some early confrontations with the regime related to accusations that the Church was defending terrorism.

18 See Collins (n 2), for more detail on the varied extra-legal goals and achievements of legally framed human rights defence during the dictatorship period.

19 See C Collins, *Post-Transitional Justice* (Penn State 2010a); Collins (n 2).

indeed recruited a brilliant jurist as one of its principal civilian advisors.²⁰ In the end, however, the new Chile was forged not in the traditional law schools but by the Chicago-trained economists who waged, and largely won, the 'palace war' for internal influence within the regime.²¹ The Bar Association, like the Supreme Court, greeted the coup with approval and relief. Their loyalty was, however, poorly rewarded when their lucrative monopoly of the old legal aid system was abolished. Legal education was certainly subjected to the same scrutiny, surveillance and repressive control as other university activities.²² However, law faculties did not make themselves a particular target, unlike other, more socially critical, disciplines. The regime's anti-state and pro-market policies expanded potential access to legal training and further diminished the hegemony of the Bar Association. Private universities opened in the 1980s began to offer law degrees. Compulsory affiliation to the Bar Association was abolished, as was its equivalent in the medical profession, by a 1981 decree law.

The Return of Politics

Political parties were banned until 1987, so opposition politics was carried out in exile, at the grassroots, or under the shelter of academic think tanks. As early as 1978, the influential 'Constitutional Studies Group', or 'Group of 24', convened jurists and other legally-literate, regime opponents to draft a democratic alternative to what later became the 1980 Constitution. The group continued to meet even after the Constitution was imposed, and its members were influential at and after transition.²³ After 1985, members of the recently opened law faculty of the Universidad Diego Portales (UDP) joined colleagues from a centrist (Christian Democrat)-led think tank²⁴ and the judicial profession²⁵ to form the innocuously named Corporation for University Promotion. They discussed future legal reforms, but focused on the judicial branch rather than the legal profession. The 1948 Code of Professional Ethics applicable to members of the Bar Association went unreformed until 2011.

Lawyers, or at least politicians versed in law, were certainly instrumental in engineering the transition itself. They include Gabriel Valdés, who had been Foreign Minister in the reformist 1964-1970 Christian Democrat administration. Returning to Chile from self-imposed exile in 1982, Valdés united moderate opposition and sought dialogue with the regime. After the 1983 protests, however, Pinochet returned to a hard-line position. Increased regime violence produced an

20 Jaime Guzmán, later assassinated.

21 See Y Dezalay and B Garth, *The Internationalization of Palace Wars* (U Chicago Press 2002).

22 Universities were given military-designated rectors; troublesome students were expelled or worse, and 'subversive' academics were summarily dismissed.

23 They included Enrique Silva Cimma, who went on to be Foreign Minister (1990-94); Edgardo Boeninger, General Secretary of the Presidency – in effect, the President's chief aide and spokesman- through the same period; Francisco Cumplido, made Minister of Justice in 1990, and Jorge Correa Sutil. Correa Sutil, then a recent law graduate, would go on to become Dean of the UDP Law School, Secretary of the Rettig Commission, Undersecretary of the Interior, and judge on the Constitutional Tribunal. Of these five members, only Boeninger was not a trained lawyer.

24 The Centro de Estudios Públicos, CEP.

25 This small group consisted of forward-thinking judges and magistrates who later consolidated themselves in the Instituto de Estudios Judiciales, IEJ, founded in 1990 as an ongoing formation initiative by the National Magistrates' Association.

assassination attempt on Pinochet in 1986. Elements of the civilian right saw an urgent need to develop an exit strategy, and the so-called 'National Accord for Transition to a Full Democracy' (*Acuerdo Nacional*) was signed after secret inter-party meetings convened by the Church. Making no specific mention of justice sector or legal reforms, the *Acuerdo* did however set out a 'commitment to democratic values'; respect for the Universal Declaration of Human Rights; a fully elected legislature; possible – but vague – 'constitutional reform'; economic continuity; 'respect for private property'; and a limited openness to accountability for human rights violations. Some of these were never fulfilled. Others became the basis for legislative proposals by the first transitional administration.

Political parties were gradually legalized, and most – with the exception of the Communist Party – agreed to accept the transition framework laid down by the outgoing regime. This dictated a nationwide October 1988 plebiscite. Fifty-five percent voted against a further period of Pinochet's rule, but 43 percent voted in favour, showing continuing high levels of support for the political right and the military. Nonetheless, Patricio Aylwin, candidate of the centre-left, 17-party *Concertación* coalition, prevailed in the ensuing 1989 presidential election. The incoming government's freedom to act was however limited by inherited constraints. The 1980 Constitution, drawn up by the regime, set out a model of restricted democracy ('*democracia tutelada*', or 'protected democracy'). Appointed senators, extremely high voting thresholds for constitutional reform, and a binominal electoral system ensured an effective right-wing veto in the legislature, while Pinochet was to continue as commander-in-chief of the army until 1998.

III. Lawyers and the Controlled Transition (1990-98)

Truth Measures and the Preservation of Amnesty

On the specific matter of human rights accountability, Pinochet famously threatened that 'the day they touch any of my men, the rule of law is over'. Efforts to investigate financial fraud produced a virtual military rebellion, giving the impression that civilian control over the military was precarious. Aylwin dropped a campaign promise to repeal the 1978 Amnesty Law, declaring instead that justice would be pursued 'insofar as is possible' (*en la medida de lo posible*). Truth and reparations measures were initiated and an official truth commission investigated disappearances and fatal political violence between 1973 and 1990 (The National Truth and Reconciliation Commission of Chile, the Rettig Commission, reported in March 1991). Financial reparations included pensions and healthcare for relatives, returning exiles and people sacked or blacklisted for political reasons.

Truth and reparations were insulated from justice implications by the amnesty law and judicial practice. Aylwin's plea that investigations be completed before amnesty was applied – on the principle that it should be applied to persons, not crimes – produced some limited case reopening. One exceptional breakthrough, in 1993, saw the conviction of former secret police chief Manuel Contreras and his second in command for their part in the Letelier assassination. However, when sentences were confirmed in 1995, military authorities refused to hand Contreras over until a specially built military prison was provided. It was widely rumoured that the armed forces had also obtained guarantees that there would be no further prosecutions. The human rights issue then declined in political salience. International support dwindled, and the *Vicaría* closed in 1992. This preference for closure was shared by the military and the political right, who criticised the Rettig report and vigorously opposed sporadic efforts to revive prosecutions during the 1990s. Pro-justice actors concentrated on keeping existing cases alive, and/or on memorialization. Relatives' associations maintained an uneasy relationship with the presidencies of Aylwin (1990-1994) and Eduardo Frei Ruiz-Tagle (1994-2000). Although their core justice demands remained unmet, the associations retained enough moral sway over *Concertación* legislators to be able to block periodic right-wing efforts to legislate further impunity.

Justice Reforms as a Central Policy Concern

Opposition politicians had been hard at work since the mid-1980s preparing a governing programme for the return to democracy. In Aylwin's first annual address to the nation, two months after taking office, he frankly admitted that some of his earlier manifesto promises had had to be watered down. A manifesto promise of 'democratisation' was now rebranded under the anodyne title 'administration of justice', somewhat obscuring the radical nature of what would eventually be done.²⁶ Under the title 'national reconciliation', where pre-election

26 In sum, these reforms resulted in a wholesale replacement of criminal codes and procedure, traversing from an inquisitorial, written, investigative magistrate system to a semi-adversarial, public prosecutor-driven system with public hearings and judges re-cast in the role of guarantors. The new system was phased in from 2000 and is now fully operational. The old system is virtually obsolete except for old cases, which must be

promises had spoken of 'clarify[ing] the truth and do[ing] justice over human rights violations, as an ineluctable moral prerequisite for national reconciliation', Aylwin now appeared to equate the situations of political prisoners, exiles, and perpetrators. He proposed assisting exiles to return and pardoning political prisoners held for non-violent crimes, pointing out that many had been detained without charge, and never convicted. He also proposed changes to anti-terrorism legislation, the death penalty, and the military justice system.²⁷ Known as the '*Leyes Cumplido*', after the Justice Minister of the day, these proposals became confused in congressional debate with a broader *acuerdo marco* ('general agreement') that was being sought. This agreement, stripped of rhetoric, traded pardons for former armed opposition members ('terrorists', according to the right) with continued broad amnesty for former state agents.²⁸ Both sets of proposals attracted the suspicion of the left and victims' relatives, for tacitly treating as moral equivalents state terror and the much more limited left-wing armed opposition. This, plus opposition from the right, proved fatal to the *Leyes Cumplido*, which emerged from legislative debate in January 1991 significantly weakened in their intended reforming effect on military courts or internal security legislation. The definition of 'conspiracy to commit terrorism' – previously used exclusively against the left – was, however, diluted to respect international law.

The Emergence of a Human Rights 'Advisor Class'

Follow-up work after Rettig on delicate topics including relations with the military was overseen by an inner circle of Aylwin's trusted political allies and aides. None of this inner circle were lawyers by training. Some figures from the *Vicaría* circle did go on to have substantial specific influence on public policy regarding the treatment of past crimes. These include Professor José Zalaquett, Chile's main internationally known transitional justice theorist, who became associated with a highly principled, largely conciliatory, pro-clemency position. They also include Maria Luisa Sepulveda, former *Vicaría* social work director; advisor to Lagos after the 2000-1 Roundtable Initiative (*Mesa de Dialogo*); vice-president of the Valech Commission; member of Bachelet's Presidential Advisory Commission on Human Rights, and current board member of the Memory Museum and the National Human Rights Institute. The growing gap between these policy advisor circles and grassroots groups disillusioned by what they saw as a continued lack of justice led to tensions, as groups privately or publicly held such figures responsible for the perceived achievements or failures of the administrations they advised. Human rights lawyers outside government circles acquired a distinctly lower profile over the 1990s, and the group shrank despite some returning exiles. A certain sense of disillusionment set in on the grassroots left: regime figures, far from being publicly repudiated, were deferred to and, on occasion, visibly feted at official ceremonies.

investigated under the system in place at the time of the offence. The old system is therefore still in existence largely, though not exclusively, due to past human rights case investigations.

27 P Aylwin, *La Transición Chilena* (Andrés Bello n/d) 30.

28 The latter proposal was provoked by the fact that some Concertación politicians and jurists had begun to talk in terms of explicitly limiting the amnesty law to crimes not constituting crimes against humanity.

Key Domestic and Internal 'Irruptions' In 1998

In transitional justice policy circles, innovation occurred mainly through unexpected crises or minority social demands impossible to ignore. Both circumstances combined in 1998, an *annus horribilis* for Pinochet, an unexpected headache for the government, and an equally unexpected source of revitalisation for the dwindling human rights community. The year's events conspired to put Chile back on the world map for the very issue it had been trying hard to leave behind: past human rights crimes. In January, two criminal complaints were lodged against Pinochet in Chilean courts. Each had a political as well as a legal logic, seeking to express disgust at the imminent investiture of Pinochet as an honorary Senator. The claims' protagonists were the Communist Party (in the person of its president), and figures from the grassroots, i.e. non-governmental, left. Although known and new human rights lawyers represented the claims, the cases originated with individual plaintiffs, who given prevailing law, had to be direct relatives of victims. The next significant milestone of the year was more directly attributable to cause lawyering by a member of the 'old guard': a moderately positive verdict in September 1998 reopened a previously amnestied case, a consequence of the efforts of ex *Vicaría* lawyer Sergio Concha, who had continued to work the case as a matter of conscience even after the victim's last close relative had died.

Witnesses had meanwhile been summoned to appear in Spain for an ongoing Spanish investigation into *Operación Cóndor*, begun in 1996. Pinochet was advised by military lawyers not to travel to Europe. Nonetheless, travel he did. The outlines and outcome of his detention in the United Kingdom from October 1998 to March 2000 are well known.²⁹ The main effects relevant for present purposes were various. First, the arrest galvanised domestic groups into opening or reviving proceedings of their own against Pinochet. When he returned to Chile in March 2000, the main domestic case against him had been joined by many others, and had itself swollen to incorporate a group of 8 or 10 lawyers, representing diverse groups of victims and relatives. The group included a serving member of parliament and one person who had previously served in high-level government posts, rubbing shoulders with former colleagues now moving in less illustrious circles. The old cause lawyer circuit was revived, while the sheer volume of new cases drew new lawyers into the issue as relatives, survivors and left-of-centre social organisations, including trades unions, vied to get in on the act by submitting their own criminal complaints.³⁰ Second, the *Concertación's* intense pressure to bring Pinochet home enraged critics on the left and increased their determination to achieve his domestic prosecution. Third, the case led to a new self-consciousness among Chile's judiciary, whose every action was suddenly scrutinised, as the genuine prospects for domestic justice became key to extradition arguments.

29 See for example S Brett, 'The Pinochet Effect: Ten Years on from London 1998' (2009) Conference Report, Universidad Diego Portales <www.derechoshumanos.udp.cl>.

30 Reinforcement also came from overseas: renewed external interest led to some revival of international support for the remaining domestic human rights organisations, mostly now severely underfunded. Contacts with civil society networks in Spain resulted for example in some young Spanish lawyers volunteering as paralegals at CODEPU for a time.

IV. The Return of Cause Lawyering and New Human Rights 'Institutionality' (1998-Present)

In a peculiar variation on a historical theme, Chile's revitalised accountability scenario for past crimes has produced new breeds of cause lawyers, much as the dictatorship gave rise to the original group. New cause lawyers are at least as diverse in origin, motivation and political background as their historical counterparts, and probably much more so if generational changes and new issue areas are taken into account and state-employed lawyers and defence lawyers are included in the definition. New and old civil society-based cause lawyers are now involved in past human rights cases, but also in other human rights and social issues. Some have crossed over to staff a small but growing number of state-sponsored or state-run human rights institutions and bodies. In part, these entities represent old transition-era promises only recently come to fruition, due to a slight softening of long political hostility from the right towards human rights discourse. Several groups of lawyers – those mainly focused on past cases, and those with other functions – are discussed briefly below.

Non-State, Pro-Prosecution Lawyers Working on Past Crimes

Since 1998, around 1,300 revived and newly brought cases of dictatorship-era crimes have made their way into Chile's domestic courts, approximately 200 of which have been definitively resolved. The effects on the judicial system cannot be fully dealt with here,³¹ but include limited opening to international and regional human rights norms, and acknowledgement by the current Supreme Court of a 'debt' in failing to protect dictatorship-era rights. As far as lawyers are concerned, the written investigative magistrate system under which these cases are still processed gives lawyers a greater role than plaintiffs once cases are under way. The absence of public oral hearings, however, limits lawyers' wider public exposure. Cases are currently litigated by an eclectic mix of old stalwarts (often referred to as 'historic' human rights lawyers), newer entrants to the grassroots field (including student volunteers), and young and established professionals working for the state. Cases are defended by an older group of lawyers, commonly with a military or security service past (state lawyers and defence lawyers are discussed in subsequent sections).

A handful of historic human rights lawyers are formerly or currently associated with the *Vicaría*, FASIC, or CODEPU. A growing, though still small, number of survivor cases for torture are often represented through these lawyers. New cause lawyering of this type usually represents a de-institutionalised, personal commitment by individuals who earn a basic living in some other sphere, as it is difficult to overstate the precariousness of current operating conditions. There is virtually no question of money changing hands for this work, to the point where there is not even a developed sense of pro bono working among lawyers since it would be unthinkable for anyone to be paid for such activity. Money does sometimes change hands between plaintiffs' organisations and lawyers to cover costs in civil claims, often excluded from any limited core funding that organisations still obtain. Purely civil awards are, however, currently being

31 See L Hilbink, *Judges in Democracy and Dictatorship* (Cambridge 2007); A Huneus 'Judging from a Guilty Conscience' (2010) 35 (winter) *Law and Social Inquiry*; Collins (n 2), and C Collins, 'The Politics of Prosecutions' in Collins, Hite and Joignant (n 3).

overturned at Supreme Court level by the Constitutional bench, making them a risky venture.

The main collective actor bringing new cases is AFEP, the Association of Relatives of Victims of Political Execution. Its legal team was directed by a Communist Party lawyer until his recent appointment to an ambassadorship. Another formerly prolific Communist case lawyer also scaled down activities when elected to the legislature. The party's recent decision to enter a coalition pact with the *Concertación* has therefore had an attrition effect on the historic case universe, although the AFEP work was taken over by younger, also party-linked, lawyers. One interesting development has been the recruitment since approximately 2009 of law student volunteers acting as paralegals for AFEP cases. Their profile is unusually varied, including attendance at traditionally conservative universities and a range of class backgrounds. The Observatory project that was directed full-time by this author until 2012 at a national university saw a similar influx of student volunteers. Some claim no political or family connection to dictatorship-era repression, attributing their interest to raised awareness provoked by recent TV series and public debate around the coup anniversary. Others cite connections between the current student movement and historic organisations, in the context of violent policing of public protests.³²

State Human Rights Lawyers

Initially conceived of as a truth follow-up body to locate victims' remains, the Human Rights Programme of the Interior Ministry (*Programa*) acquired a new lease of life after a 2001 Roundtable initiative designed to find those still disappeared. Originally founded in 1996 as the continuation of the Rettig Commission and its follow-up body the CNRR (National Corporation for Reparation and Reconciliation), the *Programa* was initially restricted by law and by mandate to seeking the remains of the disappeared. In 2001, it was given the additional job of providing legal and social assistance to families of anyone named in the Roundtable report. However, it eventually went well beyond this limited brief to become the principal expression of active state compliance with obligations to prosecute grave violations and provide assistance to victims' relatives (though it is still barred from acting for survivors of political imprisonment or torture, and cannot take part in any civil claims). Post-2001, the *Programa* was colonised by historic and emerging human rights lawyers who had previously kept a critical or antagonistic distance from the state. It quietly carved out a niche for itself in aiding privately brought cases, and in 2009 gained autonomous legal powers to initiate cases (rather than having to be appointed by relatives). Given the catastrophic resource limitations under which non-state lawyers labour, where a case features both a *Programa* and a 'private' lawyer, it is increasingly common for the *Programa* lawyer to cover the bulk of everyday activity. This works best when the two groups have a harmonious relationship. In recent years, however, some staff who were removed or resigned in the run-up to the 2010 right-wing presidency began to vocally criticise the *Programa*. Party politics on the left have also created tensions. However, the *Programa* in its current configuration has forged positive working relationships with other justice system actors, including detectives, and with at least one of the major relatives' associations. Under a young and committed –

32 The affinity is both empathetic and practical: some historic organisations, memory site groups and survivors' associations began to organise impromptu (and unofficial) human rights monitoring during recent student protests.

though overworked and insufficiently supported – new director, the *Programa* is generating thoughtful proposals for better case management and for legal representation of survivors, currently excluded from statutory legal assistance. Other lawyers employed by the state with an incidental role in dictatorship-era legal cases are those who work at the *Consejo de Defensa del Estado* (CDE), a broad-based institution best understood as a law firm representing the Chilean state’s legal interests. In atrocity crimes cases, the CDE has supported criminal prosecution but vigorously opposed civil liability when the state – as opposed to individual perpetrators – is sued by relatives or survivors.³³

Defence Lawyers as Cause Lawyers?

Mainstream right-wing figures increasingly distance themselves from former perpetrators accused of dictatorship-era crimes. Professionally well-placed lawyers on the right have also been reluctant to take on these cases, while institutional armed forces’ payment of defence costs, through a levy on serving personnel, has supposedly been discontinued. Former regime agents currently charged with past crimes tend to be defended by lawyers with personal histories in the security services and/or far-right politics,³⁴ but who are little known in broader public life. By contrast, rightist lawyers who have been dialogue partners in transitional justice policy discussions are more likely to be identified by their peers as intellectually and professionally robust. They include for example Ricardo Rivadeneira, who took part in the *Leyes Cumplido* negotiations, and Gaston Gómez, member of the Rettig commission, who later advised right-wing president Sebastian Piñera (2010-2014) on human rights.

The (Limited) Emergence of Specialised Human Rights Training and Professional Opportunities

The emergence of limited university offerings in human rights training may be both a cause and an effect of recent student interest. The country’s first dedicated masters’ programmes in international human rights law were offered at the UDP in 2014 and are due to come on-stream at the Universidad de Chile in 2015. The centrality of these schools in recent initiatives is not accidental: José Zalaquett was attached to the latter’s law school until his recent retirement and co-founded its Human Rights Centre with Cecilia Medina, gender expert and former Inter-American Court of Human Rights judge. Jorge Correa Sutil, centrally involved in Rettig, was previously founding Dean of the UDP Law School, which now boasts a Human Rights Centre and, since 2003, publishes an influential annual human rights report. General law school curricula do not, however, offer human rights training as a matter of course. At a consultation meeting with the UN Working Group on Enforced Disappearances in 2013, the consensus appeared to be that only five or six law schools in the country offered any substantive human rights

33 While the CDE usually stops short of denying official truth advances by disputing the facts of civil claims, it attempts to evade liability by claiming that the statute of limitations, though inapplicable to criminal cases for atrocity crimes, should be respected where civil demands are involved. It adds for good measure that receipt of administrative reparations should be considered incompatible with the bringing of lawsuits for damages.

34 Eg Pablo Rodríguez Grez, onetime defence lawyer of Pinochet and founder of the extreme right-wing paramilitary group *Patria y Libertad*, active before and during the Allende presidency.

training, mostly as optional courses. There were almost no course offerings outside law schools.

There is, in other words, as yet no widespread concept of human rights as a desirable, interdisciplinary study option or career choice. Nor is there a detectable clamour among the country's law students to become human rights lawyers and/or take part in past-focused accountability cases. There is a cultural barrier, as 'human rights' is a term with limited social acceptance, still mainly associated with a focus on the abuses of the dictatorship. There are also structural and class barriers: Chile's higher education sector is ruinously expensive, and human rights work offers extremely limited earning prospects with which to pay off student loans. A barrier unique to dictatorship-era cases is that they are seen under the old investigative magistrate system, in which students are no longer trained and experience of which offers limited transferable skills. Despite all of this, a small but identifiable new generation of 'cause lawyers' may be said to be emerging, some of whom worked on past accountability cases before branching out into other fields including gender, LGBT, and/or indigenous rights.

These lawyers have found some limited openings in the state structures. This is a combined push-pull effect: spaces have opened up in the state, and at the same time Chilean civil society has consistently failed to achieve the creation or consolidation of a serious, properly financed, non-state human rights community or lobby capable of proactive engagement with the state and the international community.³⁵ The *Programa*, focused exclusively on past case litigation, has already been discussed. Other members of the new generation of human rights professionals who have gravitated to the state have clustered, most visibly since 2010, around the national Human Rights and Memory Museum and the National Human Rights Institute (INDH).³⁶ The INDH is a Paris Principles compliant, autonomous, state-funded body with reasonably strong monitoring and advisory functions. It delivers an annual public report and has proved itself willing to criticise government policy. It is the closest the country currently has to an ombudsman's office, something for which there is an ongoing campaign. In 2015, a new Subsecretariat of Human Rights will be created in the Justice Ministry, for which approximately 20 professional posts will be created.³⁷ The specific choice of the first Subsecretary, not yet named, will likely be taken as a signal as to whether 'past' or 'forward looking' human rights issues are to be emphasised.

35 Although isolated instances of such organisations do exist, including an indigenous rights observatory which coordinated civil society submissions to the UN alongside Chile's first Universal Periodic Review report.

36 www.museodelamemoria.cl and www.indh.cl, respectively. The Museo is a private corporation operating with public funds but an entirely privately donated collection, and is dedicated to the 1973-1990 period. The INDH's past-focused activities are relatively limited but include legal custodianship of the two truth commission archives, which has brought it into tension with the judicial branch over access to sealed Valech Commission testimony. See Observatorio DDHH, '¿Una Nueva Medida de lo Posible?' in Informe Anual DDHH 2014 (UDP 2014).

37 This is according to the initial draft bill, a version of which is currently before parliament as of late 2014. Previous human rights functions within government, outside of the Programa's very specific dictatorship-era mandate, were only really handled in a department of the Cancillería, Foreign Ministry, reinforcing a certain perception of rights preoccupations being seen as for external consumption.

Chronology of Relevant Events

Dictatorship

- Sep 1973 Military coup and state of siege declared
- 1976 Car bomb assassination of former Chilean foreign minister, Orlando Letelier, in Washington
- Mar 1978 Amnesty Decree Law 2.191, supposedly for all acts of politically-motivated violence, but in practice clearly favouring state agents³⁸
- 1980 New constitution enshrines free-market economic system and what was euphemistically called 'protected democracy' (*democracia tutelada*), including military oversight of political matters and other authoritarian elements
- 1983 Economic crisis and related protests produce a crackdown
- 1988 Constitutionally mandated plebiscite offers yes or no to seven more years of Pinochet. 'No' vote wins by a comfortable, though not overwhelming, margin
- 1989 First presidential elections in 30 years. Civilian right wing candidate loses to 17-party centre-left opposition coalition

Transition

- Mar 1990 Patricio Aylwin, Christian Democrat, takes over as elected President
- 1990-91 Rettig truth commission; legislative proposals including *Leyes Cumplido* justice reforms
- 1993 Letelier case verdict
- 1994 Change of presidency - Aylwin to Frei (Christian Democrat)
- 1995 Imprisonment of former head of the political police for the Letelier crime
- Mid1990s Judicial reform
- Jan 1998 First criminal complaints accepted against Pinochet for human rights crimes
- Mar 1998 Pinochet retires from army and becomes a senator for life
- Oct 1998 Pinochet detained in UK on request of Spanish magistrate
- 2000 Change of presidency: Frei (Christian Democrat) to Lagos (moderate Socialist)
- 2000 Pinochet returns to Chile
- 2004-05 Second truth commission, the Valech Commission
- Mar 2006 Change of presidency: Lagos to Bachelet (moderate Socialist)
- Sep 2006 Inter-American Court verdict in *Almonacid v Chile* condemns amnesty law
- Dec 2006 Death of Pinochet
- 2009 Law creating first Chilean National Human Rights Institute (inaugurated 2010)
- Feb 2010 Inauguration of National Museum of Memory and Human Rights
- Mar 2010 Change of presidency and political alternation: Bachelet (moderate Socialist) to Sebastián Piñera (right wing coalition)
- 2012 Government sponsors draft legislation to create a Vice Ministry (*subsecretaría*) of Human Rights.
- 2013 Inter-American Court verdict in *García Lucero v Chile* criticises 'self-amnesty law' and remarks that torture cases should be opened ex officio by the state
- Sep 2013 40th anniversary of the coup. Supreme Court acknowledges past failings; Piñera closes special military prison, criticises civilian 'accomplices', and describes diehard Pinochet supporters as 'dinosaurs'
- Mar 2014 Change of presidency: Piñera to Bachelet (second term)
- Dec 2014 Government sponsors a draft bill to annul the effects of the amnesty law, and constitutional reform to affirm that crimes against humanity cannot be subject to amnesty or statutes of limitation

³⁸ By virtue of excluding those in prison or under charges at the time the law came into force (all of whom were opposition activists). The law was however applied to free some armed opposition members from prison in the early 1990s (after transition).

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