State Terror and the Law: The (Re)judicialization of Human Rights Accountability in Chile and El Salvador

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The (Re)judicialization of Human Rights Accountability in Chile and El Salvador

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The "re-irruption" in the mid- to late 1990s of attempted prosecutions for past human rights crimes in Chile, Argentina, and other parts of Latin America suggests both that the social legacies of massive human rights violations can be long-lasting and that transitional settlements featuring truth-telling and amnesty are not, as was previously thought, definitive. The transitional justice school of thought, which grew out of Latin American experiences of transition in the 1980s, underestimated the extent to which questions of criminal and civil responsibility for state crimes of torture, disappearance, and genocide would persist and eventually resurface in postconflict societies. Extensive field research into accountability trajectories in post-transitional Chile and El Salvador suggests that civil society protagonism through the courts has proved determinant in shaping the medium- and long-term future of the human rights question after political transition. The domestic mix of actor demands, judicial culture, and political-institutional constraints seems to be key in explaining why some countries have experienced successful and largely peaceful reopening of the human rights question while others have not.

Keywords: *Human rights, Chile, El Salvador, Transitional justice, Law*

Taking as its starting point a visible resurgence in the mid- to late 1990s of attempts to prosecute individual perpetrators for historical human rights crimes committed in Argentina, Chile, and elsewhere in Latin America during the 1970s and 1980s, this article argues that these attempts need to be distinguished from earlier state-level efforts to resolve outstanding justice dilemmas. These early efforts gave rise to the so-called transitional justice school of thought, which foregrounded the role of state-led truth-telling exercises and amnesties in resolving outstanding justice questions in democratizing contexts (see, particularly, the writings collected in Kritz, 1995). Practical and theoretical obstacles were identified that were considered to render justice in the form of trials unlikely or unwise. This article addresses, at a certain distance both from particular transitions and from the historical and geopolitical context in which transitional justice theories were elaborated, the question of how such justice constraints may be observed or expected to change over time. It proposes a new conceptual framework, that of "posttransitional justice," within which to analyze contemporary

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domestic justice outcomes. Posttransitional justice is concerned with who, if anyone, can be expected or observed to act in favor of the continued pursuit of justice for past human rights violations in a legal setting—henceforth termed "accountability"—after political transition. This article examines the particular institutional and actor configurations that may stimulate, facilitate, or constrain the pursuit of criminal cases or findings of civil liability in cases of past human rights violations. It is argued that evolving legal strategy on the part of domestic actors and domestic judicial change over time are the primary factors underlying a transformation and reinvigoration of domestic accountability scenarios in some Latin American countries since the late 1990s.

TRANSITIONAL JUSTICE

Transitional justice theory originated in experiences of Latin American democratization processes from the early 1980s. It focused on ways of dealing with the human rights question in transitions from authoritarian to democratic regimes such as were then occurring in Latin America's Southern Cone. Later extended to consider transitional experiences in Central America and the former Soviet Union, the transitional justice approach came to manifest certain characteristics that make it unsuitable as a tool for interpreting present-day realities in the region. The transitional justice theorists of the 1980s tended to be pessimistic about democratic stability—preoccupied, that is, with the threat of authoritarian reversal (Kritz, 1995). Some accordingly viewed calls for former state agents and authorities to be held to account for human rights violations as counterproductive or openly prejudicial to efforts to secure a definitive transfer of formal political authority to elected civilian governments.

Transitional justice did, nevertheless, take the human rights question seriously, proposing a range of truth, justice, and reconciliation measures to deal with past human rights violations committed by Southern Cone states during the "Dirty Wars" and by Central American states during counterinsurgency wars. Such measures could in theory extend to a full accounting in the form of criminal sanctions against perpetrators and reparations for victims. In practice, however, the resultant policy mix was usually heavy on truth and (somewhat ill-defined) reparation measures, cautious about justice, and prepared to countenance "truth for justice" trade-offs. The process was generally top-down and state-led. In the truth-telling arena, truth commissions became de rigueur and perhaps risked becoming a "one-size-fits-all" solution. Their justice implications were usually carefully limited, with the naming of perpetrators generally not permitted.[1] Trials were generally limited or nonexistent, as amnesty legislation was employed to seal off the possibilities for prosecution.[2] Only in Argentina, one of the earliest examples of transition, were trials held alongside truth telling. Nonetheless, the Argentine armed forces rallied more quickly than anyone had expected to counter the threat of prosecution. Military unrest forced a speedy policy about-turn toward pardon and amnesty. The lesson was absorbed by other Latin American countries, and truth exercises accompanied by the introduction or preservation of blanket amnesty accordingly followed in Chile, Uruguay, El Salvador, and Guatemala.[3]

Transitional justice practice based its preference for compromises over justice on the postulate of exceptional circumstances. It was argued that democratic fragility and/or the sheer incapacity of flawed and often heavily compromised judicial systems conspired to make trials impossible or at least unwise. However, transitional justice theory rarely if ever considered the questions of how or when those exceptional conditions could be expected to end. Issues such as how to render the courts capable of delivering justice in such matters or what ought to happen if and when such a transformation came about were rarely addressed directly. Nothwithstanding such neglect, the practice of recommending or tolerating the use of domestic amnesty had profound implications for the future of the justice debate. In effect, the apparently irrevocable juridical implications of a purely "transitional" arrangement seemed destined, if not designed, to close off the possibilities of human rights accountability once and for all.

POSTTRANSITIONAL JUSTICE?

Events, as much as theory, have come to suggest a need to revisit the assumptions of transitional justice theory in the light of recent Latin American experiences. Attempts to try individual perpetrators and/or to undermine the bases of amnesty resurfaced or took on new momentum in Chile, Argentina, and elsewhere in the mid-1990s. Some domestic judicial branches demonstrated an increased responsiveness to private legal claim making against perpetrators.[4] These judicial "re-irruptions"[5] appear to have both responded to and stimulated a reinvigoration of legal and politically framed justice claims emanating from survivors, relatives, and other domestic groups. External nonstate actors have also got into the act, with legal initiatives aimed at holding perpetrators to account before third-country as well as domestic courts.

THE NATURE OF POSTTRANSITIONAL JUSTICE

Executives and legislatures in Latin America have been exceedingly reluctant to revisit transitional justice compromises.[6] The courts are one forum through which survivors and victims' relatives can attempt to force them to do so and in effect become an alternative place to "do politics"—one manifestation of a broader trend toward the judicialization of political and social disputes in the region (Sieder, Schjolden, and Angell, 2005).[7] In part, however, ongoing or reinvigorated accountability claims are also displaced toward the courts by the very nature of the transitional solutions most often used. Amnesty is a political solution that nonetheless takes effect in the legal terrain. Courts therefore become a necessary as well as the preferred venue for working out the practical limitations and implications of accountability change, and efforts to challenge transition-era settlements are obliged to adopt judicial rather than political (lobbying) tactics.

ACTORS AND VENUES IN POSTTRANSITIONAL JUSTICE

Whereas transitional settlements were usually determined exclusively by the state, posttransitional accountability challenges are usually driven by nonstate actors, including individual claimants, lawyers, and human rights organizations.

The potential diversity of such actors has itself perhaps increased in recent times. It became increasingly common—indeed, briefly fashionable—in the 1990s for both domestic and external nonstate actors to take legally framed accountability action with regard to a particular country's human rights past (Roht-Arriaza [2004] provides examples). It is argued here that pro-accountability actors in the recent period are more likely than previously to exhibit one or more of three characteristics. First, they may themselves originate from outside of the state in question—thus Spaniards took action over Argentina and Chile in Spanish courts in 1998, while North Americans took civil action over El Salvador in the United States from 2000 on.[8] Secondly, they may make use of third-nation or international courts as venues for accountability claims. Thirdly, private accountability actors increasingly use international law to support their claim making in domestic courts—arguing, for instance, that domestic amnesty is illegitimate because of its having been explicitly ruled out by international law.

One result of such increased diversity is that present-day accountability activity has varied and possibly divergent aims. Some accountability actors want to stimulate improved domestic criminal justice responses, while others want to construct or activate supranational enforcement mechanisms. Some are focused on individual cases, while others may want to effect judicial change or set legal precedents by actions whose individual outcomes may not be the major concern (often described as "leading-case litigation"). Some actors want to use the courts to bring indirect political pressure to bear, seeking public policy change rather than solely individual criminal sanctions.

Posttransitional justice efforts can, finally, be characterized in terms of their increasingly internationalized nature. The same technological developments that have driven broader globalization processes provide the potential for individual pro-accountability actors in any country to be more easily linked to possible third-country and transnational allies. Much has been made of this dynamic in the work of theorists like Keck and Sikkink (1998), who suggest that we are witnessing the development of transnational activist networks able to rival state protagonism on the world stage. The novelty and extent of recent transnationalization should not, however, be overstated. Human rights groups interviewed in the course of this research often reported better and more frequent international linkages and resources during repressive periods than in recent times. In recent high-profile cases, cooperation on the ground between external and in-country actors can often turn out to be more sporadic and less cohesive than the term "network" might imply.[9] It is, however, legitimate to claim that in the aftermath of the 1998 Pinochet arrest in the UK, domestic accountability actors in Latin America and elsewhere are more likely than formerly to be well informed about the avenue of transnational justice.[10] Thus accountability claims can at least in theory jump across national frontiers, depending on the strategic choices and resources available to claim makers.

STUDYING POSTTRANSITIONAL JUSTICE

This article adopts the hypothesis that observed posttransitional accountability change in parts of Latin America and its absence in other settings can usefully be explored by comparative study of national contexts with particular

attention to the existence of a domestic constituency of groups and individuals pushing for justice through prosecution of perpetrators, the existence of prior legal experience and expertise among these accountability actors, and changes in the domestic judiciary affecting its receptivity to rights claims. The research on which this article is based (Collins, 2005 and 2006) accordingly traced change and continuity in domestic accountability trajectories in Chile and El Salvador with particular reference to those characteristics. Chile and El Salvador were chosen for field research because, despite their very different historical and transitional processes, they have similar dates of transition and share perhaps the broadest amnesty provisions anywhere on the continent. Additionally, both countries' human rights situations attracted high levels of international attention and activism during the pretransitional period, while both have recently been the object of third-country legal action over accountability.

These similarities are accompanied by obvious differences in accountability outcomes. Chile underwent a highly pacted transition to democracy in 1990 in which the outgoing military regime saw its constitutional framework and structural legacy preserved virtually intact. The regime even retained vestiges of direct political power, with "designated senators" in the upper legislative chamber effectively ensuring a veto of any radical change proposed by the incoming center-left administration. Political replacement was accordingly offset by high levels of institutional continuity, little or no transitional accountability, and no immediate judicial reform. By the end of the 1990s, however, Chile had experienced a significant (albeit still limited) turnaround in accountability outcomes, one prompted largely by changes in judicial positions on accountability and amnesty. El Salvador, by contrast, underwent an externally brokered transition with high levels of UN support from 1992 on, offering apparently good prospects for a democratizing institutional overhaul. A human rights ombudsman's office was instituted specifically to redress the country's rights deficit, and constitutional changes explicitly recognized the prevalence of international treaty law. The subsequent period has nonetheless seen virtually no movement with regard to domestic accountability despite explicit attempts from outside to trigger accountability change.

The following sections present research findings for these two country settings, focusing on what the field research showed about how the combination of actors, strategy, and institutional receptivity permits or prevents accountability change. The results are then compared, and conclusions are drawn about the possible broader application of a "posttransitional justice" approach to the study of accountability outcomes.

POSTTRANSITIONAL JUSTICE IN CHILE

During Chile's 1973 to 1990 military dictatorship, presided over by General Augusto Pinochet, approximately 3,000 people were killed or "disappeared" by state agents while thousands more suffered torture, political imprisonment, and arbitrary arrest (see Chile's official Truth Commission report [Comisión Nacional de Verdad y Reconciliación, 1991]). Although repression was at its height during the early years, a robust and relatively well-organized human rights movement nonetheless began to take shape relatively swiftly in

the aftermath of the 1973 coup. This early human rights response was notably legalistic, a characteristic that has proved to be a useful springboard for a recent revival of legally framed accountability activity in the Chilean courts. The protagonism of the Catholic Church in the nascent human rights community was one factor contributing to this strong legal emphasis. Keen to avoid the appearance of overt political opposition or bias, the Church adopted discourse as the frame for its work in defense of rights. The Church-sponsored Vicaría de la Solidaridad placed legal responses at the heart of its activity, filing thousands of habeas corpus claims for the disappeared or detained. Although such action produced no immediate accountability in the sense of prosecution of perpetrators, it did serve to build up a credible record of what had taken place. Crucially, this record included a paper trail created within the court system itself.

After Chile's 1990 return to elected civilian government, the Vicaría was dissolved and many of Chile's other major human rights organizations dwindled in size, resources and mobilizing power.[11] The space for addressing past human rights violations was limited by informal political pressure from the right and by an explicit 1978 self-amnesty law[12] designed to dissolve criminal responsibility for atrocities. The issue of accountability took on a relatively low profile in public discourse and on the official political agenda. Ongoing pressure for "more justice" in the form of prosecution of perpetrators became the province of a reduced group of activists, including the relatives of the disappeared. This reduction if anything enhanced the leadership role of human rights lawyers within a shrinking pro-justice sector. As organizations dwindled and public attention waned, such continuity as existed for the accountability issue was largely expressed through the unbroken, although worn, thread of legal cases that had been initiated back in the dictatorship period.

LEGAL ACTION IN THE EARLY POSTTRANSITIONAL PERIOD

Legal action initiated during the dictatorship period itself had tended to be driven by the exigencies of the period, aiming less at prosecution of perpetrators than at lessening the likelihood of torture or disappearance by drawing attention to the plight of individual detainees. After 1990, although the chances of holding perpetrators to account seemed hardly any better than before, the goals of ongoing legal action did broaden somewhat. They came to include exposure of the real and systematic nature of repression, the location and recovery of the remains of those still missing, and, in some cases, attempted prosecution where particular crimes could be shown to fall outside the remit of the 1978 amnesty law.[13] Although courts sought to apply amnesty in order to close cases, lawyers used all kinds of legal loopholes and stratagems to keep cases alive. The paper trail of casework stretching back to the time of commission of the original offense could be a definite plus in demonstrating the existence and validity of a line of investigation to be followed or a witness to be cross-examined. Lawyers often did the job of reluctant investigating magistrates for them,[14] tracking down new evidence if a particularly prolonged period of judicial inactivity threatened to see a case shelved because of "lack of progress." A core group of perhaps no more than a dozen identifiable human rights lawyers emerged. They all had caseloads, inherited from former times, that they now worked largely alone, with little institutional backup.[15]

Missing, perhaps, was a certain flair for creative legal strategy or innovative jurisprudential thinking,[16] but the existence of previous cases and the persistence of the lawyers who represented them did provide continuity of accountability action in the courts throughout the 1990s. This long tradition of legal habits also had technical advantages: the existence of an unbroken chain of legal paperwork helped to avoid legal pitfalls such as prescription.[17] Pro-accountability actors did win the occasional notable success, with the former secret police chief Manuel Contreras convicted in 1993 for his part in the 1976 assassination of the prominent exile Orlando Letelier. For the most part, however, impunity prevailed in a justice system still largely staffed by Pinochet-era appointees. It was not until 1998 that more systematic change in accountability outcomes would be seen.

CHANGING ACCOUNTABILITY OUTCOMES IN THE LATE 1990s

Judicial reform proposals approved in 1995, although far from sweeping, began from 1996 to produce a gradual replacement of the most conservative members of the Chilean Supreme Court.[18] It was after this process had begun that judicial decisions altering the prevailing interpretation of the 1978 amnesty law began to emerge. Rulings took two main paths, shifting the point of application of the amnesty law to a later point in the judicial process and/or redefining disappearance as a crime not subject to amnesty. The new doctrine on amnesty required fuller investigation than previously, as suspects now had to be named and/or charged before amnesty could be invoked. Regarding disappearance, certain judges began to accept the contention that disappearance was tantamount to kidnapping, an "ongoing crime" whose commission did not cease until the victim or his or her remains were found. This put the crime of disappearance beyond the temporal reach of the amnesty law, which covered only crimes committed wholly before March 1978. Neither doctrine was entirely new or wholly radical, and each challenged only the scope rather than the principle of amnesty for serious human rights violations.[19] These limited advances were nonetheless built upon cumulatively after 1997,[20] despite occasional reversals.

THE "PINOCHET EFFECT" AT HOME AND ABROAD

This slight softening in judicial receptivity led, predictably, to an increase in demand. Lawyers responsible for old cases pressed for new investigations. There was also an upsurge in both numbers and types of new accountability claim after early 1998, when Pinochet himself was for the first time named as the object of criminal complaints. In January 1998 the Communist party lodged a complaint over the disappearance of Communist leaders, while just days later relatives of victims of the so-called Caravan of Death massacre[21] launched their own case. These early complaints were motivated by domestic political dynamics: Pinochet was due to retire in March 1998 as commander-in-chief of the armed forces and take up a position as a lifetime senator.[22] Although both sets of claimants were also aware of earlier judicial softening over amnesty interpretation, neither claimed to have really expected the cases against Pinochet himself to prosper, viewing the actions as a largely symbolic moral and political exercise (interviews, Santiago, 2002). When the assigned

judge unexpectedly began to investigate the complaints early in 1998, lawyers and relatives alike accordingly both celebrated and capitalized on the opening of this unexpected new front in the struggle against impunity.

Some rushed to have old cases transferred to the new investigation. Others brought entirely new claims, with survivors arguing that crimes such as torture should be addressed by the courts for the first time. Meanwhile, a previously little-noticed criminal complaint that had been submitted to the Spanish courts in 1996 finally reached an explosive and unexpected stage. The Spanish judge concerned was persuaded to issue an international arrest warrant in hurried response to Pinochet's decision to visit Europe in October 1998. The UK detention of the former dictator irrupted onto the existing Chilean accountability scene with great symbolic and catalytic weight. It finally persuaded the skeptical that Pinochet was untouchable no more and that prosecutions might finally prosper. Spurred on by a veiled offer from the Chilean government to ensure that Pinochet would be tried domestically if he were returned home, the number of claims specifically accusing Pinochet had swelled to over 300 by the time he finally returned to Chile in March 2000. Cases against other perpetrators and civil claims for compensation also moved ahead as specially dedicated "human rights judges" were appointed to investigate past human rights crimes.

ACCOUNTABILITY IN CHILE IN THE RECENT PERIOD

Many, if not most, of the cases generated before and after 2000 are still in Chile's domestic judicial system and now seem likely to be allowed to run their course. Although the amnesty law remains intact for the present,[23] judges have since 1998 largely kept to the practice of excluding certain crimes from it and insisting on full investigation of others. The numbers of perpetrators identified and/or sentenced is likely to grow. Pinochet himself, initially protected by judicial acceptance of his claims to mental incapacity, was rendered vulnerable once again by the withdrawal of Supreme Court protection in 2004. After Pinochet gave a sprightly 2003 birthday interview, judges apparently tired of being used to prop up a transparent lie. They immediately began to rule that he was, after all, medically fit to stand trial. The final ignominy came with the so-called Riggs Bank scandal: U.S. Senate investigations into money laundering through U.S. banks turned up evidence of millions of dollars hidden away by Pinochet in secret accounts. The Chilean right and the military establishment, already severely embarrassed by human rights revelations, found allegations of financial impropriety to be the last straw. Any remaining pretense of unconditional loyalty was virtually abandoned,[24] and Pinochet's death in December 2006 produced more muted eulogies from the political right than might otherwise have been expected.

THE LIMITS OF ACCOUNTABILITY PROGRESS

Judicial enthusiasm for accountability in Chile is certainly not unbounded: the 1978 amnesty law survives intact, while lawyers' attempts to use international law to have it declared invalid or inapplicable have been inconclusive.[25] Judicial change over accountability nonetheless seems to have been decisive in a qualitative shift in outcomes since early 1998. If the acceptance of cases against Pinochet in January 1998 represents the first major landmark, a

Supreme Court ruling against the premature application of amnesty in September 1998 is the second. Four human rights lawyers interviewed also cited earlier lower-court rulings in the same vein. It should be noted that all of these judicial changes predate Pinochet's UK arrest in October 1998. This shift, not therefore attributable to the "demonstration effect" of events in Spain or the UK, is somewhat counterintuitive, representing a relatively unreformed judiciary adopting an activist approach to this single rights issue in isolation. Other rights matters in Chile, including reproductive matters, divorce laws, censorship, and freedom of speech, have continued to produce negative rulings from a largely conservative judiciary given to illiberal moral pronouncements (see Couso, 2004, and Hilbink, 1995). There has, in other words, been no "rights revolution" in Chile (see Epp, 1998, and Couso, 2004), but there has been accountability progress shored up and made possible by judicial change. Judicial shifts are limited, specific to the historic human rights issue, and poorly understood (Hilbink, 2007). They nonetheless seem to constitute the decisive factor permitting change in outcomes, given that other factors such as accountability actor pressure and governmental ambivalence have remained virtually unchanged since the early 1990s.

POSTTRANSITIONAL JUSTICE IN EL SALVADOR

In El Salvador there has been virtually no discernible accountability movement since the UN-sponsored peace accords of 1992 put an end to the country's 11-year civil war. Certain clear historical differences underlie this contrasting accountability experience. Violence between U.S.-backed state forces and the left-wing armed guerrilla Frente Farabundo Martí para la Liberación Nacional (Farabundo Martí Front for National Liberatiion FMLN) was much more widespread and indiscriminate in El Salvador.[26] In contrast to the courts in Chile, those in El Salvador were neither an open nor a safe venue for relatives or fledgling human rights organizations to lodge complaints at the height of the violence. Human rights activists were often specifically targeted, and the Catholic Church was unable to establish itself in the same way as it had in Chile as a bulwark against state repression. Indeed, many of the most emblematic atrocities of the war period involved the murder of church personnel.[27] Although lawyers were occasionally involved in setting up such organizations as did emerge, direct use of legal strategies to combat repression was never a viable alternative. Mirna Perla, today a judge, worked between 1980 and 1987 with the nongovernmental Salvadoran Human Rights Commission: "The only things we could do were direct actions or international *denuncias* . . . emergency responses in the immediacy of the moment. Also no lawyer wanted to work with the organizations . . . [and] witnesses didn't dare. A legal *denuncia* here had no impact . . . it was just a death sentence for [the person bringing it]" (interview, San Salvador, July 2003). Thus, although various courageous human rights organizations did emerge in wartime El Salvador, this embryonic human rights community never evolved legal habits during the conflict itself. The courts were not even theoretically open to claim making, and human rights response focused on political lobbying via Washington to end the war (see Popkin, 2000).

PATTERNS OF VIOLENCE

The report of the UN Truth Commission for El Salvador (1993) documented state responsibility for the vast majority—over 90 percent—of a catalogue of crimes committed against the civilian population by combatants and paramilitary forces since 1980. These included massacres of entire rural communities suspected of sympathizing with the FMLN. This wartime pattern of extreme violence was accompanied by sporadic and spectacularly inept pretense at judicial intervention, apparently intended primarily to persuade external funders including the U.S. Congress that action was being taken to end military impunity. Occasional trials were accordingly held at which low-ranking triggermen were convicted of certain high-profile crimes. Nothing, however, was ever done to address high-level involvement. All in all, the judicial system was not only irrelevant to but actively collusive with human rights violations. The truth commission report later condemned the leaky, informer-ridden system wholesale, calling for the entire Supreme Court to be replaced. The truth commission itself had been created only after the United States, finally losing patience with the Salvadoran military, pressed the government to move ahead with peace talks. The peace accords eventually signed in January 1992 mandated a UN-led truth commission, which reported in early 1993. The report was allowed to name perpetrators, who were supposedly to be banned from future public office.[28] There was, however, an absolute lack of other forms of justice: the report was followed just days later by a sweeping amnesty law[29] ensuring that no one would be tried for the atrocities it had catalogued.

THE ACCOUNTABILITY IMPULSE AFTER THE WAR

El Salvador's amnesty law seemed if anything more successful than Chile's at institutionalizing posttransitional impunity for past human rights violations. In part this had to do with an even more pronounced lack of appetite for accountability not just in the public as a whole but even, it would seem, among relatives and survivors. El Salvador's victim profile was partly responsible: the majority of fatal victims had been from remote rural communities. Access to the kind of organizational and educational resources required to mobilize around human rights therefore was and remains relatively scarce. Benjamín Cuellar of the Jesuit university's human rights center Instituto de Derechos Humanos de la Universidad Centroamericana José Simeon Cañas (IDHUCA) suggests that El Salvador in the immediate postwar period was a country "strewn with victims," to the point that the notion failed to suggest the need for special attention or action (interview, San Salvador, June 2003). Thus the apparent evaporation of widespread justice demands after the peace accords was remarkably complete. Ending the war was seen as so urgent and/or the prospect and promise of accountability seemed so remote that amnesty could be regarded by some as a necessary and legitimate price for peace. The posttransitional accountability actor scene was therefore relatively thinly populated. Human rights organizations found it difficult to sustain independent momentum, and this led to the continued absence of a clear anti-impunity message combined with effective, legally framed actor pressure.

LEGAL ACTION IN POSTWAR EL SALVADOR

The lack of early judicial activity combined with the particularly broad scope of El Salvador's amnesty law have made subsequent legal challenges difficult. Many of the human rights organizations that survived into the postwar period accordingly restricted their legal activities to administrative rather than criminal law initiatives. Thus one human rights organization, the Centro Madeleine Lagedec, has assisted rural communities in having exhumations carried out for victim identification purposes only. Pro-Búsqueda, an organization that traces children separated from their families during the war, also until recently undertook legal work only for limited purposes having to do with official records of identity. This relatively narrow legal agenda seemed logical given the poor response to isolated efforts to challenge the edifice of impunity. In 1998 the church-based human rights organization Tutela Legal challenged the constitutionality of the 1993 amnesty law. The Supreme Court nonetheless upheld the statute in a ruling produced after much delay in September 2000.

The ruling did apparently give lower-court judges the power to decide whether an individual case had ceased to fulfill the conditions for amnesty. This concession was, however, largely symbolic, since previous structural changes had substantially reduced the chances of any individual human rights violation case's actually coming before a lower court. These changes involved the reassignment of prosecutorial discretion away from investigating magistrates to the state prosecutor's office. This office is now responsible for constructing and presenting the state's case in any criminal prosecution. The appointment of the powerful prosecutor at the head of this system effectively remains in the political gift of the Salvadoran president, and all appointees since the peace accords have been individuals who have expressed open and implacable hostility to accountability efforts involving wartime human rights violations.

Thus the accountability bottleneck has simply shifted from the judiciary to the state prosecutor's office, and the theoretically more progressive attitudes of certain members of the reformed judicial branch[30] have never been put to the test. This shift is, moreover, only one element of more widespread justice system changes in which a completely geographically restructured court system has produced another clean break with the past. Lack of continuity with the prewar system means that even such case files as did previously exist have often been lost. Many of the relevant crimes are therefore now technically subject to prescription because of a lack of demonstrable, timely legal action.

Faced with such slim justice system pickings, many have opted to ignore the legal route altogether. Others have resorted to external venues: Pro-Búsqueda sponsored in 2004 the first case against El Salvador ever to be admitted to the Inter-American Court of Human Rights. Such regional mechanisms, however, cannot impute individual criminal responsibility for past crimes: they allow only for findings against the present-day state. Actors pushing systematically for criminal accountability are virtually limited at present to a single institution, IDHUCA. In March 2000, IDHUCA brought a fresh claim before the Salvadoran courts against the intellectual authors of the 1989 murders of five Jesuit priests, a co-worker, and her teenage daughter.[31] The move was prompted by an imminent prescription deadline rather than by any perception that prospects for accountability had improved (Pedro Cruz and José Burgos, interviews, San Salvador,

June 2003). Sure enough, after a drawn-out and very public exchange between IDHUCA and the state prosecutor's office, which repeatedly sought to have the claim disallowed, the Supreme Court ruled in 2004 that the case should not proceed. IDHUCA, initially keen to prioritize the pursuit of justice through the national courts, has nonetheless been forced after various similar attempts to conclude that domestic avenues still offer little or no possibility of change. The institute accordingly began in 2006 to explore the prospect of renewed regional-level activity and/or a domestic case in Spain, although it expressed skepticism as to any possible "boomerang effect" of such actions on national judicial receptivity (Benjamín Cuellar, interview, San Salvador, June 2003, and by telephone, 2006; Pedro Cruz and José Maria Tojeira SJ, interviews, San Salvador, June 2003).

El Salvador is, after all, the country whose experience to date perhaps most comprehensively gainsays the transnational justice enthusiasts. A series of civil claims brought in the U.S. courts from 2000, with the initial stated aim of triggering accountability change inside El Salvador, found very little echo even with domestic human rights groups, much less with the national political or judicial authorities. The claims were initially brought by relatives of U.S. churchwomen raped and murdered by security forces in El Salvador in 1980, and four former Salvadoran military men have to date been found liable for crimes including torture (visit http://www.cja.org for details). Nonetheless, only a tiny minority of the hearings to date has involved plaintiffs, survivors, or witnesses normally resident in El Salvador rather than in the United States, and human rights organizations interviewed in El Salvador in 2003 expressed concern at the apparent lack of backward linkages between the U.S. cases and the domestic scene. Relatives' groups in El Salvador were meanwhile resentful of the fact that they had not been consulted about the cases in advance, going so far as to raise the question of a possible financial motive for the claims (interviews, San Salvador, 1993).

Although the U.S. organization concerned has made efforts to build retrospective in-country links, particularly with IDHUCA, this experience has not to date led to or even coincided with a Chilean-style re-irruption of the accountability question in El Salvador. Other political and structural differences, moreover, reduce the likelihood of any such breakthrough in El Salvador. While it is true that Chile's ruling center-left coalition has been cautious and even negative regarding accountability since 1990, all the major political forces in El Salvador have been not only averse to accountability but actively committed to the preservation of amnesty. There was no direct political replacement after the peace accords: ARENA, the right-wing party that had presided over the atrocities of the later 1980s, kept its hold on government. Meanwhile the FMLN, now the largest opposition party, is faced with the knowledge that its own infractions of international humanitarian law render it equally liable to prosecution if the amnesty that it had a hand in creating were ever dissolved (Ana Guadalupe Martinez and Ernesto Chacón, interviews, San Salvador, August 2003).

COMPARATIVE CONCLUSIONS

What helps to explain the differences in accountability outcomes between these two posttransitional settings, with high levels of change in Chile but very low levels in El Salvador? Four major areas of contrast can be identified:

the history of domestic human rights organizing, judicial-institutional issues, the passage of time and related contingencies, including political change or continuity, and the impact of transnational accountability efforts.

With regard to domestic human rights organizing, Chile and El Salvador offered very different pretransitional spaces that in turn have affected the feasibility of adopting legal accountability strategies today. Chile's pretransitional human rights organizing was strong, with human rights becoming the dominant theme of opposition to the dictatorship and such opposition taking on a strongly legal character from Day One. In El Salvador human rights organizing was secondary to the logic of armed conflict, making identification between human rights organizations and political opposition much more problematic. Although there was ideological affinity and practical overlap between at least some human rights organizations and the armed left in El Salvador, the fundamental aim of the human rights lobby had to be to end the war, whereas the fundamental aim of the FMLN was to win it. These differing objectives also affected strategy choices for El Salvador's human rights organizations. Efforts were, by the mid-1980s, principally directed not inside the country but outside it, to bodies like the U.S. government, which was bankrolling the war, and the UN, whose protagonism was likely to be crucial in ending it.

Opportunity structures also shaped this turn to the outside: international lobbying was at least possible, whereas the constant threat of retribution and the abject submission of the judicial system meant that in-country organizing and legal activity largely were not. The absence of accountability as a viable or clearly articulated goal and of access to a minimally functional justice system seem to have spilled over into the present day. Most surviving human rights organizations lack a clear accountability repertoire, while the ostensible reduction in opportunity costs provided by El Salvador's extensive postwar justice reform has resulted neither in increased activity nor in improved judicial performance on amnesty.

Comparison of the two judicial-institutional contexts produces apparently counterintuitive conclusions. Chile's highly controlled transition allowed for no major institutional changes. Structural changes to the judiciary took almost five years and even when they came were ostensibly unrelated to human rights concerns.[32] The initial reforms were, moreover, relatively superficial, encouraging some turnover of Supreme Court personnel but doing nothing to eliminate its arcane hierarchical arrangements and practices. Thus it was a relatively unreformed judicial branch that suddenly began to act positively on accountability in Chile from the late 1990s, whereas its much more radically overhauled counterpart in El Salvador has shown few if any signs of such movement. Part of the resolution of this apparent paradox lies in recognizing the opaque and indeterminate quality and direction of much of the judicial reform carried out in El Salvador, particularly, during the 1990s. A fuller treatment of this point lies beyond the scope of this article, but experts including Dakolias (1996), Prillaman (2000), and Domingo and Sieder (2001) question the extent to which judicial reform packages in the region in past decades have positively affected rights outcomes, transparency, efficiency, or any of the other occasionally contradictory goals that were set for them at their inception. In El Salvador, particularly, the lesson seems to be that institutional engineering is much easier to achieve than genuine behavioral or legal-cultural change (Popkin, 2000).

Nor is it clear that a more successful Salvadoran reform process would automatically have produced more accountability change. Ironically, it is precisely some of the aspects of the new frameworks considered most successful from a progressive, rights-focused criminal justice standpoint that have proved inimical to the renewal of accountability. New criminal codes introduced in the postwar period reduce prescription periods for crimes including murder. Designed to improve system responsiveness and protect the rights of the accused by ensuring more expeditious justice-system activity, these shortened periods were, however, invoked by the state prosecutor's office as one more reason to rule out reinvestigation of the 1989 Jesuit murders when requested by IDHUCA in 2000. Perhaps most important, the reassignment of discretion over prosecution has become a substantial present-day obstacle. Considerations of political bias, collusion, and obstruction that previously applied to the judicial branch now apply equally to the politically appointed state prosecutor. The fate of the human rights ombudsman's office, the Procuraduría de los Derechos Humanos (PDDH), instituted precisely to improve rights protection, lends itself to a similar interpretation. The ombudsman's office was initially popular with the public because it took a robust stance against instances of state abuse. However, it was quickly politically sidelined through apparently malicious directorial appointments (see Uggla, 2004).

El Salvador's considerable present-day public security challenges and the prevalence of violent crime have also given rise to a public and media discourse about security which privileges repressive responses and denigrates concern about rights: the PDDH has been a particular target. Against this background the occasional promotion of individual figures associated with progressive attitudes toward the courts can do little to alter the systemic response to historical accountability, which apparently remains as stubbornly negative as ever. Also, the present succession of legal cases in Chile is to a large degree predicated on a continuity of evidence and cases that does not exist in El Salvador. It seems that the explicit or implicit price of institutional renewal in El Salvador has been the acceptance of a thick line drawn between past and present, with a tacit agreement that matters from the past will not be allowed to spill over into the new era.

Regarding the passage of time and related contingencies, Wilde (1999) describes periodic re-irruptions of the accountability question into posttransitional public life in Chile. Particular anniversaries, occasional journalistic revelations, the continued outspokenness of relatives' groups, and events such as the inauguration of a public memorial to victims in the capital's general cemetery all conspired, he argues, to keep the human rights question at least visible in public life until such time as conditions were ripe for a different set of answers. Pinochet's scheduled retirement from the army and entry to the Senate in early 1998 proved to be a turning point, provoking as it did the repudiation of a small group of legally minded activists. In El Salvador, as we have seen, the human rights question has, however, proved largely inseparable from the broader context of the civil war. The determination to ignore the consequences of both seems if anything to have become more intense with the passage of time: the political-party component of this commitment to forgetting has been discussed above; and a monument to victims mandated in the truth commission recommendations was simply never built. (A private commemorative initiative coordinated by human rights organizations only recently won a simple space in a San Salvador park.)[33]

Milestones created by legal cases, with the public revelations and media attention that they generate, have also been largely absent in El Salvador as compared with Chile. In Chile, the televised Letelier trial of 1993 proved the first and very substantial chink in the wall of forgetting. The 1998 Pinochet arrest and the ensuing media frenzy constituted yet another justice-related event sparking fresh public debate. Since 1998 the Chilean government has in fact felt compelled to institute a new series of public gestures. These include a 1999–2001 "round table" designed to locate the remains of those still disappeared and the 2004 Valech Commission, a renewed truth-telling initiative dealing with torture. It would not be impossible to conceive of the emergence of similar or equivalent dynamics in El Salvador, and indeed a recent U.S. civil case over the 1980 assassination of Oscar Romero raised some echo in El Salvador itself. Nonetheless, at least to date, accountability has not been repeatedly and definitively placed back on the public agenda in the postwar period. El Salvador has rather occupied itself since 1992 with newer but apparently equally vital problems, including an exponential rise in criminal and gang violence.

Finally, the existence of transnational legal action over past human rights violations is a feature common to Chile and El Salvador in the late 1990s. Nonetheless, such activity is clearly not enough by itself to kick-start domestic accountability; although both countries were the subject of external activity, only Chile has to date experienced substantial change in justice outcomes. Moreover, the transformation of Chile's accountability scene has clear domestic foundations: existing accountability actors at the national level had already embarked upon a course of legal action challenging impunity. Transnational activity with regard to Chile—the Pinochet case in Spain—was arguably more spectacular than that with regard to El Salvador in the United States in that it affected a much more significant figurehead and consisted of criminal rather than civil proceedings. Nonetheless, it also fell on much more fertile ground once effectively "repatriated."[34] Preexisting cases in Chile had been made possible by an accumulated history of legal strategizing and learning on the part of Chilean human rights activists, a history that has few parallels in the equally courageous but of necessity very different trajectory of Salvadoran human rights organizations during and after that country's civil war. The conclusion must be that the existence of a legally literate domestic accountability community is a prerequisite for or at least a strong predictor of the ability of transnational actors to build successful domestic linkages offering genuine influence over national accountability outcomes. In Chile and El Salvador, at least, national rather than international configurations of actors, legal strategy, and judicial receptivity seem to have been the key determinants of posttransitional justice trajectories.

CONCLUSION

In El Salvador, transnational legal activity has been insufficient to catalyze domestic accountability change where domestic actor pressure and judicial receptivity remain weak. For Chile, even domestic actor pressure with a strong "legal" character was unable to effect wider transformation until matched by judicial change. This article accordingly argues that posttransitional justice

trajectories are primarily internally driven and advocates closer research attention to domestic rights communities and the mechanisms of national judicial change over rights. Transnational initiatives, although occasionally successful in their own right, have not been able to interrupt or shorten domestic posttransitional trajectories to the extent of independently creating favorable accountability conditions. This finding throws into doubt the capacity of transnational legal actions based on universal jurisdiction to cut short domestic postconflict trajectories by engineering national change through international litigation.

NOTES

1. The major exception being the UN-sponsored Salvadoran truth commission (see below).

2. While most amnesty laws in theory renounced only the state's option to bring criminal prosecutions, the lack of a culture of civil litigation combined with powerful structural disincentives to private legal action meant that the courts usually remained effectively off-limits for those lobbying for justice. El Salvador's amnesty law went farther, explicitly ruling out civil as well as criminal liability for politically motivated killings and other crimes.

3. Only Guatemala's amnesty law, the last in the sequence, conformed more closely to international human rights law by excluding certain grave human rights crimes such as genocide.

4. Such claim making can be civil but is mostly criminal. Many Latin American justice systems allow private individuals directly affected by a crime a role in triggering subsequent criminal prosecutions.

5. The term was coined by Wilde (1999).

6. Argentina, where President Nestor Kirchner (2003–2007) saw fit for various personal and political reasons to throw executive weight behind renewed calls for justice against the former Argentine junta, is perhaps the only partial exception to date.

7. Accountability change after transition usually becomes, moreover, a minority interest in the face of majority indifference or antipathy. Accountability therefore exemplifies the increasing use of rights-based litigation as a revindicative strategy by minority groups in democracies (see Dezalay and Garth, 2001).

8. In relation to the former see Davis (2003); for the latter see below and http://www.cja.org.

9. Thus, for example, the cases over Argentina and Chile launched in Spain in 1996 were initiated without the knowledge of domestic human rights organizations in those countries, whilst civil litigation in the United States over El Salvador was later criticized by in-country groups.

10. That is, claims using third-country courts as venues.

11. These included CODEPU (Corporación de Promoción y Defensa de los Derechos del Pueblo), founded in 1980, and FASIC (Fundación de Ayuda Social de las Iglesias Cristianas), founded in the early 1970s.

12. Decree Law 2.191 of April 1978.

13. Which, although drafted as broadly as possible, had important limitations in that it applied only to crimes committed before its introduction on March 10, 1978. This included most cases of disappearance but left out certain notorious human rights violations which occurred subsequently.

14. Chile, along with many other Latin American countries, at this time employed the system also common in Continental Europe whereby magistrates (judges), rather than state prosecutors, receive initial denunciations of a crime from the police or the public and are themselves responsible for the subsequent investigation. This system is in transition in Chile: by the end of 2008 investigative oversight will have been fully transferred to the separate Public Ministry.

15. The human rights organizations CODEPU and FASIC nominally oversaw the active caseload inherited from the Vicaría. However, with reduced external funding they were no longer able to pay honoraria or even expenses. Lawyers thus continued to work cases in their "free time," earning a living through other professional commitments. Motives included personal ideological commitment and promises made to individual survivors or victims' relatives, although some human rights lawyers also were and are motivated by their own direct experience as survivors of repression.

16. According to Adil Brkovic, then legal director of CODEPU (interview, Santiago, January 2003). Other Chilean interviewees also compared themselves unfavorably with Argentine colleagues in this respect.

17. Effectively a statute of limitation whereby the power to punish a crime is forfeited if legal action is not initiated within a fixed period after the commission of the offense.

18. The reforms included financial incentives for Pinochet-era appointees, who could not be directly removed, to retire.

19. Indeed, the doctrine of kidnapping as an ongoing crime had the perverse effect of pushing perpetrators simply to admit to the more serious but still-amnestiable crime of murder.

20. Becoming established practice through repeated upholding at the Supreme Court level. Nonetheless, since the Chilean legal system does not rely on precedent, accountability progress is constantly vulnerable to reversal.

21. Just days after the coup of September 1973, a delegation sent personally by Pinochet had toured the country by helicopter and carried out dozens of summary executions.

22. A move that would have granted him parliamentary immunity from further legal actions.

23. The Chilean government promised in late 2006 to introduce an "interpretative bill" to limit the effects of the amnesty law in response to a 2006 Inter-American Court ruling finding it unlawful. However, as of May 2008 the bill had not yet materialized.

24. The right-wing candidate in Chile's presidential election of 2005 made much of the fact that he had not voted for Pinochet's continuation in office in a historic 1989 plebiscite, while the previous candidate, from a party much more directly associated with Pinochetismo, declared that, had he known then what had since been revealed, he would not have done so either. Both declarations would have been unthinkable as little as four or five years previously.

25. A 2006 Inter-American Court ruling roundly condemned the operation of the law, although it is most unlikely that this will carry much weight with Chile's traditionally insular judicial hierarchy. A government promise to introduce by the end of 2006 an "interpretive bill" in order to comply with the ruling had still not materialized 18 months later.

26. Some estimates suggest up to 75,000 deaths (see Call, 2002).

27. Archbishop Oscar Romero and four U.S. churchwomen were killed in 1980, as was a group of Jesuit priests and co-workers in 1989.

28. See Popkin (2000) on failures of enforceability regarding the banning measure. Later U.S. and UN insistence did, however, lead to the retirement of a number of former members of the military high command.

29. Legislative Decree no. 486, March 20, 1993.

30. Including some figures strongly associated with human rights activism, such as Mirna Perla and the former state prosecutor Sidney Blanco, who had resigned in 1989 in protest at the army's sabotage of his investigation of a major atrocity.

31. This notorious incident had produced an earlier, exceedingly questionable national court case in which a few soldiers had been convicted while evidence of high-level military and political involvement had been brushed aside (see Doggett, 1993).

32. Then-President Eduardo Frei carefully presented his 1995 judicial reform package under a "modernization" rubric in order to increase the chances of its passage through Congress.

33. And its impact should perhaps be counterposed against the even more recent erection of a statue to death squad member and ARENA founder Roberto D'Aubuisson in a central San Salvador municipal square.

34. Pinochet was, for example, subjected to a writ of indictment in one of many existing domestic cases against him on the very day of his return to Chile in March 2000.

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