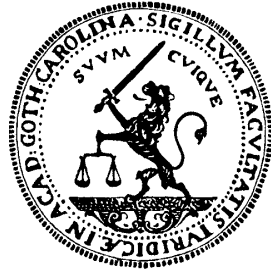


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Impunity in Chile

-A Minor Field Study-

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A Graduate Thesis in Public International Law

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Abstract

The thesis deals with the phenomenon of impunity. The topic is analysed from a legal perspective. By applying the amnesty law of 1978 without investigating, prosecuting and punishing the crimes against humanity, Chile breaches its obligations under international law, both treaty law and customary law.

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Abbreviations

ACHR	American Convention on Human Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CNI	Central Nacional de Informaciones
DINA	Dirrección de Inteligencia Nacional
FPMR	Frente Patriótico Manuel Rodríguez
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
MIR	Movimiento de Izquierda Revolucionaria
RN	Renovación Nacional
UDI	Unión Demócracia Independiente
UN	United Nations
UP	Unidad Popular

1 Introduction

Chile has had a long democratic history. After the independence from Spain was achieved in the beginning of the 19th century, it has been a democratic country compared to other Latin American countries, until the military coup in 1973 and the following 17-year dictatorship under General Pinochet. The military junta decreed an amnesty law in 1978, which enabled the military to commit atrocious crimes as torture and killings without the crime being investigated or the perpetrators prosecuted or punished. Despite the transition to a democracy in Chile, impunity still exists because the amnesty law is still in force.

Once in Chile, it is not difficult to feel the tensions or the power of the military. It was perhaps especially evident the period I was there, during the 25th anniversary of the military coup, the 11th of September and the arrest of Pinochet in London in October 1998. For instance, on the 11th of September in 1998, the upper class and the upper-middle class left Santiago for the countryside. Providencia, Las Condes and Vitacura, the fanciest parts of Santiago, were unusually calm and quiet. There were no people on the streets and no buses. It was almost like a ghost town. Downtown, however, there were hundreds of thousands of people marching towards the Moneda, the presidential palace, and then to the cemetery. The people participating in the 11th of September demonstrations were communists, left-wing people, people for human rights, relatives of people who disappeared etc. There were also hundreds of *Carabineros*¹ dressed in the special riot uniform with helmets and shields, armed to the teeth. There were riot barriers everywhere. The demonstrators were shouting unison: - "Compañero Allende! Presente! Ahora y siempre!" (Comrade Allende! Present! Now and forever!). Before going to the demonstration I had been instructed to bring my passport in case of arrest; lemon and salt to put in the mouth and under the eyes respectively against the teargas and to avoid running because then one could get arrested. Suddenly, I could see a cloud that I suspected to be teargas and people started to run. I started to run as well, but was told by people participating in the demonstration to stop running so the Carabineros would not arrest me. Between the demonstrators there were a special kind of solidarity I have never sensed with people I do not know. While I was trying to get away I was looking over my shoulder and saw huge tanks appearing. The Carabineros were hosing water into the crowd with an incredible force. Some of the demonstrators were throwing molotov-cocktails

¹ Carabineros is Chile's uniformed police force, which is subordinate to the Minister of Defense.

at the Carabineros. Three people were killed this day, among them Claudia Lopez, a young girl at my university. Hundreds were hurt and hundreds were arrested. This is how the majority of all demonstrations in Santiago ends: with teargas and water cannons and people getting hurt and arrested and sometimes killed. There were several demonstrations each day after the arrest of Pinochet in London, both for and against. Not only were people expressing their opinion in regular demonstration, but also by banging pots and pans every night between 22.00 and 22.30 at the same time as the national anthem was being played to show their support for Pinochet.

1.1 Objective and purpose

The objective of this thesis is to look into the phenomenon of impunity. In order to do this, I will look at the implications of the way the Chileans dealt with abuses which took place during the Pinochet regime 1973-1990, especially between 1973-1978 and the division between the Chileans. My purpose is to try to find an answer to the question why it is not possible to punish the perpetrators, i.e. the obstacles for impunity. I will examine the discrepancy between domestic and international law. In order to do this, I will describe the amnesty law, the judiciary, especially during the junta and the transition to democracy. As a part of the latter, I will also describe the Truth and Reconciliation Commission - The Rettig Commission, its function, method and recommendations. I will also look into international law, both customary law and treaty law.

1.2 The Scope of the Study

The study will focus on impunity in Chile, even though impunity is a problem prevalent in several other countries, not least in Latin America. However, the problem of impunity will also be discussed in general terms. The government of Chile has an obligation, as a signatory to several international human rights instruments, to investigate and punish human rights violations. I will analyse whether this obligation is fulfilled and whether the amnesty decree is a violation of international law. Considering the given time and space, the study is not exhaustive in any way.

1.3 Method and Sources

I conducted a minor field study in Chile between September and December 1998 for the purpose of collecting material for this graduate thesis. In Chile I collected material from libraries and interviewed different people, such as victims of torture, human rights lawyers, NGO officials and other people directly or indirectly connected to the subject. To get an overall understanding of the Chilean society, several field visits were conducted, for instance at Villa Grimaldi, which is a former torture centre; the main cemetery in Santiago where there are buried thousands of unknown people; the 11th of September demonstration; the Congress in Valparaíso etc. I also went to a couple of seminars in Santiago. While I was in Chile, I studied Politics and Spanish at the Universidad Academia de Humanismo Cristiano in Santiago where lectures were held by many interesting people.

The written material collected in Sweden mainly consists of legal material, such as UN documents, Amnesty reports, international human rights instruments and textbooks on impunity and international law.

2 Political History of Chile

In 1536, the Spaniards reached Chile for the first time, looking for gold. There were one million Indians living in Chile at the time, mainly Mapuche Indians. By 1540, the Spaniards had established themselves in the country. Pedro de Valdivia founded Santiago in 1541 and Chile was colonised, except in the south where they did not manage to take control.

Chile was liberated from Spain 1808-1814, when France occupied Spain. The 18th of September 1810 is celebrated as the national day in Chile. In 1814, Spain recaptured the control of the colony, but was finally defeated in 1818 and Chile was proclaimed an independent state. A stable, centralised government was established in 1830. This was a solid foundation for the economic and territorial expansion in the 19th century. There were wars against Peru and Bolivia, in which Chile won land in the north. The Araucanians, the Indians in the south, were finally defeated in 1883. In 1891, there was a short civil war in Chile.

In the beginning of the 20th century there were a couple of military coups. A new constitution was codified in 1925 and progressive social legislation was enacted. In 1938, a constellation of socialist and communist parties came to power and the industrialisation got governmental economic support. The economy weakened in the end of 1958, which led to inflation and budget deficit. People moved to the cities and the slum areas expanded. This, together with the Cuban revolution in 1959, led to a radicalisation in the beginning of the 1960s.²

2.1 The Eduardo Frei Montalva Government, 1964-1970

This period, 1964-1970 during which Eduardo Frei Montalva was the President of Chile, is sometimes called revolution in liberty. Frei Montalva was the leader of the Christian Democrat party (PDC), the first party with Catholic background to win power in Latin America. In the early 1960s, Chile was a very Catholic country. There had been a traditional link between the Catholic Church and the Conservative Party, but this was no longer the case when the Church was separated from the state in 1925.³

² *Nationalencyklopedin*, Fjärde bandet, 1990, pp. 115-116.

³ Collier, J. and W. Sater, *A History of Chile, 1808-1994*, 1996, p. 305.

The PDC wanted to mix both capitalism and socialism to create a “communitarian” society. However, the definition of communitarianism was vague. The PDC wanted to conduct social reforms, including agrarian reform and combine it with a strong democratic ethos. This two-pronged approach was called a revolution in liberty.⁴

Internationally, Frei Montalva kept an independent stance vis-à-vis the United States and other Latin American countries. Chile had restored diplomatic relations with the Soviet Union and Eastern Europe. In April 1965 when the U.S. intervened in the Dominican Republic, Frei Montalva condemned President Lyndon B. Johnson’s action at the Organisation of American States. However, the U.S. provided Chile with about US\$ 720 million between 1961 and 1970 under President Kennedy’s “Alliance for Progress”. In 1965, Frei Montalva went to Western Europe to state visits to strengthen the bonds with this part of the world.

Domestically, the PDC faced a few problems, within their own party and from other parties. The reform legislation Frei Montalva wanted to perform was not very popular among the own party. The decision to govern without seeking allies caused difficulties with the other parties.⁵

For the PDC government, four areas of reform were of particular importance: promoción popular, education and welfare, the countryside, and copper mining. Promoción popular included the creation of networks of local, self-helping organisations, especially in shantytowns where it was needed. Different types of organisations were set up, e.g. resident’s committees, mothers’ centres, youth’s clubs, parents’ groups, sports associations etc. These organisations provided hundreds of thousands Chileans with “a new form of life and hope” according to Frei Montalva.

In the welfare area, the Frei Montalva government provided a doubling of the number of hospitals and beds, 260,000 new houses were built and 200,000 lodgings were found. In the educational reform the results were noteworthy: 3000 new schools were built and by 1970 primary education covered 95 percent of children in the relevant age group.

The PDC government stimulated rural unionisation and expropriated estates on a large scale. The government used the

⁴ Ibid., pp. 307-308.

⁵ Ibid., pp. 310-311.

Alessandri⁶ agrarian reform law in the early years and expropriated 400 haciendas prior to mid-1967. In July 1967 Frei Montalva signed a new reform law which made all farms of more than 80 hectares liable to expropriation. By the end of the year, the PDC government had expropriated 1,300 haciendas. However, the agrarian reform was far from complete.

Frei Montalva also wanted to nationalise the American owned copper companies in order to increase the revenues in the country. However, instead of a complete take-over, Frei Montalva preferred to take control over the companies, i.e. to acquire 51 percent of the voting stock.⁷

Multinational companies began investing in Chile in the 1960s. This was encouraged by the PDC. Foreign investors controlled 40 of the top 100 Chilean companies by 1970.

Despite economic advances 1965-1966, inflation rose again in 1968, 1969 and 1970. In spite of this fact, many Chileans experienced a better standard of living than ever before. Still, the old problems of slow growth, inflation, uneven distribution of income and the concentration of economic power remained.⁸

A left-wing alliance was created in October 1969. The Unidad Popular (UP) consisted of Socialists; Communists; Radicals; the MAPU party (Movimiento de Acción Popular Unitaria, a party that was formed by former members of the PDC); PSD (a new Social Democratic party); and API (Acción Popular Independiente). Salvador Allende from the Socialist party (PS) was appointed as the presidential candidate for the election in 1970. On the 5th of September 1973, Allende won the election with a margin of 40,000 votes. For the first time a Marxist president had been appointed in democratic elections. This created uncertainty especially in the Santiago stock exchange, which fell dramatically. The Congress had to confirm Allende's election since none of the three candidates had an absolute majority. The PDC, the arbiter of the situation, agreed to support Allende if the UP signed a "statute of democratic guarantees". The Right did not approve of Allende and nor did the U.S. Supported by the CIA, some generals from the Right kidnapped General Schneider to provoke the army into action. The kidnap attempt failed and Schneider was mortally wounded and died.⁹

⁶ Alessandri was the President of Chile between 1958 and 1964 and leader of the Right.

⁷ Ibid., pp. 311-315.

⁸ Ibid., pp. 318-320.

⁹ Ibid., pp. 327-329.

2.2 The Salvador Allende Regime, 1970-1973 - the Chilean Road to Socialism

The Allende government offered a better standard of living for many Chileans than they had experienced before. The government redistributed wealth to the poor by increasing wages and by improving health and reducing the level of malnutrition. As a consequence of this, social spending increased. Only one third of the population had voted for Allende, which meant that the rest of the population did not approve of his policies. This was particularly the case with wealthier people whose interests were to be undermined. However, the opposition came as much from the President's own coalition as from his adversaries. Salvador Allende wanted to build socialism on democracy, while others were orthodox Marxist-Leninists. This caused a lot of problems within the coalition and the "Chilean road to socialism". The Communists and the Radicals were supportive of Allende's politics, while the Socialists, MAPU and the MIR¹⁰ (which were outside the coalition) followed their agenda and forced the President to adhere to policies against his will. The UP and Allende improved their political position during 1971. However, after municipal elections, the UP only controlled one-third of the Senate and two-fifths of the Chamber. The PDC was still the single largest party.

Copper was still the most valuable resource in Chile. The UP stated that the foreign ownership had caused the underdevelopment in the country and therefore wanted to nationalise the copper mines. The holdings of two of the largest companies were to be purchased with 30-year bonds in payment. Instead of being paid, the companies were to pay the state, which the companies did not approve of. They took the case to foreign courts, since they did not have any legal remedy in Chile. This discouraged the potential purchasers of Chilean copper. The U.S., which had financial interests pressured Chile by opposing Chilean loan application to international banks.

The nationalisation did not produce the expected revenues. Some blamed the U.S.. Many technicians quit after the nationalisation for different reasons: in protest of the government policies, for no longer being paid in dollars etc. This hamstrung the production, as did the many strikes. The miners were on strike 85 times in 1971 and 1972. The government expected the miners' demands for

¹⁰ MIR is a leftist armed group.

higher wages to cease with the nationalisation, but the workers held out, encouraged by the PDC.¹¹

The agrarian reform was greatly speeded up during the UP government. By the end of 1972, there were no haciendas larger than 80 “basic” hectares. The MIR wanted to accelerate the process even further and organised the peasants in a Revolutionary Peasant Movement (Movimiento Campesino Revolucionario). They organised their own land seizures and seized more than 1,700 properties, many of which were smaller than eighty hectares. This was a dilemma for Allende. The reform law made it possible for the government to seize an estate and appoint a temporary administrator. However, the opposition did not approve of this solution. The uncertainty about the future, poor weather, the fear of expropriation among other factors, had an effect on the agricultural production. A price freeze and a wage increase obliged the government to import food. The countryside only produced two-thirds of what Chileans consumed.

The government’s objective was to nationalise the most significant parts of the industry as well. The idea was to have an economy in three distinct sectors: the “Social Area” with state-owned companies; the “Mixed Area” with companies where the state was the majority stockholder; and the “Private Area” with small private-owned business. Different parties within the coalition wanted to proceed at different speeds and concentrate on different parts, depending on their ideology. The government made a lot of companies, as well as the major banks, state-owned. In 1971, the workers in a textile factory demanded the factory be state-owned. Other workers soon followed suit. The production fell because the price freeze made it unprofitable to produce at the same level, expected expropriation made private owners refuse to invest in their own business.

It became impossible for Salvador Allende to keep his promise to raise the living standard as industrial and agricultural production fell. The government had to begin to import when industry failed to produce sufficiently. The copper prices fell, which made it difficult to pay for the import. By the end of 1972, the country faced an enormous trade imbalance.

During 1970, the President increased the wages by 55 percent. The UP government also increased social expenditures for health, housing and education and the public access to the social security system. During 1971, the money supply doubled, the available credit for private and public sectors tripled and tax revenues

¹¹ Ibid., pp. 330-336.

declined. The government borrowed money from foreign banks to find funds. The American credit squeeze made it difficult to seek loans in international banks. Loans were granted mainly from China, the Soviet bloc and other Latin American countries. A decline in the local production coupled with a black market raised the prices drastically. Inflation became too high. By the mid-1973, the economy was close to collapse.¹²

Military discontent had grown stronger and action was taken on the 29th of June 1973 when the Second Armoured Regiment tried to stage a coup d'état. The attempt failed, but Allende's political position deteriorated. He tried to hold his government together by forming a new cabinet in early August 1973, where he included the military in order to satisfy the PDC. General Prats who were the new Minister of Defence, resigned on the 21st of August after the military had declared he did not enjoy their support. General Augusto Pinochet Ugarte replaced him. General Gustavo Leigh and Admiral José Toribio Merino replaced the Air Force Commander and the Fleet's Commander. On the 9th of September, the leaders of the armed forces with the support from the Carabineros decided to overthrow the Allende government. The date was set for the 11th of September. The Navy seized Valparaíso early in the morning without difficulty. In Santiago, in La Moneda- the presidential palace- Allende refused to surrender. Later that day, in the afternoon Salvador Allende was found dead in La Moneda. He had probably shot himself in the head with a machine gun.¹³

2.3 The Pinochet Regime, 1973-1990

From the beginning of the Junta's take-over, the repression started. A curfew was imposed, the Congress was closed, the UP parties were banned, left-wing papers disappeared from the news-stands and all important national institutions were assigned to militaries. Tens of thousands were arrested and just as many were exiled. Especially communists and UP activists were hunted down by the military and either shot or put in concentration camps. DINA (Dirección de Inteligencia Nacional, Directorate of National Intelligence), which was a secret police under the control of General Augusto Pinochet, was created in 1973. The chief in command was Colonel Manuel Contreras. DINA reported directly to General Pinochet through Contreras. Pinochet was in command

¹² Ibid., pp. 337-346.

¹³ Ibid., pp. 353-358.

of its operations.¹⁴ General Pinochet was also head of the armed forces.¹⁵

The characteristics of political repression in Chile was:

- (i) The role of the military intelligence;
- (ii) The phenomena of unacknowledged detentions and secret executions;
- (iii) Manipulation of public opinion;
- (iv) Dehumanisation of the enemy, i.e. the communists;
- (v) Torture: destruction of subjectivity and personal autonomy;
- (vi) Impunity;
- (vii) Irrelevance of constitutional safeguards (compliance of the judiciary);
- (viii) Destruction of solidarity;
- (ix) Consumerism and diversion;
- (x) Co-option of political alternatives.¹⁶

DINA set up torture-centres where especially members of the MIR and the Communist party were tortured. DINA did not only operate within the country, but also in other countries. General Carlos Prats and his wife were killed by a car bomb in Buenos Aires, Argentina in September 1974. In September 1976, Orlando Letelier, the Foreign Minister of the Allende government, was killed together with his American assistant by a car bomb in Washington D.C., USA. The murder of Letelier led to dissolution of the DINA. It was replaced by CNI (Central Nacional de Informaciones, National Information Centre).

In January 1976, the Church formed Vicaría de la Solidaridad, a non-governmental organisation set up to provide legal aid to victims of repression and to monitor human rights violations.¹⁷

General Pinochet never lacked support in the population. The population admired him at large for his strength. The hostility towards Allende was transformed into admiration for Pinochet. By the end of 1974, Pinochet was the President of the Republic.

In 1980, a referendum was held whether a new constitution should replace the one from 1925. The new constitution would move Chile to a so-called protected democracy with a Congress with limited powers; one-third of the Senate nominated instead of elected a strong eight-year presidency and guaranteed military

¹⁴ Contreras gave this piece of information to the Chilean Supreme Court in February 1998.

¹⁵ *Amnesty om Pinochet – The Case of General Pinochet: Universal Jurisdiction and the Absence of Immunity for Crimes Against Humanity*, 1998, p. 24.

¹⁶ Brett, Sebastian, the 6th of October 1998.

¹⁷ Collier, J. and W. Sater, *supra* note 3, pp. 359- 362.

influence over future governments. More than six million Chileans voted; 67 percent voted for and 30 percent against.

Regarding the economy, the Junta took help of some economists trained at the University of Chicago, the home of monetarism and the principle of laissez-faire. The effect of these neo-liberalists soon became evident: almost all price controls were abolished and the currency was devalued. In 1974, the copper price fell drastically and inflation was out of control as an effect of the international recession caused by the Arab-Israeli war in 1973. Professor Milton Friedman advised Pinochet in 1975 to put Chile through a shock treatment to eliminate inflation. Pinochet gave the so-called “Chicago Boys” free reins. They had utopian objectives and wanted to completely reconstruct the economy of Chile. They thought that state-interventions held back economic growth and wanted to comprehensively open up the economy. Market relations were to be imposed throughout society and the state was only to assume the role of a “night-watchman”. The effect of this shock treatment was deep recession with extremely high unemployment. The neo-liberal program was carried out anyhow, despite the recession. Over 400 state-owned or state-controlled companies were privatised. The import tariffs were brought down and liberal foreign investment laws were decreed. The agrarian reform was stopped and one-third of the land was given back to the former owners. The spending on agricultural was drastically reduced. The Mapuche Indians were encouraged by a new law in 1979 to divide their common land into private plots. The new agriculture led to an intensification of rural poverty. However, the inflation fell drastically and was in 1981 9.5 percent.¹⁸

In 1982, Chile experienced a recession even worse than that of 1975-76. The peso was devalued twice and in 1983 the regime took direct control of ten banks because the banking system was close to collapse. The new economic policy was pragmatic. The exchange rate and the money supply were manipulated and the domestic industry and agriculture were favoured. Direct foreign investment increased after 1985. This new policy created a solid growth from the mid-1980s and onward.

The effects of neo-liberalism have been much debated. Economic growth was achieved at the cost of two recessions, high level of unemployment and poverty and skew income distribution. The poorer got a worse standard of living while the ones better off got a better standard of living. However, some things were improved for the poorest, e.g. child nutrition, infant mortality, life expectancy, low-cost housing, street-paving, sewerage and domestic water

¹⁸ Ibid., pp. 364-369.

supply. Between one-third and two-fifths of the working population worked in informal sectors, such as street vending and domestic service by the late 1980s.¹⁹

After 1982-1983, vocal opposition to the regime and demonstrations began, caused by the economic recession. The regime's response to the demonstrations was violent and ended in deaths, injuries and arrests. In 1985, the Cardinal Archbishop of Santiago convinced eleven parties to sign a national agreement for the transition to full democracy, which meant free elections, re-establishment of the rule of law and a mixed economy. Pinochet did not pay any attention to it.

According to the 1980 Constitution, there were to be a plebiscite in 1988. Pinochet hoped to win it so he could be President until 1997. In February 1988, more than fifteen parties formed the Concertación de Partidos por el No (Concertación of parties for No), trying to win a No vote in the referendum in October. The No vote won by 54 percent over Yes with 43 percent. The presidential and congressional election date was fixed for December 1989. The Concertación proposed a couple of amendments to the 1980 Constitution. In a referendum in July 1989, a few of the proposals were agreed on, e.g. an end to the prohibition of communist parties. There were other proposals that was not changed, e.g. the binomial election system that favoured the Right and the laws that Pinochet had decreed to secure influence on the future government. For instance, Pinochet were to remain Commander-in chief of the Army until 1998 no matter the outcome of the election.²⁰

Patricio Aylwin Azócar won 55 percent of the vote in the presidential election.

2.4 The Aylwin government, 1990-1994

The new government was to re-establish democracy in Chile. However, the process of transition was designed by the military. Elections were allowed in exchange for respect of the constitutional structure enforced by the military. With the concept "Truth and justice to the extent possible", the Aylwin government did not want to provoke a confrontation with the military. The normalisation of the civilian–military relations was one of the main political-institutional objectives of the transition.²¹

¹⁹ Ibid., pp. 371-374.

²⁰ Ibid., pp. 376-381.

²¹ Roth- Arriaza, Naomi (editor), *Impunity and Human Rights in International Law and Practice*, 1995, pp. 171-172.

President Aylwin set up a Commission for Truth and Reconciliation²² in 1990 in order to establish the truth about the human rights abuses during the former regime.²³ The Rettig Commission consisted of eight people. The even number was to signal that it was not a decision with a majority/minority. The Commission included the crimes committed by the far-leftist groups in the Rettig report and equated them with human rights violations committed by state agents. Human rights have always been limited to actions of the state and seek to limit state power. Since there is no protection of human rights from the state there is a need for international protection. As far as crimes committed by private individuals are concerned, there is a criminal justice system to restore the rights of the victims. In this way the government of Chile gives the impression that no state terrorism took place, but rather that it was merely a skirmish between two rival gangs.²⁴

The Commission did not have a mandate to name the perpetrators, but it was to send to the courts any new useful information. The courts were to decide whether the information was useful. However, in reality the Commission did this and therefore exceeded its competence. As a result, much of the relevant information never reached the courts. The failure to make public all available information was only one of the ways the government made it more difficult to identify the persons responsible. Domestically, the Human Rights Commission of the Chamber of Deputies and the Senate can only investigate acts that occurred after the Aylwin government came to power. Internationally, Chile accepted the jurisdiction of the Inter-American Court of Human Rights and the UN Human Rights Committee, but with the reservation that it was valid only for events that took place after March 1990. The identification of the perpetrators has not been facilitated.²⁵

The Rettig report was presented in March 1991. Under the 1992 Reparation Law, more than 4,000 relatives of victims in the report were in 1994 receiving benefits from the government every month; 821 received educational grants and 63 had been provided homes. In 1992, the National Corporation of Reparation and Reconciliation was created. It was to continue the work of the Rettig Commission.

²² It was called the Rettig Commission after the President of the Commission Raúl Rettig.

²³ Collier.J. and W. Sater., *supra* note 3, pp. 382-383.

²⁴ Roth- Arriaza, Naomi, *supra* note 21, pp. 172, 174-175.

²⁵ *Ibid.*, p. 178.

The Aylwin government did not do very much to improve the legal obstacles set up by Pinochet to prevent court investigations. The government hoped that the judiciary would achieve justice as far as possible. The Aylwin government did not address the two major obstacles to prosecutions either; the amnesty law and the broad military jurisdiction. However, a change in the courts' approach to investigations could be noted in 1993. The President requested the courts to investigate the cases thoroughly before granting amnesty. This was called the "Aylwin doctrine". Even the Supreme Court and its judges approved to a larger extent of the investigations. One of the reasons for this change of opinion might have been the impeachment and dismissal of a Supreme Court judge for gross abandonment of duty when transferring a case to the military court. There was an apparent change of direction when the Supreme Court transferred a lot of cases to the military courts. According to FASIC²⁶, this change was due to the Boinazo incident when the heavily armed soldiers appeared in the streets in May 1993 to show their discontent over the evolution of trials. President Aylwin felt the pressure from the military and tried to find a political solution to the problem of the trials to keep both the military and the relatives of the disappeared content. Aylwin proposed to make the investigations more effective and efficient and at the same time secret. The other parties of the coalition did not approve of this solution.

According to Human Rights Watch, during Aylwin's four-year mandate the democracy in the country consolidated, even though the objectives of the Concertación government were not accomplished. Chile was still not a democracy in 1994. It still lacked some of the important attributes of a democracy, such as a fair voting system, properly designated Senate, the President's power to dismiss and reappoint the Commander-in-Chief of the armed forces and the police.

Eduardo Frei Ruiz Tagle, the son of the former President Eduardo Frei Montalva, won the presidential election in December 1993 with 58 percent of the votes as the candidate of the Concertación por la Democracia.²⁷

²⁶ Foundation for Social Assistance of the Christian Churches, a ecumenical human rights organisation.

²⁷ *Chile Unsettled Business: Human Rights In Chile at the Start of the Frei Presidency*, Human Rights Watch Americas, May 1994, pp. 1-4.

3 Definition of Impunity and Amnesty

The dictionary definition of impunity is “exemption from punishment or penalty”. Amnesty, which is one of the most frequently used means to establish impunity, is derived from the word amnesia, a medical term indicating “loss of memory or forgetting”.²⁸

Impunity means, according to Louis Joinet, Special Rapporteur on Impunity, “the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations made to their victims.”²⁹

The term impunity comprises two aspects, according to Louis Joinet, i.e., a) in terms of meaning it covers “all the measures and practices whereby, on the one hand, states fail in their obligation to investigate, try and sentence those responsible for violations of human rights and, on the other hand, impede the enjoyment by victims and their families of the right to know the truth and have their rights restored”; b) in terms of scope, the word impunity is used solely in reference to “violations of a serious and massive nature or constituting a systematic practice”, excluding “cases of impunity following reprehensible conduct which is non-premeditated.”³⁰

Impunity is the means by which alleged perpetrators of a crime against humanity escape being charged, tried and punished for criminal acts committed in their official capacity. Impunity can be achieved through amnesty laws, pardons or by default. Amnesty laws are either passed or decreed by the abusive government or the successive government. Pardon means that the convicted criminals remain unpunished and default is the deliberate lack of any action at all.³¹ Impunity is granted through legal channels, such as amnesty, exemptions, pardons, favours, or through circumstances.

²⁸ Harper, Charles (editor), *Impunity: An Ethical Perspective - Six Case Studies from Latin America*, 1996, p. 73.

²⁹ U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of the impunity of perpetrators of human rights violations (civil and political)*, Final report prepared by Mr. Joinet, the 26th of June 1997, p. 12.

³⁰ Harper, Charles, *supra* note 28, p 14.

³¹ *Ibid.*, p. ix.

The latter is called de facto impunity and arises when there is a failure to investigate; when facts are denied or covered up; when no action is taken against the perpetrators by either the police or the judiciary; when the punishment is totally disproportionate to the committed crime; or when there are military tribunals.³²

The phenomenon of impunity and its effects on society involve violations of a wide range of human rights, including those of a civil, political, economic, social and cultural nature.³³

Amnesty means any domestic legislation applied by a state whereby the criminal nature of actions is removed and thus makes the culprits non-liable to prosecution or punishment. Amnesty has the effect that proceedings are stopped and a sentenced punishment is never exacted. The consequence of amnesty is that it weakens penal actions and sometimes precludes material and moral reparation for actions protected by the injunction. A lot of countries in Latin America have used amnesty to achieve peace and reconciliation after civil conflicts or during transitional phases in order to achieve democracy.³⁴

The main objectives of punishment are:

- To prevent the perpetrator from repeating the crime;
- To make him pay for the breach of the law;
- To prevent others from committing a similar crime;
- To provide some psychological comfort to the victim and the society by conveying that the illegal act committed against them attracted the imposition of sanctions;
- To reform the perpetrators and turn him into a law-abiding citizen.³⁵

When perpetrators are not punished these objectives are not achieved.

The State of Chile has stated that there are three different forms of impunity: legal, political and moral impunity. Legal impunity is performed through amnesty laws. Political impunity “consisted of legitimising the acts of public servants involved in violations of human rights by providing them with publicity or legal defence and promoting them to higher posts in the public function, congratulating and decorating them because of their “success” in combating crime. Moral impunity consisted of justifying State agents who committed criminal acts on the ground that they were

³² *Justice – Not Impunity*, International Meeting on Impunity of Perpetrators of Gross Human Rights Violations, 1992, pp. 185-186.

³³ *Ibid.*, p. 183.

³⁴ *Ibid.*, p. 169-170.

³⁵ *Ibid.*, p. 80.

heroes who served the motherland and campaigned against subversion.”³⁶

³⁶ U.N. Commission on Human Rights, Report of the Working Group of Enforced or Involuntary Disappearances, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Question of Enforced or Involuntary Disappearances*, the 7th of January 1993, p. 131.

4 The Chilean Legal System

4.1 The Military Jurisdiction

Historically, military tribunals have always existed. The original purpose was to convict soldiers which committed military crimes. Before the dictatorship, the military courts were mistakenly given too much authority and knowledge about things they should not know about. For instance, ley de control de armas, the weapon control law, which was decreed during the Eduardo Frei Montalva government. This law meant that whenever weapons were involved, the case was automatically transferred to the military tribunals. This led to that civil cases were transferred as well. Judicial repression was exercised through the military tribunals. The military had direct hierarchical control over the tribunals, and could orchestrate the outcome of the cases. The dictatorship exercised judicial repression through the military tribunals. In this way, the defence of the prosecuted was weakened. This created the illusion that the dictatorship prosecuted and judged/sentenced people by means of a tribunal that preceded the dictatorship. It gave the military a chance to defend itself.³⁷

Military jurisdiction has always been broad in Chile, even before 1973. During the Pinochet regime, the jurisdiction of the military tribunals broadened further and included political and security-related charges against civilians. By the end of the 1980s, the military courts almost exclusively tried civilians for crimes of dissent or alleged violent opposition to the regime. The court procedure did not fulfil international standards; for instance confessions under torture were admitted, access of the defence to prosecution evidence was limited etc. If the armed forces wanted to oppose a civilian jurisdiction, the Military Prosecutor General stated that the crime involved military personnel and in military or police quarters.³⁸ According to the armed forces, during the period 1973-1978 there was a war since internal war had been declared. The cases of disappearance were transferred to the military

³⁷ Salazar, Héctor, the 9th of December 1998.

³⁸ Art 5 (3) of the Code of Military Justice defines military jurisdiction as: "proceedings for common crimes committed by military personnel during the time of war, being in the field, in an act of military service or occasioned by such service, in the barracks, camps, bivouacs, forts, military works, stores, offices, premises, foundries, workshops, factories, parks, academies, schools, vessels, arsenals, lighthouses and other military or police establishments or premises of the armed forces."

tribunals. The reason for this was that, according to the military, a military institution had carried out the detention. Cases of torture and extra-judicial executions were almost without exception transferred to military tribunal or closed. Even during the Aylwin government's first year, cases continued to be automatically transferred from the civilian courts, even before the formal indictment.³⁹

During the Aylwin government, a few changes were made, although they still had jurisdiction to bring up civil cases and judge civilians for crimes that are not military. Not only could they judge civilians, they could additionally defend military officers by not bringing up cases where military officers were involved.⁴⁰

Even though Aylwin limited the jurisdiction of military judges over civilians accused of political or security offences, the military courts retained the jurisdiction of criminal offences committed by military personnel on active service. As experience has shown in many countries with military jurisdiction, the military courts tend not to uphold the guarantee of impartiality needed for investigations of human rights abuses. The Rettig Commission recommended that the military jurisdiction should cover only “purely military offences, that is crimes committed in acts of service by personnel of the armed forces and the Carabineros and against persons belonging to these institutions.”⁴¹

Military justice is a crucial element of impunity. The reasons for this are the extensive jurisdiction of military tribunals, the military composition of the military courts, a political tradition and a strongly military-dominated civil society. The weaker a civil government and a civil society, the deeper the intrusion of military justice. These circumstances provide the factors leading to the military impunity; the lack of a profound conviction that human rights violations must be brought to justice and the hierarchical structure of the military, where military justice is an integral part of the armed forces.^{42 43}

³⁹ Brown, Cynthia, *Human Rights and the Politics of Agreement – Chile during President Aylwin's first year*, An Americas Watch Report, July 1991, pp. 38-41.

⁴⁰ Salazar, Héctor, the 9th of December 1998.

⁴¹ *Chile Unsettled Business*, supra note 27, p. 4.

⁴² Ambos, Kai, *Impunidad y Derecho Penal Internacional - Un estudio empírico dogmático sobre Colombia, Bolivia, Perú, Chile y Argentina*, 1997, p. 494.

⁴³ Ambos, Kai, *Impunity and International Criminal Law – A Case Study on Colombia, Peru, Bolivia, Chile and Argentina*, Human Rights Law Journal Vol. 18 No.1- 4, the 29th of August 1997, p. 8.

The military keeps special prisons used for special penalties. One of them is Punta Peuco, where the Chief Commander of the DINA, Manuel Contreras, is serving his sentence.

The judicial situation has improved the last few years as compared to the Pinochet era, according to Salazar. There are more legal options, but a lot of obstacles remain, such as the military jurisdiction, the amnesty law and conservative judges. Salazar argues that Chile still lacks an independent court, as a democratic country should have, but it less bad than a dictatorship.

What has improved?

According to Salazar, there is a greater will of some civil judges to investigate. Before there was a self-censorship which meant that the judges wanted to close the cases whenever they suspected the cases were complicated.⁴⁴

4.2 The Amnesty Law

After international pressure the Pinochet government announced in April 1978 a transition to what it called a “new institutionality”. As part of this, the junta decreed an amnesty law the 18th of April 1978, decree law 2,191. The amnesty law covered criminal acts, which included cases of torture, extra-judicial executions and disappearances committed by uniformed agents. Article 1 of the amnesty law states: “That an amnesty be extended to all persons who; as principals or accessories, have committed criminal offences during the period of state of siege, between the 11th of September 1973 and the 10th of March 1978, unless they are currently on trial or have been convicted.”

Article 2 applies the amnesty to those convicted by military courts before the 10th of March 1978.

Article 3 mentions the exceptions of crimes that are not included in the amnesty. However it does not include homicide, kidnappings or assault.

Article 4 states that anyone involved in the assassination of Orlando Letelier do not fall under the amnesty.⁴⁵

The official purpose of the amnesty law of 1978 was to promote pacification and reconciliation in the country. A broad amnesty law

⁴⁴ Salazar, Héctor, the 9th of December 1998.

⁴⁵ Brown, Cynthia, supra note 39, p. 43.

was decreed to cover all cases. The amnesty law, which cover crimes committed between 1973-1978, served to erase all signs of crimes DINA had committed. The law did not grant amnesty to specific persons, but to crimes committed during this time. The amnesty covered all types of crimes committed during 1973-1978. However, some specific crimes were excluded:

- Kidnapping of adolescents;
- Embezzlement of public funds.

None of the grave crimes committed by DINA were excluded.

Between 40 and 50 political prisoners were released from prison when the decree law was enforced. After 48 hours they were expelled from the country. As soon as they left the country they were not allowed to return - prison was replaced with exile. In this case the amnesty law did cover specific persons.

Because so many of the DINA agents were neither charged, nor convicted of a crime, they were not acquitted as such. The role of the amnesty law was not to charge the agents.

It is known how many political prisoners were released because of the amnesty law, but how many agents who were covered by it is unclear. Even today, the amnesty law remain in force. It is therefore not even possible to investigate the cases; it is not possible to know how many people participated and what happened.

Because of pressure from the U.S., the Letelier case was excluded from the amnesty law. In this case it was known exactly which persons were involved in sharp contrast to the other cases. If the case had not been excluded from the amnesty law it had meant a more extensive confrontation with the U.S. The main purpose of the decree law was that the truth would not be known about what had happened and about the fate of the detained disappeared.

Héctor Salazar was one of the lawyers, who were working on these cases. They worked hard for the amnesty law not to be applicable. When the amnesty law came into force, the judges decided to close the cases immediately, both in the civil and military courts. Seeking a solution they appealed to the Court of Appeal, which reopened the cases and the judges recalled their decision to apply the amnesty law.

One of the solutions they arrived at was to label the disappeared “kidnapped” as long as their fate was unknown. The kidnapping case proceeded until their fate was established. If the disappeared person was not found before 1978, after which the amnesty law

was not applicable, and the kidnapping case was left opened; an indictment could still be done. This was accepted by the Court of Appeal and was the reason why the cases to be re-opened. The cases were closed with the possibility were re-opened if the disappeared were found. The civil courts accepted this view, unlike the military courts where the amnesty was still applied. They did not consider the disappeared as kidnapped. A judicial struggle now started between the civil and military courts. The Supreme Court wanted to re-open the cases. In some cases the military court succeeded. The purpose of the amnesty law was to erase the gravest crimes committed by the military, which the military had indirectly confessed.

According to Salazar, the Aylwin government did not have the political will to touch the amnesty law. The amnesty law status quo was a compromise, indeed a condition by the military if they were to let go of the power. The Concertación did not represent a majority in the Congress and therefore was not able to annul, repeal or change the interpretation of the law to narrow its scope. The political will did not exist within the Concertación and one of the military's conditions was to leave the law untouched.

The lawyers then began to take each individual case to court. Each case opened new possibilities. The lawyers fought against the courts, where the tendency was to apply the law.

During the last two years the principle that the amnesty law shall not be applied unless the disappeared person has been found, has been established in the courts.⁴⁶

Hundreds of political prisoners were released after the amnesty law was decreed. The amnesty law pardoned both the perpetrators as well as their victims and was cited a reason to close cases by the courts.⁴⁷

Human rights organisations and the opposition had denounced the effects of the amnesty law during the Pinochet regime. The amnesty law had been decreed without popular consultation. The UN Special Rapporteur on Chile argued that the amnesty law benefited those "responsible for assassination, torture and other offences committed during the administration of the Junta, rather than granting a genuine amnesty to political opponents."⁴⁸

⁴⁶ Salazar, Héctor, the 9th of December 1998.

⁴⁷ *With Friends Like These*, The Americas Watch Report on Human Rights and U.S. Policy in Latin America, 1985, pp. 49-50.

⁴⁸ *Chile - A Time of Reckoning – Human Rights and the Judiciary*, International Commission of Jurists, Centre of Independence of Judges and Lawyers, 1992, p. 195.

The Supreme Court allowed the military tribunals to use the amnesty law to close cases before all facts had been established by comprehensive investigations. The Corte Marcial in cases of disappearances and executions closed cases without indictments. The Supreme Court has indicated that it does not think that the amnesty law is incompatible with international law, despite the fact that there are international conventions that Chile has signed and ratified which prohibit amnesty of crimes against humanity. In February 1972, Chile ratified the International Covenant of Civil and Political Rights (ICCPR) and in August 1990 the American Convention on Human Rights (ACHR) was ratified. However, the Supreme Court did not accept this ratification date, but considered the ICCPR ratified on the 29th of April 1989 and the ACHR on the 5th of January 1991 since these were the dates when the international instruments were published in the Official Gazette. Since the international instruments were not formally ratified, the Chilean courts did not obey them and could therefore ignore the new legal standards.⁴⁹

The amnesty law was one of several legal instruments created by which the military could control the civilian courts and especially the way these handled political crimes. The amnesty decree was created shortly after the state of siege was replaced by a state of emergency. Under the state of emergency, wartime military tribunals (*consejos de guerra*), that summarily handled political cases under the state of siege had ceased to function. In April 1979, the junta decreed an antiterrorist law. This law established the crime of "an attack on the social order, morality, persons or property". The penalties were harshened as well. Above all, the law also confounded the principle of presumption of innocence until proven guilty. From this point, it was the accused person who had to prove his innocence.⁵⁰

Approximately thirty cases covered by the amnesty law were reopened in 1992 and early 1993, out of 200 cases investigated since the release of the Rettig report. The main reason for the investigations was the testimony of three former DINA agents. According to Human Rights Watch, a wider acceptance of the "Aylwin doctrine" might be the reason for the reopening of cases and the acceptance of legal appeals against the amnesty law. The "Aylwin doctrine" states that the amnesty law is not applicable in a case until every effort has been made to clarify the crime, the circumstances and the responsible persons. A case is not to be

⁴⁹ Brown, Cynthia, *supra* note 39, pp. 44-45.

⁵⁰ *With Friends like these*, *supra* note 47, p. 50.

closed merely because it involves a certain type of crime or perpetrator.⁵¹

On the 28th of May 1993, the army reacted and exhibited their disapproval by posting heavy equipped soldiers in full camouflage combat gear on guard outside the armed forces headquarters, where the Council of Generals was holding a meeting. This incident was later referred to as the Boinazo, a reference to the black berets (boinas) worn by the Army Special Forces. One of the main reasons for this incident was the prosecution of a lot of militaries for human rights crimes.⁵² The army wanted a new amnesty law, covering the crimes committed after 1978 as well, but President Aylwin rejected it. The President held meetings with Pinochet, political leaders, the judiciary and human rights groups in July 1993. He thought that the trials could be speeded up if the army collaborated and proposed the appointment of special judges that would guarantee that the testimony of former military personnel would be secret and the witnesses would be anonymous. Aylwin's proposals were presented to the Chamber of Deputies on the 4th of August 1993:

- Up to fifteen appeals court judges would be appointed as special investigating judges (ministros en visita) that would handle the cases of torture, homicide, kidnapping and illegal arrest, where the amnesty law was applicable;
- The testimonies of witnesses and defendants which contributed precise data or information which contributed to clarification of a crime and its circumstances, would not be made official and the actual interviews could be carried out outside the court itself;
- The penalty for court officials and lawyers who violated confidentiality would be imprisonment;
- The ministros en visita would be appointed within two years from the publication date of the law.

The proposals were not agreed on within the coalition. Many people were afraid that it would mean that the courts would close investigation more easily; the perpetrators would be acquitted without public identification and therefore violate the principle of accountability; and the victim would not gain access to all evidence. The proposals were overturned in the Congress.

⁵¹ *Chile Unsettled Business*, supra note 27, pp. 7-8.

⁵² *Ibid.*, pp. 8-9.

The lack of clear legislative directives has caused difficulties on how to interpret the amnesty law. It has also led to battles for jurisdiction between civilian and military courts and that cases have been closed, reopened and closed again.⁵³

Salazar contends that legal mechanisms are investigated in order to redecree a law that reinterprets the amnesty law. The amnesty law should only be applied in cases when the investigation cannot proceed further. Salazar does not believe that it is possible to annul the amnesty law or to decree a new law.⁵⁴

4.2.1 The Letelier Case

Only one case was explicitly excluded from the amnesty law: the case of the assassination of former Minister of Foreign Affairs and Defence under the Allende government, Orlando Letelier. Orlando Letelier was killed, together with his assistant, the American Ronni Moffit, by a car bomb in Washington D.C. on the 21st of September 1976.

In 1978, FBI investigations revealed that DINA agents with co-operation from anti-Castro Cubans in exile were responsible for the assassination. The Cubans had prepared and activated the bomb as ordered by DINA which had prepared the assassination. Five Cubans were arrested and the court indicted four DINA agents. The four agents were Michael Townley, American-born but resident in Santiago, Armando Fernández Larios, Pedro Espinoza, the operational chief of the DINA and Manuel Sepúlveda Contreras, the director of DINA. Townley was expelled to the USA to face trial in 1978. He confessed his participation in the plot. Townley was convicted and jailed in the U.S. However, his sentence was reduced under a plea-bargain, which was awarded by the Justice Department. Fernández was released in lack of evidence, after having been detained and questioned in Chile. However, in 1987, he gave himself up to the U.S. authorities and confessed. The U.S. wanted Espinoza and Contreras extradited, but in 1979 the Chilean Supreme Court rejected the request. Therefore, they were released from preventive detention without charge.

The judicial investigations in the Letelier case, which started in 1978, languished for more than ten years in the military courts. The lawyers of the Letelier family spent much time trying to reopen the case that the military tribunals declared temporarily closed (temporalmente sobreseído). The Letelier family, vainly as it

⁵³ Ibid., pp. 9-11.

⁵⁴ Salazar, Héctor, the 9th of December 1998.

turned out, appealed to the Corte Marcial to take a court confession by Fernández into consideration.

The Ministry of Foreign Affairs launched an inquiry, after the Aylwin government had taken office in 1990, to investigate the falsification and forging of official passports by Ministry officials acting upon the orders of DINA between 1975 and 1977. Since the DINA agents had been using false passports going to the U.S., this was relevant to the Letelier case.

In April 1990, the Santiago newspaper *La Epoca* published an interview with Luisa Monica Lagos. She confessed that she had been a DINA agent, who under the assumed name of Liliana Walker, had gone to Washington with Fernández on his surveillance mission. The military prosecutor considered this evidence and the Letelier case was reopened. It was closed again after the military judge had interviewed Luisa Lagos. She was released without being charged.

The Aylwin government was anxious to bring the DINA agents involved to justice because of the relations with the United States and hoping that the U.S. would renew its military aid. Law 19,047⁵⁵ stated that those crimes affecting international relations would be transferred to the Supreme Court. Applying this law, the Supreme Court appointed judge Bañados to take over the investigation. The Letelier family presented accusatory dossiers against Contreras and Espinoza to the Court in August 1990, in order to forestall the possibility that the court would close the case. On the 21st of September 1991, the Court could have closed the case under the 15-year statute of limitations, if no one had been indicted. Contreras and Espinoza were arrested on the 23rd of September 1991, and charged with first-degree murder. Bañados later convicted and sentenced Contreras and Espinoza and both are in prison at this time.⁵⁶

4.2.2 Interpreting the Amnesty in Accordance with National and International law

The amnesty law, if interpreted correctly legally, is no obstacle for criminal punishment of the perpetrators. The reason for this is that Chile is a party of several human rights instruments which precludes an amnesty, which is part of Chile's constitutional law.

⁵⁵ One of the Cumplido laws. See Chapter 4.4.

⁵⁶ *Chile- A Time of Reckoning*, supra note 48, pp. 205- 210.

The Supreme Court has interpreted the amnesty law on several occasions to impede *any* prosecution. Legislative action to allow the lower courts to apply the amnesty law correctly is needed. The reason for this is that it has not been successful to leave it to the courts for a judicial interpretation to deny effect of the law in cases of gross human rights violations. There are several legal options:

- Annulling the amnesty law, which was proposed by President Aylwin. This was done in Argentina, but Chilean legal tradition does not formally allow for annulment of laws;
- Derogation of the decree, which was also proposed by Aylwin. However, the desired result would not be achieved, because it would not have retroactive effect.⁵⁷

4.3 The Transition to Democracy

In 1981, the so-called “transition to democracy” began with the drafting of the 1980 constitution. Chile would return to a “state of law” after defeating the opposition, (defined as terrorists). In 1983, a national protest movement began, which demanded a democracy - i.e. a new constitution, the removal of Pinochet and open, congressional elections. The response of the government was a mixture of minor political concessions and extreme force. The government offered some economic relief when the protests continued, but in 1984 returned to the hard policy and total abandonment of conciliatory efforts.

The four-man military junta, with Pinochet as President-by-decree, changed the fundamental Chilean laws long before 1989, and the new constitution was brought into force. The junta was preparing for the “protected democracy”. It stated that it wanted to reshape the state so it was not only to hold power, but its rule would be legitimate and democratic.

An internal war was declared at several times and it “justified” the suspension of basic fundamental civil and political rights. However, the measures were never justified by international or Chilean human rights organisations.⁵⁸

The subordination of the courts started as early as in 1973, with transfers and removal of judges for political reasons and

⁵⁷ Roth-Arriaza, Naomi, *supra* note 21, pp. 182-183. See also Velásquez Rodríguez case chapter 6.3.2.

⁵⁸ *With Friends like these*, *supra* note 47, pp. 48-49. See chapter 6.5.2 on further information on derogation clauses.

harassment of lawyers defending political detainees. During the military regime, the courts failed to protect human rights even in areas where they had maintained jurisdiction and authority to investigate. Cases were rejected or addressed so slowly that no protection could be offered during initial incommunicado detention periods. As late as 1984, the Chilean Supreme Court upheld the government's right to exile its critics without a hearing. Yet another civil right, the right to a fair and public hearing, was thus breached.

With the 1981 adoption of the new constitution, Chile was proclaimed to have returned to a "state of law". The junta decreed a new law less than a week after the constitution came into force. This decree law re-established the powers of the wartime military tribunals to handle cases of persons accused of attacking or killing any high official, general or any other public figure, if the action was because of that person's official position. A special military prosecutor was to lead the investigation of such charges. The results of the investigation were kept secret from the defence and the defence only had 48 hours to present the evidence before the court.^{59 60}

In July 1989, there was a plebiscite regarding 54 constitutional reforms which were passed. Among the reforms was an amendment to article 5 of the Constitution, which established a duty of the government to act in accordance with international human rights instruments signed and ratified by Chile. There have been two attempts to apply the reformed article 5 to the amnesty law, but they have both failed:

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⁵⁹The ruling of 1984 was based on Transitory article 24, which states that where acts of violence against public order occur "or should be a risk or disturbance to internal order" the president may declare a state of exception, renewable every six months. Under the state of exception, persons may be held in their home or places other than prisons for up to 20 days; rights of assembly and free information may be restricted; political opponents of the regime may be expelled or excluded from Chile and persons may be banished for three months of internal exile. There were 29 articles in the new constitution that expanded the presidential powers during the transition. Transitory article 24 legalises administrative expulsion from Chile and internal exile, relegacion. Internal exile means deprivation and loneliness in a remote, economically depressed area of the far North or South. The exiled has to report daily to the local police. He has to support himself as best as possible. The penalty was used against poorer men whose absence meant near-starvation for their families.

⁶⁰ *With Friends like these*, supra note 47, pp 50-51, 58.

In 1978, Los Familiares de los Detenidos Desaparecidos⁶¹ grouped together seventy of the best documented cases of disappearances and submitted them as one. The main defendant was General Manuel Contreras, the former president of DINA. The case was transferred to a military tribunal and nothing happened for a decade. In December 1989, 35 of the 70 cases were closed with reference to the amnesty law. The plaintiffs appealed to the Corte Marcial. In January 1990, the plaintiffs presented a so-called *recurso de inaplicabilidad* to the Supreme Court, arguing that the amnesty law was not applicable and the application of it was unconstitutional according to international human rights laws. The Supreme Court rejected the petition in August 1990 with the explanation that the Geneva Conventions were not applicable in Chile in the mid-1970s. The country was not at war. The Genocide Convention was not applicable either because it was not implemented in domestic law, although ratified as early as 1949. In September 1990, the case was rejected again after another appeal. In August 1998, the Supreme Court argued the reverse; the Conventions *were* applicable.⁶²

The perpetrators were amnestied. After this case when several cases were rolled into one, which was not successful, each case have been processed separately. The lawyers try to bring up the cases where the amnesty law is not applicable; otherwise it is not possible to bring up the case again.⁶³

2. The Case of the 13 - the Judge Cerda Case

In 1976, 13 communist leaders disappeared in Santiago. The government stated that they, voluntarily had left the country for Argentina. In 1977, the Supreme Court designated a special investigating judge (*ministro en visita*). After three days the investigation was dropped. A second *ministro en visita* was designated in 1979, who did not just leave the case open but went a little bit further. In 1983, a third *ministro en visita* was appointed. It was the Appeals Court judge Carlos Cerda Fernández. He received a lot of information in 1984, when a former Air Force Intelligence agent defected and revealed what he knew about the disappearances. In 1986, judge Cerda indicted 41 persons, both civilians and military officers. The accused complained to the Appeals Court, which accepted and demanded their release with

⁶¹ Los Familiares de los Detenidos Desaparecidos is a human rights organisation, which was set up by relatives of the disappeared to try to find out what happened to them.

⁶² Brett, Sebastian, the 6th of October 1998.

⁶³ Salazar, Héctor, the 9th of December 1998.

reference to the amnesty law. The Supreme Court agreed and ordered the case closed in September 1986.

Judge Cerda did not give up. Since he did not consider the Supreme Court's decision consistent with his duties as a judge, he wrote a confidential document where he set out the legal reasons for his position, i.e. that a judge is not allowed to close a case until the investigative options have been exhausted.⁶⁴ For this Cerda was suspended for two months and charged with insubordination by the Supreme Court. The case was closed. In 1987, the case was appealed by the plaintiffs. They argued that the Geneva Conventions and International law was superior to the amnesty law and domestic law. The petition was rejected. In July 1990, the Supreme Court threatened to debar judge Cerda from the bench, when it noted that he had not closed the case. Cerda argued the applicability of international law as established in the Constitution. In August the same year, Cerda closed the case after being ordered to do so.⁶⁵

4.4 Attempts to Justice and Reform

In the 1989 campaign document for the Concertación, the multiparty coalition led by Aylwin said it would repeal or annul the amnesty law in order to reach the truth and to punish the perpetrators of human rights violations. The Concertación suggested five measures:

- Repeal the penal laws decreed by the junta, which hindered investigations and permitted the military arbitrary penal advantages;
- Assurance that full judicial investigation was possible and that the cases were presented to the courts;
- Establishment of immunity legislation for the perpetrators who co-operated in establishing the truth;
- A period of one year when cases for which statute of limitations had run out could be reopened;

⁶⁴ Referring to the Code of Criminal Procedure art 415.

⁶⁵ Brown, Cynthia, *supra* note 39, pp. 45-47.

- The repeal or annulment of the amnesty law, to ensure it was not an obstacle to establish the truth, effective investigation or prosecution of grave human rights abuses.⁶⁶

Once in power the government was not able to fulfil its commitment. The fear of the armed forces was too great. Nor did the Rettig Commission⁶⁷ suggest the annulment of the amnesty law, even though it is illegitimate under international law.

The Aylwin government made some legal reforms (named after the Minister of Justice Francisco Cumplido). The legal reform had three main objectives:

- 1) To eliminate the death penalty;
- 2) To amend the 1984 law on Terrorist Conduct (the Anti-terrorist law);
- 3) To reduce penalties and re-examine offences set out in the various laws affecting politically defined crime and to offer detainees basic guarantees of decent treatment, such as fair and speedy trials.⁶⁸

A little step forward has been taken with the negotiations with the right about softening the consequences of the dictatorship's laws. But the process has been limited because of the military. The military draws the line. Pinochet and the government did not let go of power for nothing, but in fact exchanged it for full impunity for Pinochet. It explains why the government defends Pinochet now, because the compromise safeguards the democracy, which will otherwise be under serious threat.⁶⁹

The last few years, the Chilean government has publicly discussed the remaining obstacles to the full implementation of democracy, which is openly admitted to be incomplete. The human rights violations during the Pinochet regime and the investigations and the prosecution of these, are the pre-eminent questions in this debate. Three main legislative proposals have been broached in the Chilean Senate in recent years:

1. In July 1995, the right-wing opposition parties, Renovación Nacional, (RN) and Unión Democrática Independiente (UDI), proposed legislation to interpret the 1978 amnesty law to close all court investigations into human rights violations that took place between 1973-1978. The proposed legislation would ensure:

⁶⁶ *Chile - A Time of Reckoning*, supra note 48, p. 193-194.

⁶⁷ See chapter 5 for further information on the Rettig Commission.

⁶⁸ Brown, Cynthia, supra note 39, pp. 50-54.

⁶⁹ Salazar, Héctor, the 9th of December 1998.

- The definitive closure of all temporarily suspended cases, if no new facts have arisen in the last year;
 - The closure within a period of 90 days of all cases covered by the amnesty law;
 - The restriction of further investigation by the courts into disappearances, which would investigate only the location of the remains. The persons who provides information where the remains can be found would be guaranteed anonymity.
1. The Frei government proposed in August 1995 a legislative package, also known as the Frei Bill. The proposal consisted of three separate pieces of legislation:
 - A bill establishing further investigations of the disappearances but which prevents further prosecutions. Within 15 days all cases pending before the military courts would be transferred to civilian courts. Up to fifteen Appeals Court Judges would be appointed to work exclusively on pending disappearance cases for two years. However, the responsibility for the crimes would not be established, nor would the perpetrators be brought to trial. The identity of those providing relevant information on the disappeared would not be made public. Those who reveal it would face penal sanctions. Cases would be closed when the remains have been located or when the cause of the death has been established. Cases which have not been clarified, would remain open for two years or be temporarily closed.
 - A bill that would reform the Military Structure Law and allow the President to appoint the Commanders of the Armed Forces and dismiss military officials.
 - Constitutional amendments to extend civilian representation in the Constitutional Court, the National Security Council and the Senate.
 3. In November 1995, a proposal resulting from negotiations between the government and the right-wing party Renovación Nacional was presented. The proposal was called the Figuero-Otero Bill. Prosecutions would be prevented, judges would be restricted to the investigation of the locations of the remains of the disappeared. Total secrecy would be ensured for these investigations, as well as the identity of the perpetrators or those providing useful information. Cases could be closed before the remains were located or the full truth established. Once a case is closed it can never be re-opened.

The Socialist Party opposed the Figueroa- Otero Bill and presented sixteen amendments.⁷⁰

In his presentation of the legislation package to the Senate, President Frei wrote in August 1995 that Chile has to resolve two problems in its transition: the question of the past human rights violations and the deficiencies in the democratic institutions. Frei did neither consider a Full Stop law “just nor ethically acceptable”. Furthermore, the President stated that “[the] government understands that after twenty years, the objective of truth is ethically superior in the national soul than penal sanction against those responsible. We do not seek vengeance; we seek a new opportunity for the truth that has not yet been attained.”⁷¹

⁷⁰ *Chile - Transition at the Crossroads – Human Rights Violations under Pinochet Rule Remain the Crux*, Amnesty International, 1996, pp. 4-9.

⁷¹ *Ibid.*, p.10.

5 The National Commission on Truth and Reconciliation - The Rettig Commission

On the 25th of April 1990, President Aylwin announced the creation of the Commission for Truth and Reconciliation. The Commission consisted of eight persons from various political factions and the President of the Commission was the lawyer and former Senator Raúl Rettig. It had a nine month mandate to establish the truth about the grave human rights violations committed between the 11th of September 1973 and the 11th of March 1990, when the Aylwin government took office.

The opposition strongly opposed the creation of the Truth and Reconciliation Commission. General Pinochet tried to stall the creation and the army publicly condemned it. Pinochet thought the objective of the Rettig Commission was to sit judgement on his government. He would not have accepted anything that would stain the honour of the armed forces. Pinochet was afraid of a witch-hunt against the armed forces and reprisals by the government. The right wing parties, Renovación Nacional (RN) and Unión Demócrata Independiente (UDI), thought that the intention of the Commission was to put the military junta “on public trial”. The opposition was afraid that the body would sit judgement on individuals which would be deprived of the right to reply or mount a legal defence.

In May 1990, the army put pressure on the Aylwin government to abandon the idea of a truth commission. President Aylwin had a meeting with Pinochet and reprimanded him for exceeding his constitutional authority, because according to article 90 of the Constitution the Ministry of Defence has authority over the Commander-in - Chief. Pinochet had to back down and agree to guarantee the army’s co-operation.

Nevertheless, the tensions remained reaching a climax in December 1990 when the army was put on a grade one state of alert. The government’s fear of military intervention was great. However, nothing happened.⁷²

⁷² *Chile – A Time of Reckoning*, supra note 48, pp. 35-39, 130, 133.

5.1 The Objectives of the Truth and Reconciliation Commission

The Rettig Commission would:

- Establish the most complete record possible about grave human rights violations, their background and circumstances;
- Gather material which would permit identification of victims⁷³ and determine their fate and whereabouts;
- Recommend measures for reparation and restoration of honour so as to create justice;
- Recommend legal and administrative measures which, in its judgement, may be adopted to impede or prevent the commission of the acts referred to in this article (Decree Law No. 355, Art. 1).

The gravest human rights violations were defined in the Decree that established the Rettig Commission, as: “situations of disappeared detainees⁷⁴, the executed and those tortured to death, in which the moral responsibility⁷⁵ of the state appears involved through acts of its agents or persons in its service, as well as kidnappings and attacks against the lives of persons committed by individuals under political pretexts.” “Individuals” denoted members of far-leftist armed groups, such as MIR and FPMR.^{76 77}

The Commission did not review all cases of violation of human rights that took place 1973-1990, only cases of enforced disappearance, summary executions and torture resulting in death.

⁷³ Victims of human rights violations are those persons who were subject to: forced disappearance (i.e. disappearance after detention), execution in any form, excessive use of force resulting in death, abuse of power resulting in death, torture resulting in death, attempts against life resulting in death perpetrated by private citizens under political pretexts including terrorist acts, forced suicide. *To Believe in Chile*, Summary of the Truth and Reconciliation Commission Report, p. 15.

⁷⁴ Detained-disappeared means those persons who were detained by agents of the state and this being the last time they were heard from. The state agents either claim they were released or that they were never detained.

⁷⁵ The Commission defined the moral responsibility of the state as “the responsibility which, the state has for actions carried out by its agents, executed in accordance with policies or orders of state organisms, or with the protection or inaction of same tending to leave that behaviour unpunished.” *Ibid.*, p. 13.

⁷⁶ Brown, Cynthia, *supra* note 39, pp. 17-19.

⁷⁷ *To Believe in Chile*, *supra* note 73, pp. 13-14.

Nor did it seek to establish responsibility or identify offenders.⁷⁸ The cases where people were forced into exile, fled from Chile because of harassment; were detained in massive sweeps, were wounded and tortured but survived, were not included in the investigation.⁷⁹

Aylwin's intention with the Commission was to establish the truth in order to achieve national reconciliation, and he also stated that the truth was the only way to rehabilitate the dignity of the victims in the public mind and to help the relatives to honour them. The Commission expressed in the report that "Chileans must take from the truth that which makes each and everyone responsible."⁸⁰

The Commission considered its main duty to find out the truth about what happened in each case. However, it had no right to pass a judgement on the responsibility of individual persons and lacked the power to subpoena anyone. According to the Commission, it worked autonomously without the influence of the government or any other power.⁸¹

The Commission limited its investigation so it excluded the legitimacy of the use of force on both sides on the 11th of September 1973 and the period directly there after. The Commission stated that these rules were part of international humanitarian law and also of Chilean legislation.⁸²

It was neither a judicial, nor an investigative body; its mandate was limited to gathering information. The Aylwin government had explicitly rejected the establishment of special courts to try the perpetrators of human rights violations. Nor did the government pass a moral judgement.⁸³ By the founding decree law 355, the Rettig Commission was prohibited from reaching conclusions concerning the responsibility of individuals for certain crimes. The Commission's role was limited to updating the courts about any new information about criminal offences and the Commission pledged that closed cases should be reopened. While the Rettig Commission was not allowed to name names, it did name the specific *organs* of repression, military units and offices of the military government.⁸⁴

⁷⁸ 1990 Annual Report On the Human Rights Situation in Chile, Inter-Church Committee On Human Rights in Latin America, January 1991, p. 7.

⁷⁹ Brown, Cynthia, *supra* note 39, pp. 24-25.

⁸⁰ *To Believe in Chile*, *supra* note 73, p. 11.

⁸¹ *Ibid.*, p 12.

⁸² *Ibid.*, p. 13.

⁸³ *Chile –A Time of Reckoning*, *supra* note 48, pp. 130-131.

⁸⁴ Brown, Cynthia, *supra* note 39, p 19.

In my opinion, Aylwin established the Rettig Commission because that was all that he could do at that time without the military disagreeing too much. Something had to be done for the victims and their relatives. Since Aylwin was the first elected president in 17-years, the Chileans expected very much of him. The UN and NGOs also had their eyes on Chile and the new government. Aylwin was put under pressure from the military on one side and the victims of human rights violations and their relatives on the other side. The new government had to prove that it was more democratic than the former government. By establishing a truth and reconciliation commission, Aylwin showed the world that he wanted to improve the situation in Chile.

5.2 The Methodology of the Truth and Reconciliation Commission

The Truth Commission used the standards in the Universal Declaration of Human Rights and other international instruments, such as the right to life and the inherent dignity of the person. Since, in the Commission's opinion, there had not been a state of internal war or civil conflict 1973-1990, there was no reference to the 1949 Geneva Conventions or international humanitarian law.⁸⁵

The Commission had been authorised to obtain information from victims, their relatives and representatives, from human rights organisations within and outside Chile and to get documents from the state and the armed forces. Indeed, the armed forces refused to co-operate on several occasions. The Commission could not coerce the parties and therefore it did not receive much co-operation from the military in cases involving military victims. Some members of the military assisted voluntarily, however.

In order to gather information the Rettig Commission organised hearings with victims and their relatives and representatives on about 3400 cases. National human rights organisations and the military provided archival material and lists of victims. To receive information from exiles, advertisements in newspapers were published around the world. International organisations were asked to contribute information and to suggest preventive and reparative measures.⁸⁶

⁸⁵ *Chile – A Time of Reckoning*, supra note 48, pp. 136-137.

⁸⁶ Brown, Cynthia, supra note 39, pp. 19-20.

5.3 The Results of the Truth and Reconciliation Commission

The Commission found that 2,115 persons had been victims of violations of human rights and 164 victims of political violence. The number of dead people was estimated to be 2,279. The Commission examined another 641 cases in which the cause of death could not be established. 508 cases fell outside its mandate and in 449 cases only the name of the victim could be determined.

State agents or people in their service killed half of the 1,068 persons whose deaths were the result of human rights violations. 957 cases were disappeared detainees, and 90 people had been killed by leftist-armed groups. The 164 cases of victims of political violence include victims of violent opposition and of state policy; e.g. a person killed by the police during a peaceful political demonstration.⁸⁷

The Judiciary was strongly criticised by the Rettig Commission. It stated that “serious defects in the laws and the judicial system” together with the “weakness and the lack of zeal of many judges” were the explanations for the lack of protection of human rights. It further stated that the courts had assisted in the upholding of the impunity of the perpetrators of human rights violations. This had been done mainly in three areas:

- The adoption of a particularly high standard of evidence in cases where state officials were accused of human rights violations. This led to the closing down of many cases;
- The courts’ acceptance, without questioning, the statement made by the accused;
- The extension of the amnesty to include cases when investigations were incomplete.⁸⁸

5.4 Proposals for Reparation and Prevention

The Rettig Commission proposed symbolic reparation, economic reparation and legal reparation. The symbolic reparation consisted of the rehabilitation of the good name of the victims and the

⁸⁷ Ibid., p. 25.

⁸⁸ *Chile – A Time of Reckoning*, supra note 48, pp. 141-142.

construction of public monuments. The economic reparation consisted of a single-amount pension for the relatives of the victims and special health benefits for the victims who survived, and for the relatives of the victims. The legal reparation was the instalment of a legal procedure whereby the disappeared could be declared “presumed dead”.

The preventive measures recommended in the Rettig report included modification of national law to make it compatible with international human rights instruments, the ratification of the Optional Protocol of the International Covenant of Civil and Political Rights, a revision of the reservations made by Chile in international instruments, a strengthening of the judiciary's role as protector of human rights, a creation of an office of Ombudsman (Defensor del Pueblo) to protect citizens from abuses of human rights, reforms on penal procedure (such as a restriction of the competence of military tribunals and a guarantee for the defence to have access to the prosecution evidence) introduction of human rights education in military training, reform of the judicial system such as the training of judges and appointment of Supreme Court judges. The Commission also suggested the creation of a special body investigating the fates of the disappeared. It further proposed a criminalisation of the withholding of information about the disappeared. Those who would give any information would not be punished

For years the relatives of the victims had been ignored in their search for truth and justice. With the Rettig report they were recognised officially for the first time.

In order to achieve national reconciliation and to avoid a repetition of what had happened, it is of the greatest importance that the judiciary works, according to the Commission. Protection of human rights is possible only if there are laws and adherence to the laws by all citizens and courts.^{89 90}

The recommendations have had a symbolic and an educational function and some economic compensation were paid to the victims. In that sense it was a success. In some cases scholarships were given. The symbolic functions have been that the President has apologised to the victims, a monument was built in the cemetery etc. However, in other aspects it was less of a success, i.e. the failure to locate the missing persons. There are also cases, which the Rettig Commission did not investigate, such as torture, exile and exile within the country.

⁸⁹ Ibid., pp. 22-23, 150-153.

⁹⁰ Brown, Cynthia, *supra* note 39, pp. 27-29.

Salazar argues that regarding the judicial recommendations there was a dual problem. On the one hand the government did not have a majority in the Congress and therefore did not want to risk a political failure. On the other hand, the political will simply did not exist, according to Salazar.⁹¹

5.5 The National Corporation of Reparation and Reconciliation -The Successor Body

The National Corporation of Reparation and Reconciliation was established in February 1992. Its task was, as was the Rettig Commission's, to determine whether agents of the state were responsible for cases of human rights violations. The violations could be divided into three categories:

- Cases in which the commission had insufficient information to reach a final conclusion;
- Cases which were registered with the Commission but were not mentioned in its report for lack of details;
- New cases reported to the Corporation within a ninety-day period from the 15th of July to the 13th of October 1992. This time limit was extended for a further sixty days, from the 20th of April to the 19th of June 1993.

The Corporation was dealing with 2,227 cases of which 964 were new. A special division within the Corporation was to investigate the fate of the disappeared.

The preliminary report was delivered to the President on the 31st of January 1993. 850 of the reviewed cases had been classified as human rights violations. The total number of cases resulting in death during the Pinochet regime was 3,129, which included the cases investigated by the Rettig Commission, out of which 2,032 were killings (including 444 killings in political violence, such as people accidentally being killed in cross-fire, in armed clashes or in street demonstrations) and 1,097 disappearances.⁹²

⁹¹ Salazar, Héctor, the 9th of December 1998.

⁹² *Chile Unsettled Business*, supra note 27, pp. 1-2.

6 International Law

6.1 Introduction

After the experience of the horrors of the Second World War, the international community realised that certain types of conduct violated principles imposed by the United Nations and constituted a threat to international peace and security. The reason for this was the seriousness of the conduct and the gravity of the consequences for large sectors of the society. These crimes are sometimes called crimes against humanity. The international community considered that the prosecution should be entrusted both to the national and the international judiciary. The reasons for this, are among others, that:

- a) The consequences of these crimes extend beyond the suffering of the victims;
- b) As the crimes are committed by agents of the state, these crimes were not likely to be punished as long as government, which allowed them, would remain in power.

Article 27 of the Vienna Convention on the Law of the Treaties states that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” This means that if a state has signed a treaty which prohibit crimes against humanity and such crimes are committed, the state is not allowed to grant amnesty by passing a law or decree. If it were to do so, it must first denounce the treaty.⁹³

States where grave human rights violations have taken place to a large extent with impunity, could be regarded as a lawless society. International law can be an important and useful guideline for transitional governments on how to deal with past abuses of fundamental rights. If the state does not comply with international law it will suffer real costs, such as international isolation or loss of trade. A principle established in international law is less likely to be seen as an act of vengeance or political capitulation.⁹⁴

Many countries in Latin America, among them Chile, have resorted to amnesty laws in order to restore and attain peace and reconciliation in the country after bloody civil conflicts. However, this does not conform with international law. International law

⁹³ *Justice - Not Impunity*, supra note 32, pp. 194-195.

⁹⁴ Roth-Arriaza, Naomi, supra note 21, pp. 4-5.

obligates States to investigate and sanction all violations of human rights as a derivation of the general duty to respect and ensure them.

The violation of physical integrity such as arbitrary killings, torture and forced disappearance, are clearly prohibited under international law and have historically been subject to the highest possible degree of protection. These rights are non-derogable rights even in war and national emergency. These principles are considered to be peremptory norms, which means that they are norms widely shared over many judicial systems and they cannot be overthrown by a treaty provision to the contrary. The perpetrators of the rights mentioned above are considered to be subjects to universal jurisdiction.

Arbitrary killings, torture and forced disappearance performed by agents of the state, violate rights defined in international and regional instruments, such as Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Inter-American Convention on the Forced Disappearance of Persons and court cases establishing torture and disappearances as violation of customary law.⁹⁵

The following principles may be extracted from international instruments:

- a) The duty to ensure and respect the rights enumerated in the instruments (ICCPR art.2, ACHR art.1.1);
- b) The responsibility of the State for acts committed by its agents and authorities when this constitutes an infringement of the rights, recognised in international instruments, of persons subject to its jurisdiction;
- c) The right of the victims and his/her relatives to obtain fair compensation and to know the truth about the violation and the identity of the perpetrators.

Within this framework, an amnesty law may not cover acts which constitute violation of international law. The Inter-American Court stated in the Velásquez Rodríguez case, that according to Article 1(1) of the American Convention “any exercise of public power

⁹⁵ Ibid., p.6.

that violates the rights recognised by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention.”⁹⁶

Amnesty may only be granted to opponents of the State because an amnesty, which favours the agents of the State, is not consistent with international law.⁹⁷

The use of disappearances instead of official execution make it possible to get rid of people without much publicity and denying responsibility which makes it very difficult for the relatives of the victims to insist on a trial. The rights protected in domestic and international law lose their effectiveness if governments could place the burden of proof on the victims. Affirmative obligations to investigate, prosecute and compensate must be placed on governments in order to make the system effective.⁹⁸

6.2 Why punish?

Criminal punishment is probably the most effective insurance against future repression. It has a deterrent effect on potential lawbreakers. Trials engender respect for the rule of law and the inherent dignity of individuals. A failure to punish atrocities undermines the authority of the law. Some scholars argue that it is important for the transition to democracy and respect for democratic institutions that governments prosecute the former government’s crimes. Prosecution could strengthen fragile democracies because the rule of law is integral to democracy. When a government prosecutes military personnel for human rights violations, it further affirms the supremacy of the civil society.

The main argument against prosecution is that fragile democracies may not survive the aftermath of politically charged trials. Some contend that former dictatorships are so unstable that in order to consolidate the country democratically, a policy of reconciliation must be implemented, for instance by means of an amnesty law. If the military retains some power, it may be provoked if the civilian government prosecutes past violations. This could in turn provoke a confrontation that could weaken the authority of the civilian

⁹⁶ Velásquez Rodríguez Case, Inter-American Court of Human Rights, Judgement of the 29th of July 1988, para. 169. English version taken from Human Rights Law Journal Vol. 9 (1988), Parts 2-3.

⁹⁷ *Justice – Not Impunity*, supra note 32, pp. 170-171.

⁹⁸ Roth-Arriaza, Naomi, supra note 21, p. 7.

government. Some analysts argue that it may in fact provoke the overthrow of the civilian government.⁹⁹

Proponents of prosecution often state that prosecution has a deterrent effect and is an effective way to find out the truth and re-establish the rule of law. If the perpetrators are not prosecuted, the civilian control over the government will be hard to establish. For the citizens, the prosecution will help restore the dignity of the victims. The opponents argue that it can destabilise a fragile transitional regime and can lead to a prolonged period of political instability or return of dictatorship. There are also many practical obstacles to prosecute all those responsible; it is time-consuming, difficult to collect evidence etc.¹⁰⁰

If a government prosecutes past violations of a prior regime, there is an inherent risk of military discontent. The new government is bound to feel pressure, both from international law and the requirement of punishment, and from the military that seeks impunity. However, a certainty of punishment could deter abusive regimes from relinquishing power voluntarily. If prosecutions are undertaken in accordance with international law, it is less likely that they are seen as an act of vengeance. Amnesty laws can help achieve reconciliation. However, the amnesty law is not allowed to cover grave violations that require punishment according to international law.¹⁰¹

6.3 Sources in International Treaties of an Obligation to Investigate, Prosecute and Provide Redress

Only after the 2nd World War has a state's treatment of its own citizens been regarded as a concern of international law. This part and the next examine international law available on the subject of investigation, prosecution and redress for victims of grave human rights violations. This part looks at treaty-based sources, whereas 6.4 looks at non-treaty-based sources.

According to written international law, only torture is universally prohibited and subject to a universal duty to punish. Concerning disappearances and extra-legal executions it could be argued that there is a duty to investigate and prosecute under universal and

⁹⁹ Orentlicher, Diane F., *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, June 1991, pp. 2542- 2546.

¹⁰⁰ Roth-Arriaza, Naomi, *supra* note 21, pp. 8-9.

¹⁰¹ Orentlicher, Diane F., *supra* note 99, pp. 2549-2550.

regional instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR). These instruments include articles which state that the state parties should "respect and ensure" human rights and a right to a remedy. One could also make the interpretation that written international law does not establish a legal duty to punish human rights violations except torture.^{102 103}

Scholars have different opinions exactly what international law requires. International law has given states the freedom to decide how to ensure the rights therein. International penal law has concentrated on the *power* rather than the *duty* to punish violations committed outside its territorial jurisdiction. International law has increasingly required states to punish certain human rights abuses in their territory. Several human rights treaties require states to criminalise some grave violations, such as genocide and torture, and to investigate and to punish the perpetrators. The comprehensive treaties, for instance ICCPR, do not mention a duty to punish. However, authoritative interpretations mean that within the duty to ensure and respect the enumerated rights, lies a duty to investigate and punish the violations. Furthermore, a failure to punish repeated grave violations breaches the customary obligation to respect the rights.¹⁰⁴

The Convention on Prevention and Punishment of the Crime of Genocide (The Genocide Convention) article 4 and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) article 4(2), provides the most explicit obligations to punish human rights violations.¹⁰⁵ In contrast to them, the ICCPR and ACHR do not explicitly require states to prosecute or punish human rights violations. Authoritative interpretations mean that these treaties require State Parties to investigate grave violations (torture, extra-legal killings and disappearances) and to punish the perpetrators. ICCPR art. 2(2) and ACHR art.2 require States Parties to adopt legislation or other measures to give effect to the rights and freedoms recognised in these treaties. ICCPR art. 2(3) and ACHR art. 25 require an effective remedy before a competent court.¹⁰⁶ The Human Rights Committee has on numerous occasions affirmed that states have an obligation to investigate torture, summary executions and disappearances and to prosecute those responsible and to compensate the victims.¹⁰⁷

¹⁰² Ambos, Kai, *supra* note 42, p. 489.

¹⁰³ Ambos, Kai, *supra* note 43, p. 6.

¹⁰⁴ Orentlicher, Diane F., *supra* note 99, pp. 2551-2552.

¹⁰⁵ *Ibid.*, p. 2562.

¹⁰⁶ *Ibid.*, pp. 2568-2569.

¹⁰⁷ *Ibid.*, p. 2571.

The principle that crimes against humanity must be punished is so important that it bypasses one of the main principles of international law – the respect for national sovereignty.¹⁰⁸

6.3.1 International Criminal Law Provisions

Universal Jurisdiction

International law has for a long time allowed universal jurisdiction of states over individuals who committed crimes that were morally reprehensible against civilians, such as piracy and slave trading. Universal jurisdiction is permissive, not mandatory. Since the establishment of the International Military Tribunal of Nuremberg, which had jurisdiction over crimes against humanity regardless of where they had been committed, the principle of universal jurisdiction has been recognised.^{109 110} In the course of the last fifty years, the number of crimes under universal jurisdiction has expanded and the assumption of jurisdiction has been made mandatory. It has been made mandatory according to the principle of *aut dedere aut judicare* - extradite or prosecute. The 1949 Geneva Conventions provide that the High Contracting Parties “shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts... [or] hand such persons over for trial to another High Contracting Party...”¹¹¹ Under the Geneva Conventions grave breaches means “wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body and health, unlawful deportation or transfer or unlawful confinement.”¹¹² According to Protocol 1 articles 86 and 91, the High Contracting Parties shall repress grave breaches and pay compensation for violations of the Protocol. Grave breaches have been thought to apply only to international conflicts. Even though common article 3 of the Geneva Conventions states minimum humanitarian standard for non-international conflicts, there is no explicit

¹⁰⁸ *Ibid.*, p. 2593.

¹⁰⁹ The principles, which were articulated in the Nuremberg Charter and Judgement, were recognised as international law principles by the UN General Assembly in 1946.

¹¹⁰ *Amnesty om Pinochet*, supra note 15, p. 26.

¹¹¹ Geneva Convention 1 art 49, Geneva Convention 2 art. 50, Geneva Convention 3 art. 129, Geneva Convention 4 art. 146.

¹¹² Geneva Convention 1 art. 50, Geneva Convention 2 art. 51, Geneva Convention 3 art. 130, Geneva Convention 4 art. 147.

requirement to prosecute. The distinction between international and non- international conflicts is not clear in this regard.¹¹³

The Genocide Convention

Article I of the Genocide Convention states that genocide is a crime under international law which the contracting parties undertake to prevent and punish. The offenders of the convention shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.¹¹⁴ States shall ensure that they have effective penalties for the perpetrators.¹¹⁵

The Convention against Torture

The Convention against Torture requires investigation, prosecution and compensation to the victims as well as universal jurisdiction over its perpetrators. Article 2 of the Convention requires the state parties to take effective measures in order to prevent torture. No justification may be invoked by the state, such as war, public emergency or superior order. Torture shall be a criminal offence under national law and shall be subject to penalties that take into account the grave nature of the crime.¹¹⁶ The state shall either extradite or prosecute.¹¹⁷ An investigation shall be initiated as soon as an alleged violation of the Convention has been committed.¹¹⁸

The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions

Principle 18 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states that: “Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such person to justice or co-operate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall

¹¹³ Roth-Arriaza, Naomi, supra note 21, pp. 24-25.

¹¹⁴ Article IV of the Genocide Convention.

¹¹⁵ Article V of the Genocide Convention.

¹¹⁶ Article 4 of the Convention against Torture.

¹¹⁷ Article 7 of the Convention against Torture.

¹¹⁸ Article 12 of the Convention against Torture.

apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.”

The UN Declaration on the Protection of All Persons from Enforced Disappearance

Article 18 of the UN Declaration on the Protection of All Persons from Enforced Disappearance states: “Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force. All States should take any lawful and appropriate action available to them to bring to justice persons presumed responsible for an act of enforced disappearance, who are found to be in their jurisdiction or under their control.”¹¹⁹

The Inter-American Convention on the Forced Disappearance of Persons

This Convention requires states to criminalise acts of forced disappearance, to treat them as continuing offences and to extradite or prosecute the offenders.

The Inter-American Convention to Prevent and Punish Torture

Article 8 of this Convention states that if there is a well-founded reason to believe that torture has taken place within a state’s jurisdiction, the state shall ex officio conduct an investigation and initiate a criminal process.

The trends in international criminal law have moved from permissive to mandatory jurisdiction and from the idea of an international tribunal to a duty for the national tribunals to prosecute. However, the crimes covered in the present conventions are few: murder, torture and inhumane acts such as disappearance.¹²⁰

¹¹⁹ *Amnesty om Pinochet*, supra note 15, pp.29-30.

¹²⁰ Roth-Arriaza, Naomi, supra note 21, pp. 26-28.

6.3.2 Comprehensive Human Rights Instruments

There are a number of human rights instruments that do not directly refer to an obligation to investigate or prosecute, but the monitoring bodies have required states to investigate, prosecute and compensate victims in cases of torture, summary executions and disappearance. These conventions are the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the European Convention on Human Rights. Still, the Conventions explicitly recognise the right to a remedy and to a fair trial.

In the comprehensive human rights treaties, the obligation to ensure the full enjoyment of the enumerated rights impose an affirmative obligation on states. According to ICCPR art. 2(1), states shall respect and ensure to all individuals the rights in the Covenant. The duty to respect means that State Parties must refrain from restricting the exercise of the enumerated rights, if this is not expressly allowed. However, some rights are absolute even in a national emergency situation. The obligation to ensure the rights is a positive duty, which means that State Parties should take steps to the realisation of those rights. Paragraph 2 requires States Parties to enable the rights in the Covenant by legislative or other measures. Does this merely involve an obligation of result or is there an additional obligation of conduct or of means, such as an obligation to incorporate the Covenant in the domestic legislation, to make it directly applicable etc? According to general international law, the State Parties are to decide how to implement their international obligations. The result of the implementation is only of importance, i.e. the respect and assurance of the rights in the convention. However, a treaty can prescribe specific obligations of conduct.

Even though State Parties have the freedom to choose how to implement international law in domestic legislation, the priority of legislative measures is determined by the formulation “legislative or other measures” in article 2(2). This has probably to do with the character of civil and political rights, which take effect with the enactment of corresponding laws and the correct application by the courts and administrative authorities. However, as the HRC has pinpointed, the obligation to ensure the rights in the ICCPR requires the adoption of measures other than mere legislation. Article 2 does not contain any obligation to incorporate the ICCPR in the domestic legal system, but the duties and obligations in the treaty are to be implemented and observed directly when it enters into force according to general international law. The State Parties

must therefore make sure that their legal systems and legal practice harmonise with the ICCPR prior to ratification.¹²¹

ACHR art. 1(1) states that the State Parties shall ensure all persons free and full exercise of the rights and freedoms in the Convention.

The Human Rights Committee, established under the ICCPR, has established, in a couple of cases of torture, summary executions and disappearance, an obligation for the states to investigate, prosecute and compensate victims. The Committee stated in a General Comment on article 7 of the ICCPR, that article 7 read together with article 2 meant that: “States must ensure an effective protection through some machinery of control. Complaints about ill treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.”

The Committee has noted that some states have granted amnesty in cases of torture. Amnesties are generally incompatible with the duty of states to investigate, to guarantee freedom from such acts within their jurisdiction and to prevent them from occur in the future.

In the case of Eduardo Bleier from 1985 the Human Rights Committee established the duty to investigate and prosecute. The HRC stated that “it is implicit in article 4(2) of the Optional Protocol that the State Party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities.”¹²²

¹²¹ Nowak, Manfred, *UN Covenant on Civil and Political Rights – CCPR Commentary*, 1993, pp. 36-37, 53-57.

¹²² Roth-Arriaza, Naomi, *supra* note 21, pp. 28-30.

The Velásquez Rodríguez Case and the American Convention

The American Convention on Human Rights, as well as the ICCPR, obligates states parties to ensure the rights enumerated therein. In the 1988 Velásquez Rodríguez case of the Inter-American Court of Human Rights the Court established this obligation. The Velásquez Rodríguez case was about a Honduran student activist who was arrested, tortured and executed by the Honduran military. The Court found that Honduras had breached the right to life (art. 4), the right to humane treatment (art. 5) and the right to personal liberty (art. 7) and also the obligation under article 1(1) ACHR to ensure these rights. Article 1 puts an affirmative duty on the State Parties to the free and full enjoyment of human rights is judicially ensured. The Court stated “[a]s a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognised by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”¹²³ The Court expressed that “The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.”¹²⁴ The duty to prevent includes means of a legal, political, administrative and cultural nature.¹²⁵

In the Velásquez Rodríguez case the Inter-American Court of Human Rights employed a broad definition of actions of state responsibility. Furthermore, it stated that successor regimes are responsible for the actions of their predecessors.¹²⁶ Even one single violation gives the state an obligation to act.^{127 128}

¹²³ Velásquez- Rodríguez case, supra note 97, para.166.

¹²⁴ Ibid., para.174.

¹²⁵ Ibid., para. 175.

¹²⁶ “According to the principle of the continuity of the State in international law, responsibility exists both independently of changes of government over a period of time and continuously from the time of the act which creates responsibility to the time when the act is declared illegal”. Ibid., para. 184.

¹²⁷ Ibid., para. 176.

¹²⁸ Roth-Arriaza, Naomi, supra note 21, pp. 30-31.

The Right to a Remedy

The Universal Declaration of Human Rights establishes in article 8¹²⁹ the right for everyone to an effective remedy by a competent court. In article 2(3) of the International Covenant on Civil and Political Rights, the right to a remedy is further specified.¹³⁰ An effective remedy is not provided if unrestricted discretion to grant amnesty is given to a political organ.¹³¹ In the American Convention on Human Rights, the right to a remedy is included in article 25.¹³² The Inter-American Commission on Human Rights has interpreted the right to a remedy in the ACHR to include the obligation to investigate, prosecute and punish the perpetrators of torture and disappearance.¹³³

The Right to Judicial Remedy

Universal Declaration article 10 states that everyone is entitled to a fair and public hearing by an independent and impartial tribunal. The ICCPR article 14 states that everyone is equal before the courts and tribunals and that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal

¹²⁹ Article 8 of the Universal Declaration reads: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

¹³⁰ Article 2(3) of the ICCPR reads: “Each State Party to the present Covenant undertakes:

- a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) To ensure that the competent authorities shall enforce such remedies when granted.

¹³¹ Nowak, Manfred, *supra* note 121, p. 58.

¹³² Article 25 of the American Convention on Human Rights reads: “1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b) to develop the possibilities of judicial remedy; and
- c) to ensure that the competent authorities shall enforce such remedies when granted.

¹³³ Roth-Arriaza, Naomi, *supra* note 21, pp. 32-34.

established by law. Article 8 of the ACHR also establishes the right to a fair trial. These provisions establish an obligation for the State Parties to investigate, prosecute and punish. However, not all states are parties to these treaties and are therefore not bound by them. Still, if the obligation to investigate and prosecute has attained the status of customary law or general principle of law, these countries are still bound to respect the obligation.¹³⁴

6.4 Non-treaty Sources of the Obligation to Investigate and Prosecute

The two most important of non-treaty sources of law are customary law and general principles of law. Customary law results from a general and consistent practice, which, because of a sense of legal obligation of the state, is followed.

Scholars disagree about the range of human rights protected by customary law. However, they agree that torture, extra-legal killings and disappearances are prohibited under customary law. It has been debated to what extent the violations are prohibited; some say that a single violation of a right protected under customary law is a violation, while others state that the violations have to be systematic or a state policy in order to be punishable. Even less clear is whether there, under customary law, exists a duty to prosecute the violations, or whether states are only required not to directly inflict these violations. It could be interpreted from a range of activities of the UN and other intergovernmental organisations, that punishment is necessary in the states' duty under customary law.¹³⁵

The obligation to investigate, prosecute and provide redress is quite unclear under customary law. A combination of a number of sources suggest an obligation under customary law:

- I. The treaty provisions;
- II. Diplomatic practice;
- III. Customary law of crimes against humanity;
- IV. The practice of arbitral tribunals under the rules of state responsibility for the protection of aliens.

Multilateral treaties, which many states have signed and ratified, may create customary law because they reflect state practice.

¹³⁴ Ibid., pp. 35- 36, 38.

¹³⁵ Orentlicher, Diane F., supra note 99, pp. 2582-2583.

The International Court of Justice and the U.S. Supreme Court have both stated that treaties can create binding obligations for non-parties. The ICJ held in the North Sea Continental Shelf case, that treaty provisions of a “norm-creating character” might become general rules of international law, especially if there was a “very widespread and representative participation in the Convention.”¹³⁶

The failure to incorporate international law on crimes against impunity in domestic law, does not excuse a state from the obligation to investigate. ICCPR article 15(2) establish that a person can be prosecuted according to general principles of law recognised by the community of nations.¹³⁷

6.4.1 Practice at the United Nations

Another type of state practice can be found in resolutions and reports of UN organs, especially the General Assembly. In a resolution from 1981 the Assembly stated that it thought Chile ought to “investigate and clarify the fate of persons who have disappeared for political reasons, to inform the relatives of those persons of the outcome of the investigation and to prosecute and punish those responsible.”

Special Rapporteurs appointed by the Commission on Human Rights have in several different reports expressed their concern for the lack of investigation and prosecution, which they thought created impunity and encouraged further abuses. Investigation, prosecution and punishment are considered to have a deterrent effect by the UN Rapporteurs.

In the Final Report on Impunity, Louis Joinet established that victims had three rights: the right to know, the right to justice and the right to reparations. The right to know is not only an individual right to the truth, but also a collective right in order to prevent repetition. It is also a duty to remember the history of the nation. Joinet proposed two solutions: the establishment of extra-judicial commissions of inquiry and preservation of archives relating to human rights violations.

The right to justice comprises the right to a fair and effective remedy, and obligations by the State to investigate, prosecute and punish the guilty. The national courts should have jurisdiction, but if they are unable, an international court could be given jurisdiction. Joinet proposed that a universal jurisdiction clause

¹³⁶ Roth-Arriaza, Naomi, *supra* note 21, pp. 39-41.

¹³⁷ *Amnesty om Pinochet*, *supra* note 15, p. 31.

should be included in international treaties that require State to prosecute or extradite.

The right to reparation includes both individual reparation, such as restitution, compensation and rehabilitation and collective reparation, such as public recognition by the State of its responsibility.¹³⁸

The Economic and Social Council adopted the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution in 1989. Article 1 states that the government shall prohibit and criminalise extra-legal, arbitrary and summary execution and make them non-derogable. According to article 9, a thorough, prompt and impartial investigation shall be indicted in all suspected cases. All participants in the crime shall be brought to justice, irrespective of their identity.¹³⁹ A contrasting order from a superior officer or a public authority is no justification and this party may also be held responsible. A blanket amnesty shall not be granted under any circumstances to a person suspected to have been involved in executions.¹⁴⁰

The General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985. Article 4 states that victims are granted access to the mechanism of justice and to prompt redress. Judicial and administrative mechanisms should be established and strengthened when necessary.¹⁴¹ States shall also review existing legislation and should enact and enforce legislation establishing rights and remedies for victims and prohibiting serious abuses of political and economic power.¹⁴² A group of international criminal law experts developed principles to implement the Declaration. These principles urge the governments to conduct investigation and prosecute or extradite perpetrators of serious crimes and to avoid granting immunity from prosecution. A superior order is not a justification.

The Declaration on the Protection of All Persons from Enforced Disappearance, which was adopted by the General Assembly in 1992, has the objective to set standards to punish and prevent forced disappearance. The Declaration contains obligation for the

¹³⁸ U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of the impunity of perpetrators of human rights violations (civil and political)*, Final report prepared by Mr. Joinet, supra note 29, pp. 4-5, 7.

¹³⁹ Article 18.

¹⁴⁰ Article 19.

¹⁴¹ Article 5.

¹⁴² Article 21.

state to investigate, prevent, punish perpetrators and to compensate victims. Article 4 allows mitigating circumstances in national law if victims are brought forward alive or if information that clarify cases of forced disappearances are brought forward. Articles 9 and 13 require effective judicial remedy and investigation. Articles 14, 16 and 18 require extradition or prosecution of the persons responsible. They should be tried by a civilian court and not be granted immunity or amnesty. However, according to article 18.b. States are allowed to use pardons as long as the seriousness of disappearances is taken into account.¹⁴³

The UN Working Group on Enforced or Involuntary Disappearances stated in 1991 that impunity was one of the factors contributing most to disappearances.¹⁴⁴ In 1992, the Working Group recommended some measures in order to deal with the problem of impunity, such as the right to habeas corpus¹⁴⁵, a properly functioning administration of justice, the protection of witnesses, publication of investigations results as well as the identity of the victim and the perpetrator, no granting of impunity etc. No laws or decrees should be enacted or maintained that grant the perpetrators immunity of the crime. The prosecution and punishment of gross human rights violations should be dealt with in civilian courts. Obedience of orders should not be a valid defence from criminal responsibility.¹⁴⁶

The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities produced Draft Principles on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, outlining the obligation for the state to restitute, compensate, rehabilitate and guarantee non-repetition. The full truth, public apologies, prosecution of the perpetrator and assurance that no immunity is granted is included in these obligations. Reparation includes a duty

¹⁴³ Roth-Arriaza, Naomi, supra note 21, pp. 43-44.

¹⁴⁴ U.N. Commission on HR, Report of the Working Group on Enforced or Involuntary Disappearances, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Question of Enforced Disappearances*, 1991.

¹⁴⁵ Habeas corpus (or remedy of amparo) means that any person may present an appeal to a competent court for a writ of amparo on behalf of a person subject to illegal detention. The court may order the detainee to be brought before it and may order his/her immediate release after investigation of the legal situation, rectify the irregularities of his arrest or place him at the disposal of a competent judge. Thousands of amparo appeals were rejected between 1973 and 1978 during the state of siege. *Chile- A Time of Reckoning*, supra note 48, pp. 82-83.

¹⁴⁶ U.N. Commission on HR, Report of the Working Group of Enforced or Involuntary Disappearances, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Question of Enforced Disappearances*, supra note 36, pp. 11-12.

to prosecute and punish and “[i]mpunity is in conflict with this principle.”

At the World Conference on Human Rights in Vienna in June 1993, the concern with impunity was expressed and the duty to investigate and prosecute was affirmed as well as the legislation that upheld impunity for gross violations should be abolished.¹⁴⁷

6.4.2 General Principles of Law

According to article 38 (1.c.) of the Statute of the International Court of Justice, the general principles of law are a separate source of law. General principles of law are principles common to the major legal systems. All the major legal systems contain provisions of punishment by the state when state agents or officials of the state commit a crime.¹⁴⁸

6.4.3 Crimes against Humanity

The law arising from the prosecution of war criminals after World War II is relevant to a state’s obligation to investigate and prosecute human rights violations. Firstly, prosecutions acknowledge the importance of an official reckoning of the truth. Secondly, the prosecutions affirm that the crimes committed by state agents against individuals were crimes under international law where no immunity was granted.

According to article 6.c. of the Charter of the International Tribunal at Nuremberg, crimes against humanity are “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

Although the enumerated acts are characterised as international crimes, there is no duty to punish; only a permission to prosecute and a legal basis per se.

Crimes against humanity and the norms which regulate them, form part of what is called *jus cogens*, i.e. fundamental norms. They

¹⁴⁷ Roth-Arriaza, Naomi, *supra* note 21, p. 45.

¹⁴⁸ *Ibid.*, pp. 46, 48.

cannot be modified or revoked by treaty or domestic law, because they are peremptory norms of general international law. A treaty is void if it conflicts with a peremptory norm. Article 53 of the Vienna Convention of the Law of Treaties states that “a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹⁴⁹

In 1970, the UN General Assembly noted in a resolution on war criminals and crimes against humanity, that in order to prevent such crimes and uphold international peace and security, it was important that a thorough investigation was carried out resulting in the arrest, extradition or punishment of the perpetrators and the compensation for the victims. The Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War crimes and Crimes Against Humanity adopted in 1973, establishes an obligation for the state to prosecute the authors regardless of where the crime was committed.

The Draft Code of Offences Against the Peace and Security of Mankind, prepared by the International Law Commission after the Nuremberg trials, established a duty to extradite or prosecute perpetrators of crimes, including state officials and heads of state, in order to promote peace and security.¹⁵⁰

6.5 Special Problems of a Duty to Prosecute: Amnesties, Derogations, Statutes of Limitation, Superior Orders and Immunity

Can a state exempt itself from its obligations by passing domestic laws granting total or partial amnesty? Could such an amnesty be justified as a permissible derogation from existing international commitments? And could a state avoid most if not all its obligations if potential defendants successfully raise the defence of superior orders or the statute of limitations?

¹⁴⁹ *Amnesty om Pinochet*, supra note 15, pp. 26-27.

¹⁵⁰ Roth-Arriaza, Naomi, supra note 21, pp. 50-52.

6.5.1 Amnesties

None of human rights treaties or criminal law treaties prohibit an amnesty. However, a prohibition of a blanket amnesty may be implicit as the opposite of a duty to prosecute. There is a distinction between amnesties granted to the state's opponents by the state and amnesties granted to state officials. In the latter case, the state judges in its own case, which is inconsistent with general principles of law forbidding self-judging. This principle was re-established by the Permanent Court of Justice in the 1925 Frontier between Iraq and Turkey case; "no one can be judge in his own suit". This principle exists in all major legal systems in one form or another. The principle should be applicable in cases of self-amnesty granted by the state to its own forces and should therefore be considered to be prohibited under general principles of law.

The Chilean amnesty decree law 2,191 violates international standards, since it exempts the security forces from punishment, even for non-derogable acts. The amnesty law violates the principle of equality, the constitutional remedy clauses and indirectly the right to life and physical integrity and the right to effective remedy.^{151 152}

The duty to prosecute implies that the perpetrators cannot be amnestied. International norms allowing amnesties, such as article 6, paragraph 5 of the Second Additional Protocol to the Geneva Conventions apply to the prosecution and punishment of criminal offences related to armed conflicts.¹⁵³ Self-amnesties, such as the amnesty law in Chile, lack legitimacy and violate the prohibition of privileging certain groups of persons and the principle of equality, which are fundamental principles that exist in international instruments. The prohibition of amnesty is a non-derogable principle, which is valid even in a state of emergency.^{154 155 156}

When amnesties are granted through non-legitimate means, e.g. through a decree of a de facto government or a law passed by a

¹⁵¹ Ambos, Kai, supra note 43, p. 493.

¹⁵² Ambos, Kai, supra note 43, p. 8.

¹⁵³ Article 6 (5) of the Second Additional Protocol to the Geneva Conventions reads: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

¹⁵⁴ This follows from ICCPR art. 4, ACHR art. 27, which declare certain rights non-derogable and thereby imply protection of these rights under domestic law. It could also be based on the right to an effective remedy (ICCPR art. 2, ACHR art. 25).

¹⁵⁵ Ambos, Kai, supra note 42, pp. 490-491.

¹⁵⁶ Ambos, Kai, supra note 43, p. 7.

non-democratically elected legislature, they may legitimately be denied legal status due to their method of issuance.

Self-amnesties may in some cases be granted by the successor regimes in exchange for transition or social peace. In the case of Chile, the amnesty was passed by the military junta, but was allowed to remain in force after the transition by the Aylwin government. It is a well-established fact that a government is not relieved of a prior regime's duties under international law. The successor regime is obliged to punish atrocious crimes if the prior regime has failed to do it. Discontent military forces or promotion of national reconciliation is no excuse. Naturally, international law does not require states to put vital national interests at stake. Ratification of inconsistent domestic laws, such as an amnesty law, does not erase international obligation.¹⁵⁷

The UN Declarations on the Protection of All Persons from Enforced Disappearance, on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, and on Basic Principles of Justice for Victims of Crimes and Abuse of Power all explicitly prohibit blanket amnesties. Amnesties are prohibited in the case of forced disappearance in the 1992 draft of the Inter-American Convention on Forced Disappearance, but not in the final text.

The UN Human Rights Committee has stated that amnesties are generally incompatible with States Parties' duties under article 2(3) (the right to a remedy) read together with article 7 (prohibition of torture) of the ICCPR.

As mentioned before, in the Velásquez Rodríguez judgement the Inter-American Commission on Human Rights found that amnesties violate the American Convention on Human Rights. The ACHR requires prosecution that a domestic amnesty cannot annul or overrule. Article 25 (the right to remedy) read together with article 4 (the right to life), article 5 (the right to physical integrity), article 1 (the obligation to ensure the rights) and article 8 (the right to a fair trial) made the Commission reach its conclusion.¹⁵⁸

6.5.2 Derogations

Blanket amnesties can be legal under international law if the obligations to investigate and punish are derogable. Under ICCPR article 4(1) and ACHR article 27(1) derogation from some human

¹⁵⁷ Orentlicher, Diane F., supra note 99, pp. 2595-2596.

¹⁵⁸ Roth-Arriaza, Naomi, supra note 21, pp. 57-60.

rights obligations is possible in a “public emergency”. “Public emergency” denotes fragile new governments facing hostile military actors or continued ethnic or factional strife. The danger must be actual or imminent and the effect must involve the whole nation and must threaten the continuance of the organised life of the community. The European Court of Human Rights stated this in the Greek case. The danger must be exceptional and normal measures inadequate. It is up to the state to decide this. The other State Parties must be informed.¹⁵⁹ Chile is one of many states that has made notifications of derogation measures pursuant to article 4(3). Rights may be derogated only from “the extent strictly required by the exigencies of the situation”, according to article 4(1) ICCPR. ACHR article 27(1) has the same formulation with the amendment “for the period of time strictly required”. This emphasises the principle of proportionality, which requires that the necessity of derogation measures be reviewed by independent national organs, especially the legislative and judicial organs.¹⁶⁰

Furthermore, derogations are permitted only if it is consistent with other obligations under international law, including non-treaty law. Some rights are always non-derogable, such as the right to life and freedom from torture.¹⁶¹ The prohibitions of torture, disappearances and extra-legal executions can never be abrogated because they have the status of peremptory norms.¹⁶² According to article 27(2) ACHR, the judicial guarantees essential for the protection of non-derogable rights are also non-derogable. Disappearance is not explicitly prohibited, but might fall under the right to life provision. The Inter-American Court has held that because habeas corpus is an effective means of preventing torture and since torture is non-derogable, that the right to habeas corpus is a non-derogable right, although not explicitly mentioned in article 27(1) ACHR.¹⁶³ The right to habeas corpus and the right to a fair trial are minimum guarantees that should not be derogated from since this would contradict the principle of proportionality.¹⁶⁴

If states were not required to take action against the violations of non-derogable rights, non-derogability would be meaningless in all but name. This lead to the assumption that amnesties are not allowed for violations of non-derogable rights. Necessity cannot be invoked to avoid its obligation under international law if the state contributed to creating the state of necessity. However, to avoid its

¹⁵⁹ ICCPR art. 4(3), ACHR art. 27(3).

¹⁶⁰ Nowak, Manfred, *supra* note 121, pp. 78-79, 84.

¹⁶¹ ICCPR art. 4(2), ACHR art. 27(2).

¹⁶² Orentlicher, Diane F., *supra* note 99, p. 2607.

¹⁶³ Kokott, Juliane, *No Impunity for Human Rights Violations in the Americas*, 1993, p.157.

¹⁶⁴ Nowak, Manfred, *supra* note 121, p. 85.

obligations under customary law a state must show that it did not create or contribute to the danger, that there were no other ways of confronting the danger and that its actions were not prohibited by treaty.¹⁶⁵

6.5.3 Statutes of Limitations

An application of statutes of limitations in civil or criminal cases may work as a kind of de facto amnesty. According to the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, statutory or other limitations do not apply to the prosecutions and punishment of genocide or crimes against humanity.

The Declaration on Enforced Disappearance allows for suspension of the statute of limitations while remedies are not effective. If disappearance is characterised as a continuing offence, the statute does not begin to run until the facts are clarified. The Inter-American Convention on Disappearances article 7 abolishes the statute of limitations for penal action against perpetrators of forced disappearance except in certain limited circumstances.¹⁶⁶

6.5.4 Superior Orders

By arguing the theory of due obedience to superior orders, states may try to avoid prosecutions. Nuremberg held that even during wartime, orders from superior officers are not sufficient to exempt a subordinate from criminal responsibility. The Inter-American Torture Convention, the Inter-American Convention on Forced Disappearance and article 2 of the CAT explicitly exclude the defence.¹⁶⁷

6.5.5 Immunity of Heads of State and Public Officials

Immunity or special privileges cannot be invoked by the authors of torture, genocide and other crimes against humanity in order to avoid criminal or civil responsibility. There is a long established fundamental rule in international law that there is no immunity under international law for heads of state and public officials for

¹⁶⁵ Roth-Arriaza, Naomi, *supra* note 21, pp. 62-63.

¹⁶⁶ *Ibid.*, pp. 63-64.

¹⁶⁷ *Ibid.*, pp. 65-66.

crimes against humanity. Article 7 of the Nuremberg Charter stated that: “[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.” Under international law, no state has the power to enact legislation providing immunity for any individual from criminal and civil responsibility for crimes against humanity. The principle of individual criminal responsibility, even for heads of states, was articulated in the Nuremberg Charter and Judgement and has long been part of international law. The UN International Law Commission has explained the reasons why heads of state and public officials are not immune: a public official who plans, authorises and orders crimes against humanity not only provides the means and the personnel necessary, but abuses the authority and power entrusted to him. He may be considered even more culpable than a subordinate. By committing atrocious crimes, the public official in his position threatens international peace and security.¹⁶⁸

6.6 The Inter-American Commission on Human Rights

6.6.1 The Complaints before the Commission

During 1997, the Inter-American Commission continued to receive complaints against Chile based on the application of the amnesty law. The complaints alleged that the very existence of the amnesty law caused violations of the right to justice, and that the law was applied under a Supreme Court ruling confirming its conformity with the Constitution and that its repeal had been blocked by the Legislature. Chile thus violated international customary and conventional law, such as the American Convention on Human Rights ratified by Chile on the 21st of August 1990, according to the petitioners. In their complaints the petitioners demand that the Commission should declare the amnesty law incompatible with article XVII of the American Declaration on the Rights and Duties of Man and articles 1, 8 and 25 of the American Convention on Human Rights and that Chile must punish the perpetrators.¹⁶⁹

¹⁶⁸ *Amnesty om Pinochet*, supra note 15, pp. 32-34, 38.

¹⁶⁹ Annual Report of the Inter-American Commission on Human Rights 1997, pp. 512-513.

6.6.2 Allegations Presented by the State of Chile

Chile stated that, as the amnesty law was decreed during the military dictatorship, it has not issued a law incompatible with the American Convention on Human Rights. It pleads the Commission should take into consideration the history of Chile and that the new government had to accept the demands the military imposed. The government tried to repeal the decree law, but this was not possible since the majority of the Senators were not elected.¹⁷⁰

6.6.3 Observations of the Commission on the Allegations of the Parties

The Commission contested that a *de facto* government, such as the military junta 1973-1990, lacks legal authority and everything that runs counter to the Constitution is against the law. Those who benefited from the amnesty were the accomplices of the junta. “It is one thing to have to legitimise acts of the society as a whole (so as to prevent chaos) and acts implying international responsibility, because obligations assumed in this area cannot be evaded. But it is an entirely different matter to grant equal treatment to those who acted with the illegitimate government, in violation of the Constitution.”¹⁷¹

In its report the Commission further stated that it would be absurd if the junta and its supporters were to benefit from the protection given in the Constitution. “The actions taken by the usurper can under no circumstances be considered valid or legitimate, including when these actions are taken in behalf of the illegal or *de facto* officials. If those who collaborate with illegal and usurper regimes can be assured of impunity of conduct due to their association with such regimes, there can be no difference between what is legal and what is illegal, between what is constitutional and what is unconstitutional and between what is democratic and what is not.”¹⁷²

According to the Commission, it is judicially unacceptable that the democratic government is limited by the military to consolidate democracy and that a *de facto* government has the status of a *de jure* government. According to article 158 of the Chilean Constitution of 1833, “any resolution adopted by the President of the Republic, the Senate or the Chamber of Deputies in the presence of or at the command of an army, a general in command

¹⁷⁰ Ibid., pp. 519-520.

¹⁷¹ Ibid., pp. 520-521.

¹⁷² Ibid., p. 521.

of the armed forces, or any gathering of people, with or without arms, which should fail to heed the authorities, ceases to have legal effect and is null and void under the law.” Article 4 of the 1925 Constitution declares that “No magistrate, no person or group of persons may ascribe to itself any authority or rights unless expressly conferred under the law, not even on the grounds of *force majeure*. Any action in contravention of this article is null and void.” Even the 1980 Constitution, which was decreed by the military regime, reiterated the same thing as above in article 7 second paragraph, with the amendment that the act should be sanctioned.

Under a de facto government, the fundamental rights and liberties of a person do not cease to be valid. These rights are always to be guaranteed and an abusive regime, which decrees a self-amnesty, is committing a serious abuse of power.¹⁷³

The Commission noted that amnesties violate article 1.1 of the American Convention on Human Rights. The claims of the petitioners notes the fact that the amnesty law, enacted by the junta, has not been repealed but remains in effect under the so-called democratic government, even after the ratification of the American Convention. The Commission argues that the Chilean State is responsible for the failure to amend or repeal the amnesty law and that this constitutes a violation of article 1.1 and 2 of the American Convention.¹⁷⁴

The decree law, in the way it is applied and interpreted by the Chilean tribunals, prevents the exercise of the right to a fair trial and article 8.1 of the American Convention. The decree law has, according to the Commission, left no legal recourse for the victims in order to identify and punish the authors. Therefore promulgating and ensuring compliance with the amnesty law violates article 25 of the American Convention.

As mentioned in chapter 6.3.2, the Inter-American Court has interpreted in the Velásquez- Rodríguez case, article 1.1 of the American Convention that to ensure the rights in the treaty means that the State Parties must prevent, investigate and punish any violation of the enumerated rights. Furthermore, the State has a legal duty to pursue investigation of gross violations committed within its jurisdiction, to identify the perpetrators, to punish them and to ensure compensation for the victims.

¹⁷³ Ibid., pp. 521-522.

¹⁷⁴ Ibid., pp. 526-527.

The Commission considered that although the Rettig Commission carried out a thorough investigation, it was not a judicial body and cannot be seen as an alternative to a judicial process.¹⁷⁵

The government of Chile acknowledges that the amnesty law is incompatible with international law, that there is a close link between amnesty and impunity and that the amnesty law represents a policy of systematic mass violation of human rights, which starts when the crime is committed, continues with the denial of facts and concludes when amnesty is granted. Furthermore, Chile states that it is not responsible for the violations since the amnesty law was not passed by the democratic government. It has not been possible to repeal the law or to make Chilean law compatible with international law. As for the application of the amnesty law, the government has to follow the law and the Constitution, which determine its competence, responsibilities and capabilities.

According to the Commission, Chile “cannot justify non-compliance with the American Convention by asserting that the Amnesty Decree was issued by the previous government or that the refusal or omission of the legislative in the derogation of the law or that actions by the Judiciary which confirm its application are all independent of the position and responsibility of the democratic Government, since the Vienna Convention on the Law of the Treaties established in Article 27 that a State may not invoke the provisions of its domestic law to justify non-compliance with a treaty.” The State of Chile is responsible for the violations incurred by the amnesty law. According to the principle of the continuity of the State, international responsibility still exists even after a change of governments.

The State of Chile has violated article 1 and 2 of the American Convention as the decree law has not been derogated but still remains in force and the domestic legislation does not comply with the principles set out in the treaty. Both the judiciary and the legislative have failed, within their respective areas of competence, to adapt domestic provisions to the Convention.¹⁷⁶

The State has an obligation to ensure that the truth is found out. The right to truth is both a collective right (a society wide right to gain access to information) and an individual right (a right for the relatives of the victims to know what happened to the disappeared). Both the Court and the Commission have established the principle that the whereabouts of the disappeared persons are to be investigated. As long as there is any uncertainty about the

¹⁷⁵ Ibid., pp. 529-531.

¹⁷⁶ Ibid., pp. 532-533.

disappeared, this duty to investigate remains. The amnesty law has impeded fact finding process as well and Chile has thus violated article 1.1, 8, 25 and 13 of the Convention.¹⁷⁷

6.6.4 The Commission's Conclusions and Recommendations

The amnesty decree law 2,191 is incompatible with the American Convention on Human Rights as ratified by Chile on the 21st of August 1990. The ruling of the Supreme Court of Chile of the 28th of August 1990 and its confirmation on the 28th of September 1990 in which the decree was declared constitutional and applicable, violates articles 1.1 and 2 of the Convention. The State of Chile also violates articles 8 and 25 since it has not investigated the crimes and punished the perpetrators. Article 2 has been and continues to be violated as domestic legislation is not adapted to the international legislation.

The Commission recommends that Chile derogate the amnesty decree law, so that the crimes are investigated, the authors identified and punished and the relatives receive compensation.¹⁷⁸

¹⁷⁷ Ibid., pp. 534, 535, 537.

¹⁷⁸ Ibid., pp. 538-539.

7 A Comparison with Argentina

Democratic transition in Latin America has been characterised by a high degree of impunity, despite the fact of state practice of torture, summary executions and disappearances. Perhaps is the fact that military officers still remain in office more indicative of the weakness of the new democratic regimes than of the desire to establish a genuine rule of law, based on the respect of justice.

In Chile, 1,198 people disappeared while in Argentina 30,000 people disappeared. In Argentina the militaries have apologised to the victims and it has also been known what happened to the disappeared; they were dumped in the Atlantic Ocean or the Rio Plata. In Chile, one does not know what happened. In 1990, a mass grave was discovered in Pisagua in the north of Chile and the fate of some disappeared people could be established. In August 1999, a meeting was held in Santiago with the military and the relatives of the disappeared to discuss the fate of the disappeared.¹⁷⁹ This is big progress, since the military in Chile has never wanted to discuss the issue before.

Unlike military leaders in Argentina and Uruguay, Pinochet presided over a period of sustained economic growth in the late 1980s. Chile still enjoys reputation as an economic success story at a time of mounting inflation and debt in neighbouring countries.¹⁸⁰

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7.1 Political History of Argentina

Argentina is a federal constitutional democracy. The judiciary is separate from the executive branch, headed by an elected president, and a bicameral legislature. The President is the Commander-in-Chief and a civilian Defence Minister is head of the armed forces. The Constitution, which was revised in 1994, incorporates nine international human rights conventions.¹⁸²

¹⁷⁹ *Chiles militär öppnar dialog om försvinnanden*, Göteborgs Posten, the 23rd of August 1999.

¹⁸⁰ *Chile – A Time of Reckoning*, supra note 48, pp. 21-22.

¹⁸¹ *Justice – Not Impunity*, supra note 32, p. 42.

¹⁸² Country Reports on Human Rights Practices for 1995, U.S. Congress, 1996, p. 314.

Raúl Alfonsín was elected president in 1983 after military dictatorship 1976-83. In 1983, Alfonsín ordered the trial and sentencing of the leaders of the 1976-83 military dictatorship. On the 15th December 1985, he appointed a National Commission on Disappeared Persons to find out what happened to the 30,000 people that disappeared during the so-called dirty war 1976-83. The Commission had, like the Rettig Commission, no right to subpoena witnesses or compel testimonies.

The government was being pressured to pass a law- a punto final law (full stop law) in 1986. The law limited new complaints against crimes committed during the military dictatorship to a sixty-day period. The objective of the punto final law was to speed up the trials in progress at the time and setting the time limit in order to avoid subjecting militaries to on-going suspicion. The law did not apply in cases of kidnapping of children of the victims. Alfonsín wanted to associate the military with democracy and reconcile them with the Argentine nation.

A due-obedience law was passed in June 1987, which allowed subordinate officers to escape prosecution. This law established an undeniable presumption of innocence for troops and subordinate officers up to the rank of Lieutenant-Colonel having acted in due obedience to their superiors. The explanation for passing the law was that the individual had acted without the opportunity to question the legality of the order nor oppose or resist it. The presumption of innocence was extended to include even superior officers unless proof of the contrary could be presented within a thirty-day period.

The Supreme Court upheld the constitutionality of the law in June 1987 by a three to two vote. Those who were excluded from the law and convicted were pardoned by the incoming President Saul Menem in 1989 and 1990. This undercut the authority of the judiciary. Alfonsín thought it was a step backwards while the military considered it to be a step towards peace and reconciliation.^{183 184}

7.2 The Current Human Rights Situation in Chile and Argentina

The human rights situation has improved remarkably since the return to democracy in Chile and Argentina. Compared to other

¹⁸³ *Justice – Not Impunity*, supra note 32, pp. 43-44.

¹⁸⁴ Roth-Arriaza, Naomi, supra note 21, pp 161-162.

Latin American countries, impunity in the both countries is a backward-looking issue, that is coming to terms with the past and the crimes committed during the military dictatorships. In both Chile and Argentina the amnesty law has been issued with the official purpose of national reconciliation after military dictatorships, which included massive and systematic violations of human rights. The amnesty laws exempt security forces from prosecution and punishment while in Colombia the amnesty law exempt guerrilla groups from punishment.¹⁸⁵ Both the Chilean amnesty decree and the Argentinean *punto final* law are incompatible with international criminal law. In Argentina human rights prosecutions were initiated by the new administration while in Chile the cases were pending in the courts for years and barely lead to a single conviction. The victims and the relatives of the disappeared have to some extent been granted compensation in both countries, which is a recognition of the victims.

The *punto final* law, the due-obedience law and the amnesty decree have impeded investigations into allegations of human rights violations. They have been applied even though there are significant evidence of gross violations. These laws deny effective remedy to victims of human rights violations. The Argentinean laws are in violation of ICCPR arts. 2(2), 2(3) and 9(5) and the Chilean amnesty decree violates ICCPR 2(3).

Even though the return to democracy has brought enormous advance for the protection of human rights in both Chile and Argentina, there continue to be instances of extra-judicial killings and physical mistreatment of detainees by local police. The state practice is still much lower than human rights law. In contrast to Chile, the army commander in Argentina publicly acknowledged that the army committed grave human rights violations. There does not seem to be any new cases of disappearances since the return to democracy in either of the two countries. The cases pending in courts are disappearances that took place during the dictatorship.¹⁸⁶
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Argentina underwent transition to democracy in the early 1980s, which was ten years earlier than Chile. Argentina has had approximately ten more years to stabilise the situation in the country than Chile. Nevertheless, in comparison to Argentina, Chile has in short time come a huge step forward since the return

¹⁸⁵ Ambos, Kai, *supra* note 43, pp. 2-3.

¹⁸⁶ Country Reports on Human Rights Practices for 1995, *supra* note 182, pp. 314-319, 354-362.

¹⁸⁷ Concluding Observations of the Human Rights Committee: Argentina, 1995, paras. 144-165.

¹⁸⁸ Concluding Observations of the Human Rights Committee: Chile, 1999.

to democracy in 1990. There are still a lot of work to be done in both countries to achieve the same level of the state practice of human rights as international human rights law. The both countries are moving in the right direction and the human rights reports look better every year.

8 Different Views on How to Deal with Impunity

Chile is a very polarised society; the right wing versus the left wing. It is very difficult to see how these two sides can come to terms. There are two sides of everything: the history, the coup, the political situation and how to deal with certain issues such as impunity and the amnesty law. The right and the left have completely divergent opinions about how to deal with the past human rights abuses. Generally speaking, the right argues that what happened was necessary in order to defeat communism and to re-establish the economy and democracy. The most pro-impunity is the right wing and the military, while the left wing, human rights lawyers and NGOs consider that the perpetrators of human rights crimes should be punished. Below, is presented the views of some people and organisation, which could be described as an average of the Chilean population.

8.1 A Right Wing View

I interviewed Dario Paya, who is a lawyer and a Member of Parliament from UDI, the most right-wing party in Chile and pro-Pinochet. His opinion is a fairly common one among the right wing people. To bear in mind is that there are also different sides of the background of the amnesty law and here follows Dario Paya's side of the story.

Paya contends that Chile did not have time to wait for another election after the coup -Allende had to go. According to Paya, the reason for the drafting of the amnesty law was to get rid of Manuel Contreras, the Chief Commander of the DINA who ordered the assassination of Orlando Letelier. Contreras was a problem; he kept record of what everyone in uniform had done and blackmailed people and it is why he was in charge of DINA for such a long time. Three days after the amnesty law was decreed Contreras was fired. Paya thinks that the amnesty law had to be decreed in order to get rid of Contreras. Contreras thought that he got impunity and stopped blackmailing DINA officials. Also the church supported the amnesty law, according to Paya.

Dario Paya does not think it is necessary to punish the human rights violators. If so, one would have to bring half of the Senate to court, which would only destroy the country. It would be a nice

gesture if the military apologised. Punishing them would not do any good, only reopen the wounds of the past. Furthermore, it does not do any harm to have human rights violators in the Senate. Indeed, it is beneficial to have people with experience in the Senate. A lot of them are important political actors and bringing them to trial would be bringing 80 percent of the population to trial and would do more harm than good.

Regarding national reconciliation, Paya contends that 95 percent of the population have opinions. It is a practical question - everyone wants reconciliation, but the question is how it is to be achieved. The division in the Chilean society is not an important issue. According to Dario Paya, the country is not divided. It would be better not to talk about it and respect the amnesty law. "The past has nothing to do with the future" and it is not an issue to punish the violators. "I have a clear mandate to worry about other things than impunity." One should just forgive and forget about the abuses. Bringing up the issue does not lead to reconciliation among Chileans, it only causes a wider gap. "For instance the arrest of Pinochet in London caused a division among the people in pro- or anti- Pinochet factions and has not lead to anything good." Even the relatives of the disappeared want to forget, according to Paya.¹⁸⁹

I found some things that Paya said rather spectacular considering he is a lawyer; especially that he thinks that it is not necessary to punish the perpetrators of human rights crimes. Although his opinion about certain issues is not unusual for right wing people, a lawyer usually believes in the rule of law.

One could feel that Paya was a politician and used to discuss these matters. Moreover, there were a lot of words without any substance.

8.2 A Human Rights Lawyer's View

Héctor Salazar, a human rights lawyer who has been fighting impunity for a long time and has handled many cases of disappearances, does not know if it is possible to achieve reconciliation, but at least tolerance on a basic level should be possible. Salazar is one of the most known human rights lawyers in Chile. He also works for FASIC and is head of the faculty of law at Universidad Academia de Humanismo Cristiano, which is a left oriented university. His side of the story is somewhat divergent to

¹⁸⁹ Paya, Dario, the 26th of October 1998.

Dario Paya's. In my opinion, Salazar's view is rather typical of human rights lawyers, but perhaps a little less radical than the average left wing opinion.

Salazar contends that Chile is so divided that even the national anthem is sung in two different ways. After the coup, the national anthem was changed. There is a widespread mentality that is almost like the fascist mentality in Europe during the Second World War, which was the mentality that helped Pinochet to take control. A right-wing politician once said "[t]he only good communist is a dead communist", neatly summing up the mentality of the right wing. With this mentality it is impossible to achieve reconciliation in Chile. Salazar does not believe that it is possible to use legal means to achieve reconciliation, at least not at this time.

Would it help if the guilty perpetrators were punished? Yes, it would help a lot, but it is not accepted by the military. There is a doctrine in the military, which says that since it was war and they won the war, they do not have to explain anything. The military do not confess to any crimes and therefore it not possible to achieve reconciliation. As long as we do not have the same view, the division continues to exist, states Salazar.

Future generation might be reconciled, but Salazar cannot accept the military's view when they state that while people were killed, we must turn over a new leaf and move on. Salazar states that he does not want to bear a grudge, but if the military does not want to pay for the crimes it can do the same thing again.

Regarding the case of Pinochet and his arrest in London, Salazar means that an interesting thing about the case is that the real Chile was exhibited. The government has striven to demonstrate that Chile was a democratic country and has thus been unwilling to show the division. The incident has forced political and social actors to accept the situation and to try to find a solution to the problems.

Will the arrest of Pinochet in any way help the country? It will certainly help a lot, at least in certain sectors, to show that Pinochet is not untouchable. Even if he is outside the country he is not outside the law. In Chile nothing can be done at this point. The society is afraid of the military and a lot of things are not expressed but buried inside. This fear will always be present in Chile and it affects the political and the social life. There is a fear of voicing opinions. The Aylwin government tried to convince people not to be afraid. You cannot find anybody in Chile who expresses his or

her honest opinion. The transition government tried to disguise reality.¹⁹⁰

8.3 The View of Some Scholars

Jorge Mera¹⁹¹ calls for an interpretative law that excludes the most serious abuses from the scope of the amnesty. This kind of law does not violate the principle of non-retroactivity of penal law, since under both national and international law the amnesty was never legally able to cover the serious violations. ICCPR article 15(2) states that the principle of non-retroactivity does not “prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.”¹⁹²

In cases of human rights, the truth is not enough; justice must also be done. Disclosure of the truth does not replace justice; it is only part of ensuring that justice will be done. Some people have tried to minimise the importance of the amnesty as a meaningful obstacle to justice. Their arguments are that the amnesty:

- Does not cover cases after March 10, 1978;
- Does not include persons who disappeared after being arrested;
- Does not prevent the investigation of what happened but only bars punishment for the committed acts;
- Does not cover certain acts because in theory the judges could interpret the law to exclude the most serious violations (which would not be subject to amnesty).

According to some people, the amnesty law is justified since it applies to the 1973-1978 period when Chile was in a state of siege, much like a civil war period. However, this is not true. The victims were often unarmed, at least the ones who were not members of an armed group. It was also during this period that the most serious violations took place. Therefore, there is no basis for an amnesty based on a need to restore social peace and harmony.

¹⁹⁰ Salazar, Héctor, the 9th of December 1998.

¹⁹¹ Jorge Mera is author of chapter 13 of *Impunity and Human Rights in International Law and Practice*, supra note 21.

¹⁹² Roth-Arriaza, Naomi, supra note 21, pp. 182-183.

According to Jorge Mera, the amnesty law does not prevent investigation of the fact, which is a fact that has been supported in Chilean jurisprudence. A lot of cases are pending in the courts. However, investigation without the possibility of penal sanction does not satisfy the demands for justice.¹⁹³

The Aylwin government accepted the 1978 amnesty as a fixed legal obstacle that the courts must apply. The government stated that it had neither the parliamentary strength to legislate changes to the amnesty, nor the ability to force the courts to overturn it.

“Truth and justice to the extent possible” seemed to mean that the government set its own limits in advance about what it believed possible, without any effort to obtain the results it desired.¹⁹⁴

Naomi Roth-Arriaza argues that measures against impunity must be effected relatively quickly, within a year, “before the new government loses the widespread legitimacy it enjoys, before the political unity engendered by opposition to the old regime evaporates and apathy sets in, before the old guard can reorganise, and before the new government is overwhelmed by intractable economic and social problems.”¹⁹⁵

To be able to build a democracy, the military jurisdiction must be limited so that, for instance, common crimes against civilians should be tried in civilian courts. Some of the reforms Naomi Roth-Arriaza proposes are: the government’s ability to impose a state of emergency, the attorneys right to enter the judiciary, civilian control over previously autonomous institutions like the military, and clear separation of military from police functions.¹⁹⁶

8.4 The View of Some NGOs

Agrupación de Familiares de los Detenidos Desaparecidos, the Group of Families of the Detained Disappeared.

“Our position on the problems of human rights violations is basically legal, ethical and preventative. No healthy, solid, stable democracy can build itself upon a foundation of forgetting the most serious crimes against the right to life, integrity and freedom committed in Chilean history and within a policy of state terrorism that unleashed maximum political violence against society. We

¹⁹³ Ibid., pp. 178-181.

¹⁹⁴ Ibid., pp. 183-184.

¹⁹⁵ Ibid., p. 282.

¹⁹⁶ Ibid., p. 292.

reaffirm that there is no ethical or judicial reason why crimes of human rights violations should remain in impunity.

We are asking that crimes against humanity be punished in the same way that common ones are.”¹⁹⁷

FASIC – Fundación de Ayuda Social de las Iglesias Cristianas, Christian Churches Foundation for Social Assistance.

“...learning the truth regarding each detained disappeared case cannot be avoided. The truth needs to be clear and precise. It implies knowing: where they were detained or abducted, where they were taken to, where they were killed, where they were hidden, who did it, and why they did it. Inherent in a truth of this sort is the issue of justice, which implies establishing penal, institutional and ethical responsibilities.”¹⁹⁸

“National reconciliation can neither be completed nor attempted through legislation alone, since it is an ethical, cultural, political and juridical process in which all the affected sectors must participate.”¹⁹⁹

Human Rights Watch

According to Sebastian Brett, official of the Human Rights Watch, a positive aspect about Chile as compared to other Latin American countries, is that since 1990 Chile is basically a country in peace. There have been few violent outbursts. Contreras and Espinoza are in jail, as well as are 14-15 police officers. A negative thing is that there have been no substantial clarifications from the military about what happened to the disappeared. In Argentina some officers have told their stories. It is known that the disappeared were drugged and thrown into Atlantic Ocean from helicopters. High-ranking officials have made public apologies in Argentina, something that has not happened in Chile.²⁰⁰

¹⁹⁷ *Chile - Transition at the Crossroads*, supra note 70, p. 11.

¹⁹⁸ *Ibid.*, p. 12.

¹⁹⁹ Public declaration by FASIC, Comité Defensa de Los Derechos Del Pueblo (CODEPU), Centro de Salud Mental y Derechos Humanos (CINTRAS), Servicio Paz y justicia (SERPAJ), *Ibid.*, p. 13.

²⁰⁰ Brett, Sebastian, the 6th of October 1998.

8.5 Public Opinion

According to public opinion surveys conducted by Centro de Estudios de la Realidad Contemporánea (CERC) and Comisión Chilena de Derechos Humanos (CCDH) in July and August 1995, large majorities of the population favoured continued investigations into human rights violations (75% and 80%) and continued prosecutions of the perpetrators for human rights violations (62% and 70%). Another survey conducted by CERC in October 1995 concluded that 79,3% of the population believed that democracy was not fully consolidated in the country.²⁰¹

²⁰¹ *Chile - Transition at the Crossroads*, supra note 70, p. 13.

9 Conclusions

Since the return to democracy, the human rights situation has improved remarkably in Chile. The number of human rights abuses is much lower than during the military junta. The families of the disappeared are no longer treated as enemies. For years their search for truth and justice was ignored, which is no longer the case with the establishment of Rettig Commission in 1990.

Clearly, impunity is a great obstacle to reconciliation in Chile. The amnesty law is a continuing breach of international law, customary law as well as treaty law. Of uttermost importance is that the political situation Chile experienced during the dictatorship (especially 1973-1978) is not repeated. There is a risk of that, if the amnesty continues to be applied by the courts and impunity is accepted in the country.

According to the Rettig Commission, in order to achieve national reconciliation and to avoid a repetition of what has happened, it is important that the judiciary works properly. Protection of human rights is possible only if there are laws and adherence to the laws by all citizens and by the courts. I strongly concur with this view. It is extremely important that the judiciary works properly and citizens have faith in the judiciary and the police. Citizens must feel that they can rely on the principle of equality before the law and that the courts are objective. Therefore, the judiciary should be separated from the executive and legislative organs. People feel they cannot trust the police or the judiciary. As Salazar pinpoints, people are afraid to voicing their true opinions.

The role of the military courts is still strong. Only military cases, in a narrow interpretation, should be allowed, but unfortunately this does not seem to be the case.

The civilian courts and judges should be more independent and should not allow violations of human rights. The principle of equality before the law and the right to a fair trial within a reasonable time, are rights that the judiciary must obey in order to function properly.

In my opinion, the best thing would be to abolish the amnesty law and prosecute the perpetrators for the crimes of which they are guilty. I think it will be impossible to reach reconciliation in the country if the victims of the crimes and the relatives of the disappeared cannot have faith in the judiciary and the government. I do not think it is enough only to alter or reinterpret the amnesty

law. However, I do not consider it possible to punish the perpetrators of human rights crimes at this point. One other problematic thing is the question who is going to be punished? All military officials that were following orders or only high-ranking officers? DINA and CNI destroyed a lot of evidence, which make the establishment of the guilt difficult to prove.

For me, it would seem that the implications of the way Chileans dealt with impunity have marked the country for a long time to come. It has made the transitional process much more difficult. Another consequence, no less important, is the confidence in the institutions in the country, which is non-existent for some groups in society. This confidence is of vital importance. It would take a long time to establish that faith and confidence. However, I have the impression that neither the politicians nor the majority of the judges have a will to gain that confidence.

Why is it not possible to punish the people guilty of human rights violations? There is still a great fear of the military because it still commands a lot of power, both directly and indirectly. Many people, who held high positions during the junta years, still do so. I would argue that it would be better if those people were replaced. The judges and courts, which play such a big part in the upholding of the amnesty law when closing cases without charging the perpetrators, share a great responsibility for what happened. The situation is comparable to that of the Third Reich in Nazi-Germany. The judges and jurists only obeyed the law without questioning, which proved to have dismal consequences. Even though the lawyers and judges should obey the law, it is questionable if they should do so in all cases. What would have happened in Germany if the jurists had stopped Hitler's law propositions? How would the situation have been in Chile if the jurists had not applied the amnesty law? Of course, these are only hypothetical questions, which are impossible to answer, but well worth contemplating. There are clear parallels between Nazi-Germany and Chile during the Pinochet era.

International organs, as the United Nations, should put more pressure on Chile since it does not live up to the standards and conventions it has ratified. Even though the best thing would be to have Chile resolve the problem of impunity internally, international pressure is a puissant motivation. Although the Rettig Commission did a good job to establishing the truth in many cases, there is still a lot that needs to be done. How can Chile be made to comply with international law standards?

The cases of the disappeared is still an unresolved issue, as is the body of cases that were not investigated by the Commission, e.g.

the victims of torture who did not die, the Chileans in exile etc. The whole truth has not yet been established. Hopefully, reconciliation will be achieved in Chile with the effort from all institutions involved.

One of the big problems involves the judges who were, and still are, accomplices. They seldom question the amnesty law. They claim that they are apolitical and that their role is not to question the justice, the legitimacy or social effect of laws. They passively consent to it, again reminding of the Nazi Germany situation. What might have been prevented if the jurists had questioned more? On the other hand, law students during the Pinochet regime were not allowed to question since Pinochet appointed the headmasters of the universities.

As for the establishment of the Rettig Commission, it was a sensible attempt to achieve national reconciliation. It is important to begin somewhere and the establishment of the Rettig Commission was probably all that Aylwin could do unless military would start disagreeing too much. Probably he did not dare to push it too far. Because the division is so marked among people about how to evaluate the situation, about what happened and about how to deal with what happened afterwards, it makes the problem more difficult to solve. Another question one could pose is whether there was something else Aylwin could have done in that position. The answer is: probably not much considering the pressure from the military.

In Chile, the governments in power after the dictatorship have only tried to learn the truth at the expense of justice. Truth is essential when combatting impunity, but not exclusively so. I believe that truth and justice are interrelated in this context. One cannot ignore one aspect in order to combat impunity.

Yet another problem is the great popular support that Pinochet and the military enjoy. By creating a good economy for some people, at the expense of human rights violations, seems to be accepted. I could hardly believe the support the military and Pinochet enjoy. I did not realise it before seeing all the manifestations for Pinochet after his arrest. This is part of the moral impunity.

One of the explanations for this might be that rich people do not want to have a worse standard of living than they are enjoying now. In general, they seem to be proud that Chile has a market economy and is one of the richest and most civilised countries in Latin America. Some people do not want to think about what happened. They have “forgotten”. It is probably a way of shielding

one self from the truth. They do not want to believe it, and prefer to believe the military version of what happened.

Is the installation of the international tribunal going to alleviate the punishment of the perpetrators of these atrocious crimes? Naturally, in order to come to terms with the political and moral impunity, it would be better if the perpetrators were punished in Chile. However, since this is not possible at this time, it is better to punish them in another country than to forego punishment altogether. As a Chilean proverb goes: if you cannot wash your laundry at home, you have to do it somewhere else.

The Chileans obey laws and rules. Even during the attempt of the military to stage a coup d'état in June 1973, the military stopped at the traffic lights. Perhaps this is also one factor that makes the situation more difficult when it comes to abolishing or altering the amnesty law. Maybe it is a problem in situations when you have to *question* the legality of the law and not only obey them.

In order to combat impunity, I think it is important to bear in mind that the phenomenon of impunity does not only consist of legal impunity, but of political and moral impunity as well. It is just as important to combat political and moral impunity. Merely passing a law forbidding amnesty laws or annulling current legislation would not be enough. By educating people, public apologies, the non-acceptance of military power, one might come one step closer. Naturally, it is important to transfer civil cases to civil tribunals and to let the military tribunals have jurisdiction only in cases involving military crimes, since the military tribunals are unlikely to be impartial. The politicians play a great part in this. In Chile the politicians are overly cautious, especially this year when the presidential election takes place in December. They are primarily thinking about winning votes and do not want to stick their necks out and criticise the current situation or the military. This is a big problem, since they have the power to actually do something, however limited their options might be.

Even though a lot of people are fed up with politics, there are still people who are displaying their discontent and are demonstrating or are fighting impunity in other ways.

The exposure of Chile and the situation there because of the Pinochet situation, may put some pressure on Chile to ameliorate the current situation. As Salazar pinpointed, does it show people that Pinochet is not above the law anymore.

The problem of impunity is not going to be solved over a night. It has to be seen in a longer perspective. One problem is that many people want to forget about the human rights violations, especially

the people having no relatives who were tortured, murdered or disappeared. Some people are fed up talking about it. The initiative of the Minister of Defence of the human rights dialogue, to discuss the legacy of the past human rights violations, is a little step forward. This is the first time the military in Chile has agreed on discussing the fate of the disappeared. However, this dialogue was boycotted by the Agrupación de Familiares de los Detenidos Desaparecidos.

Chile is heading in the right direction, even though state practice is lower than human rights law. Considering the fact that Chile has been a democratic country only since 1990, it has come far. Especially compared to other Latin American countries, such as Argentina who has had ten years more of democratic rule.

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