"Post-Transitional Trials in Argentina, Chile, and Uruguay"

Elin Skaar
Chr. Michelsen Institute, Bergen, Norway
elin.skaar@cmi.no

Paper prepared for LASA, Toronto, 6-9 October, 2010
Post-Transitional Human Rights Trials in Latin America, Session 1

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Abstract:
This paper analyses why Uruguayan judges have lagged behind judges in Argentina and Chile in the prosecution of its military for human rights violations committed during the dictatorship. The onset of large-scale trials in Argentina and Chile is attributed to a combination of judicial activism, a sustained demand for justice, and in the case of Argentina, important changes in the legal basis for judicial action. By contrast, I argue that a national amnesty law and explicit executive interference in judicial matters combined with the failure to reform the judiciary has prolonged the conservative nature of Uruguayan judges, making them slow in responding to international legal development in human rights.

I Introduction[1]

Since the end of the Cold War, transitional justice, and in later years post-transitional justice[2], has become a standard response to past governmental repression across the globe. Latin American countries, such as Argentina, were at front of the transitional justice wave in the 1980s by establishing the first major truth commissions. Argentina was also one of the first countries in the world, after the Nuremberg and Tokyo trials following the Second World War, to prosecute its own military in national courts for excesses and abuses committed during the so-called "Dirty War". The "juicio a las juntas" following the Falklands/Malvinas War and the debacle of the military in 1983 made headline news across the world. Nine former junta members were accused of torture, extrajudicial killings, "disappearances", and genocide. Five of these were convicted – but later absolved through presidential pardons.

Twenty years on, Argentina along with Chile, is again making world history by prosecuting a large number of its former military personnel for abuses committed more than two decades ago. Uruguay too has gradually followed suit by prosecuting a small selection of former military officials in its national courts. However, post-transitional trials in Uruguay started only years after those of Argentina and Chile, and are on a minuscule scale compared to those of its two neighbours.

Some hard facts may illustrate this point: Starting as a trickle of trials in the latter half of the 1990s, hundreds of cases are now grinding their way through the Argentine and Chilean courts systems. Importantly, though, the conviction rate varies a lot between the two countries. By the end of 2000, Chilean courts had convicted 28 individuals for gross human rights violations committed during authoritarian rule (Hilbink 2007). In the next decade, between 2000 and July 2010, 296 former security agents had been convicted for dictatorship era human rights violations in Chile (Universidad Diego Portales 2010). Already by the end of 2009, 59 of those convicted were serving confirmed custodial sentences representing "the highest single total of former repressors sentenced for these crimes anywhere in Latin America" (Universidad Diego Portales 2009). Contrast this with Argentina, the other forerunner in post-transitional justice, where only two repressors were serving confirmed custodial sentences at the end of 2009.[3] This trend continued. By September 2010, Chile had over 400 human rights related investigations, involving close to 800 former regime agents and over 1,000 victims or survivors (Universidad Diego Portales 2010).

By contrast, Uruguayan court cases have been on a much smaller scale, though conviction rates relative to the number of cases presented in court are much higher than for Argentina. Per September 2010 those serving jail sentences for past human rights violations

[1] This paper is based on Chapters 1 and 6 of my book *Judicial Independence and Human Rights in Latin America: Violations, Politics and Prosecution* (Palgrave Macmillan, in press). Comments are welcome.

[2] By *post-transitional justice* is here meant addressing gross human rights violations committed during military rule, through either criminal cases or civil law suits in the courts, at least one electoral cycle after the transition to democratic rule.

[3] Figures on Argentina are from Centro de Estudios Legales y Sociales (CELS), Buenos Aires, cited by (Universidad Diego Portales 2010).

are the former dictators Juan María Bordaberry and Gregori Álvarez, six other military officials, one soldier and two police officials.[4]

In spite of its relatively late transition, Chile was one of the two pioneers in Latin America—with Argentina—in pushing for post-transitional justice, and as of 2010 it is the country that has made the most progress in holding the military to account for past abuses. The puzzle guiding this paper is as follows: What made Argentina and Chile pioneers in the field of post-transitional justice, whereas neighbouring Uruguay lagged behind? This paper compares judicial (in)action in human rights violations cases in Argentina, Chile, and Uruguay, focusing primarily on the potential impact of judicial reform as a main explanatory factor for oscillation in the number of trials over time.

II Three case studies

There are many reasons why these three Southern Cone countries constitute an excellent testing ground for exploring the connections between constitutional reform, actual judicial independence, and the tendency for judges to prosecute the military for gross human rights violations. They share the same colonial heritage, the same language, the same dominant religion, and (basically) the same legal systems. All three countries are relatively developed by Latin American standards, meaning that they have reasonably robust and diverse economies and high literacy rates. They also have small indigenous populations relative to the rest of Latin America. All three countries suffered brutal military dictatorships in the 1970s and 1980s, when repression was rampant and the judiciaries did little or nothing to combat the abuses or speak up for human rights. The military in each ruled according to the principles of the National Security Doctrine and formed part of the regional network of repression called Operación Cóndor. Though each country showed different patterns of repression, the practice of kidnapping people and making them disappear was a common thread. The numbers vary a lot, though: For Argentina, the estimates run between 10,000 and 30,000 victims during the reign of five military juntas from 1976 to 1983.[5] Chile claimed around 3,500 dead and disappeared when Augusto Pinochet stepped down in 1990 (Chilean Human Rights Commission 1992). At the other end of the numerical scale, Uruguay documented only 164 disappeared in its truth commission report of 1985, but 10 percent of its population was thrown into prison and many were tortured at the beginning of its military dictatorship in the 1970s (SERPAJ 1989). The latest officially recognized number for Uruguay is "only" 172 – only out of which 32 are confirmed to have disappeared within Uruguay (Comisión de la Verdad y Reconciliación 2003) . The rest were kidnapped and killed in either Argentina or Chile (and a few Uruguayans disappeared in other neighbouring countries too).

[4] See blog by Roger Rodríguez at : http://notas.desaparecidos.org/2010/09/en_uruguay_la_justicia_no_tipi.html (accessed 27 September, 2010).

[5] The truth commission report released in 1984, *Nunca Más*, documented 8,960 murdered or disappeared persons (CONADEP 1991 (1984), 16th ed.). The government has recognized about 12,000 disappeared. Some human rights organizations, such as the Mothers of the Plaza de Mayo, claim that the true number is closer to 30,000. For a detailed analysis of the abuses in Argentina, see (Sikkink 1993).

With the onset of democracy, human rights constituted one of the most politically contentious issues in the countries in question. However, Argentina, Chile, and Uruguay opted for different solutions to this problem of human rights violations at the time of transition, partly in response to the way the democratic transitions came about (by military collapse in Argentina and by ballot in Chile and Uruguay), which in turn influenced the distribution of power among the key participants in the transition process. The executives in all three countries accepted or issued amnesty laws that initially precluded prosecution of the military for gross human rights violations.

Although they started off with very different institutional arrangements at the time of transition, Argentina and Chile moved in remarkably similar directions, leading to the increased tendency of judges to prosecute the military from the mid-1990s onwards. Uruguay, by contrast, had no prosecutions before 2002. The three countries also differ on another important dimension: Argentina and Chile have successfully reformed their judicial systems (including constitutional reforms augmenting formal judicial independence), whereas Uruguay has made a series of unsuccessful attempts at judicial reform.[6] This allows me to explore how judicial reform and judicial activism—or their absence—in the field of human rights may be related. We may reasonably expect that military threat and demand for justice will both vary across time. Given that the three countries are geographically located in the same region, we may further anticipate that regional and international developments in the human rights field constitute a set of relatively stable contextual factors to which the judges in all three countries respond. Since Uruguayan judges have been exposed to the same international and regional human rights developments as have judges in Argentina and Chile, reasons for the delayed onset of post-transitional justice in Uruguay must be sought principally in domestic factors. Uruguay therefore forms an interesting counter-case that allows us to explore judicial inactivity.

III The historical role played by Latin American courts in prosecuting the military

To understand the changing propensity of judges to prosecute those allegedly responsible for gross human rights violations in our three case studies it may be useful to place them in a larger regional context by distinguishing empirically between three main phases. In the first phase, corresponding to the 1970s and 1980s, military dictatorships held sway in Latin America. Human rights violations were widespread and were not dealt with by anybody—neither by the executive nor by the judiciary. The executive, that is, the military, was responsible for ordering and carrying out the violations. The judiciary was subservient to the military, either because judges were military appointees or because they were holdovers from the previous civilian regime who were friendly to the military and hence lacked independence.

In the second phase, right after the transitions to democratic rule in the 1980s and early 1990s, the issue of how to deal with human rights abuses by the former military regime was considered a political issue to be dealt with—or not—by the executive branch. Much of the

[6] Chile and Argentina have also undertaken major reforms of their criminal justice systems and procedural codes (Hammergren 2007).

debate in that period centered on the pressing question of "truth versus justice."[7] This often boiled down to a choice between establishing a truth commission (frequently perceived as a second-best option) or, preferably, putting alleged human rights perpetrators on trial. The executive could establish a truth commission, order reparations programs (frequently recommended by the truth commission reports), issue amnesty laws, or in very rare cases, order prosecution of alleged human rights violators.

Over the last decade or so, a third phase has unfolded, in which the scholarly debate has shifted in the direction of "truth *and* justice"—or solutions beyond truth versus justice.[8] Whereas judges previously acted on executive orders in the few cases where they tried to prosecute the military, judges are now increasingly acting autonomously in these matters. By the mid-1990s, some Latin American courts that had earlier refused to accept writs of *habeas corpus* or *recursos de amparo*,[9] and that on occasion had even expressed explicit support of the military regimes, seemed to be going out of their way to corner ex-military personnel responsible for serious human rights abuses. What factors increased the willingness and ability of some Latin American judges to take on cases of human rights violations stemming from the dictatorship period, years after the transition to democratic rule, while other judges seemed to remain indifferent? In other words, what factors determine when it is both desirable and possible to charge former military of a previous regime with violations of human rights?

IV Competing explanations for Post-Transitional Justice

At present, there is no comprehensive theory that explains variation in trials across time and countries. With one notable exception (Collins 2010), scholars have so far made little effort to specifically explain the onset of post-transitional justice. This is true even though the subfield of *transitional justice* has grown to cover a large number of disciplinary approaches to justice in a post-conflict setting (Bell 2009; Blank 2007; Corey and Joireman 2004; García-Godos 2008; Huyse 2008; McAdams 2001; McAdams 1997; Mendeloff 2009; Minnow 1998; Roht-Arriaza and Mariezcurrena 2006; Skaar 2005; Thoms, Ron, and Paris 2008; Waldorf 2006).

Much attention has been paid to the development of *international human rights law* and the institutions that implement it and guarantee its implementation (Akhavan 2001; Levit 1998; Nino 1992; Roht-Arriaza 1995; Sadat 2004; Teitel 2005; Webber 1999). But this literature does not to any significant extent link changing norms to changes in behavior, with the notable exceptions of works by (Couso, Huneeus, and Sieder 2010) and (Huneeus 2009). Some analysis has been done on the connections between a changing international legal framework and the activity of human rights organizations, focusing on the growth of

[7] See, for instance, (Rotberg 2000).

[8] See, for instance, (Roht-Arriaza and Mariezcurrena 2006). Note that my three phases refer to different periods of judicial behavior in human rights matters (more specifically, retributive justice), not to the three main phases of transitional justice discussed by (Teitel 2003).

[9] These are customary legal mechanisms for protecting human rights. Via a writ of *habeas corpus* or *amparo*, "courts could enjoin certain government actions (often, but not always, privation of liberty or freedom of movement) on the basis of their violation of constitutionally guaranteed rights. Under diffuse systems of constitutional control, where any judge can accept an *amparo* or refuse to apply a law he or she finds unconstitutional, such decisions are always subject to appeal to the higher courts" (Hammergren 2007) (p.173).

transnational human rights networks (Sikkink 1993, 2005) and on domestic political change (Risse, Ropp, and Sikkink 1999), but there are few links to the role of courts here.

Many writers have been concerned with the *new role of courts* in the region (Hilbink 2007) and with *judicial behaviour* (Helmke 2002, 2005), though not necessarily with respect to past human rights violations. In recent years, the *judicial activism* unfolding in a number of Latin American countries and elsewhere in the world has captured the attention of institutional and legal scholars (Couso 2005; Sieder 2005; Wilson 2009), but the connections between judicial activism and courts' activity with respect to past human rights violations has been addressed sparingly (Sikkink 2005). Much has been written on *judicial reform* (Biebesheimer 2001; Buscalgia 1995; Carothers 2001; Dakolias 1995; Hammergren 2000; Jarquín 1998; Langer 2001; Ungar 2002) and *judicial independence* (Domingo 1999; Helmke 1999; Kahn 1993; Keith 2002; Larkins 1996; Ramseyer 1994; Ríos-Figueroa 2006). But surprisingly little work has been done on the potential impact of judicial reform on transitional justice; exceptions include recent books by (Calleros 2009) and (Collins 2010), as well as a work in progress by (Domingo Forthcoming). Though each of these literatures offers only partial explanations for the onset of post-transitional justice or the behaviour of courts in human rights matters, each brings valuable insights that I build on in developing my arguments.

The strengthening of the courts through judicial reform coincides both with post-transitional justice and with the increased activism of judges in protecting human rights within the democratic states, but there is a huge knowledge gap with respect to the links between judicial reform and altered judicial behavior. Moreover, not many scholars have tried to explain post-transitional justice as a later phenomenon distinct from the efforts to address human rights violations immediately after the transition. Notable exceptions—and directly relevant for the present study—are Pilar Domingo, whose work in progress (2010) examines in general terms the impact of judicial reform on transitional justice processes in Latin America; Paloma Aguilar (Aguilar 2008), who contrasts the absence of transitional justice after the end of the Franco regime in Spain with more recent efforts to address the violations committed in the 1970s through compensation to victims; Kathryn Sikkink, who examines the importance of international human rights networks and the influence of foreign trials on the mobilization of national NGO networks in Latin America (Sikkink 2005, 2008; Sikkink and Walling 2007); and Cath Collins's (Collins 2010) study of post-transitional justice in Chile and El Salvador, examining the impact of levels of domestic activism, accountability actors' strategies, changes in the stance of the judiciary, and the presence of internationalized (transnationalized) initiatives.

In this paper I empirically explore the plausible links between court reform, formal increases in judicial independence, and the inclination of judges to act in human rights cases in two important Latin American cases, thus contributing to the scarce literature on the impact of judicial reform.[10]

[10] (Kapiszewski and Taylor 2008) find in their review of 90 studies of judicial politics in Latin America in 1983–2004 that the only work to draw the connection between judicial reform and the judiciary's response to legal claims for redress of gross human rights violations was my own (Skaar

V The argument in brief

To understand the onset of post-transitional justice, it may be useful to contrast this with the reasons for why some countries at the time of transition pushed for justice whereas other countries did not. Why did so few Latin American countries, including Chile and Uruguay, initially fail to pursue retributive justice after the fall of the dictatorships in the 1980s and 1990s? And why did some Latin American courts become forerunners in retributive justice by the turn of the millennium?

Dealing with human rights at the time of the democratic transition was widely perceived as a political issue, to be dealt with by the executive branch. Pressures from NGOs and civilian activists, as well as international pressures, often prompted executive action. The solutions a particular government chose were closely connected to the type of democratic transition in the country (Skaar 1999). Negotiated or "pacted" transitions were frequently accompanied by amnesty laws precluding prosecution – as in the cases of Chile and Uruguay - , as well as by, in some cases, truth commissions and other non-legal measures. Only where there was an explicit military defeat—in Argentina—was it considered politically possible to even suggest holding the military to account. In no other case, irrespective of the type of transition, was dealing with human rights violations considered the business of judges and courts. To the extent that human rights cases were brought to court, judges had routinely turned them down. The initial failure to hold trials, therefore, has often been attributed to executives failing to adequately address human rights violations, whether because they feared military retaliation or because they lacked personal interest in the matter.[11] However, one could equally well attribute the lack of justice at the time of transition to weak and often partisan courts that favoured whoever was in power, including the military. This meant that the efforts of private civilians to seek justice in the region rarely succeeded.

A quarter century later, international rather than domestic factors are widely hailed as driving judicial processes in Latin America. To the extent that national actors are the focus, scholars still insist that the upsurge in accountability since the mid-1990s in the region is chiefly due to changes in the political climate and changing attitudes of the *executive branch,* frequently in response to external pressures. Typical arguments are that governments have become more aware of human rights norms, more sensitive to international pressure to respect human rights, more open to extradition requests from foreign courts, and more concerned about the publicity surrounding judicial processes against Latin American former military in foreign courts.[12] Some observers have also argued that transnational human rights movements have played a role in driving accountability processes (Sikkink 2005).

An alternative hypothesis, to be explored in this paper, is that judges rather than politicians have taken the lead in the quest to obtain justice for past wrongs. This does not mean that politics has ceased to matter. But by exploring the role of courts and judges in these

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2002). Other scholars have tried to measure the impact of judicial independence on other policy areas, such as the impact of judicial reform on corruption (Ríos-Figueroa 2006).

[11] See, for example, (Huntington 1991) and (Kritz 1995).

[12] For instance, on the subject of the "justice cascade," Lutz and Sikkink emphasize "the willingness of *governments* to ensure its continuation, such as taking steps to prosecute past perpetrators when there was no immediate likelihood of their trial in a foreign court" (Lutz and Sikkink 2001).

processes, one may shed light on the shifting balance of power between the executive branch and the judicial branch in dealing with retributive justice over time. The point I want to make here is that policy outcomes on human rights issues are likely to be decided by executive preference only where the judiciary is dependent. *Where the judiciary is free to act more independently, executive preference with respect to trials should have less impact on the outcome in human rights cases.*

I propose that trials one electoral cycle or more after transitions to democracy are more likely to take place *in countries and during periods where the judiciary is more independent*. In other words, when a judge thinks that a particular human rights case merits hearing on the basis of presented facts, the judge will pursue the case if she is able to act independently—that is, without interference from the executive (who may be opposed to trials), from superior judges (who may be partial to the executive), or from the military (who may threaten to use force and hence upset democratic procedures).

The main rival hypothesis coming out of the transition literature as well as its critiques is that the executive branch (together with the legislature) is responsible for policy making in human rights matters. The "executive," here meaning the executive branch together with the legislature, arrives at a policy position after responding to or bargaining with various pressure groups.[13]

Very simplified then, we may consider two main protagonists who have the power to decide whether or not trials will be held: the executive branch (responding to or bargaining with pressure groups) and the judiciary. Each of these two actors may hold one of two positions, either favouring trials or opposing them. The executive policy position is labeled "favouring trials" if the executive officially pushes for or directly orders trials against the military. By contrast, the executive policy position is labeled "opposing trials" if the executive openly does not favour prosecution of the military and even takes steps to actively prevent trials from happening.

Table 1: Executive and judicial policy positions and degree of judicial independence

		JUDGE			
		Not independent		Independent	
		Favours trials	Opposes trials	Favours trials	Opposes trials
EXECUTIVE	Favours trials	TRIALS	TRIALS	TRIALS	**NO TRIALS**
	Opposes trials	NO TRIALS	NO TRIALS	**TRIALS**	NO TRIALS

[13] Political leaders in democratic systems are expected to respond to pressures and challenges to their survival from various societal forces. The pressures and challenges relevant to human rights are (a) *military* pressure for immunity and against prosecution; (b) *domestic* pressure for "justice" (from the human rights sector, other specific interest organizations, and possibly also part of the public); and (c) *international* pressure to respect human rights and comply with good governance procedures.

There are eight possible outcomes: four situations in which we may expect trials to occur and four situations in which trials are not expected. Notably, as indicated in the bottom row, fifth column, if a judiciary favours trials *and* is free to act independently, trials are likely to occur *even when the executive does not favour them*. Equally important, we may (at least theoretically) encounter situations in which the executive officially favours prosecution of the military but an independent court/judge refuses to hear these types of cases, citing legal arguments. The result then would be no trials, *even though the executive favours them.* These two scenarios constitute a test case of judicial independence. Where the executive favours prosecution and the judiciary is independent, it would be hard to attribute the policy outcome of trials to the influence of one over the other without in-depth study of the particular trial(s) in question. This is a problem I will discuss in more detail in the later in this paper with respect to Uruguay.

There is one more important inference to be drawn from Table 1: we may not, logically, always expect independent judges to rule in the favour of trials. Independence must be distinguished from policy preferences and from personal conviction regarding the proper role of courts and judges in a given society. Like politicians, judges do not make value-free judgments. Their decision making is influenced by their personal ideology and policy preferences.[14] With respect to political ideology, judges are often placed along a liberal-conservative axis. Judges may also be characterized according to how they view and interpret the law and whether they believe that courts should play a conservative role or be drivers of social change. Those who opt for strict application of the law are said to exercise judicial restraint, whereas those who hold an activist position with respect to judicial review may change the law through more dynamic or innovative interpretations of the legal text and hence become drivers of social change.

However, the main point is that a certain degree of judicial independence allows judges a minimal *space for independent action,* which they may or may not take advantage of. Although it is the job of the executive and legislative branches to make the laws on which the judiciary is forced to rule, there may be instances in which the judiciary revises the law by applying judicial review and declaring laws unconstitutional. Activist judges would be expected to achieve more in this way than judges who rule according to the principle of restraint. By contrast, as suggested by Table 1, an independent judge may very well apply an existing amnesty law by arguing that, legally, her hands are tied in these matters. One cannot, therefore, automatically expect independent judges to behave differently from dependent judges in human rights matters. But the existence of judicial independence broadens the scope for judicial action.

If it is true that judges in several Latin American countries have taken on a new, more activist role in cases of gross human rights violations from the dictatorship period, the second question is why judges are now taking these cases instead of refusing to hear them or sticking them in a drawer as they had previously done. A useful starting point is to examine the extensive judicial reforms that were carried out in the region in the 1980s and 1990s and their impact on judicial independence. Judicial reforms varied widely in scope and substance from

[14] (Brinks 2005) distinguishes between "preference" independence and "decisional" independence, which reflects thinking along roughly the same lines.

country to country. The point I wish to make in this paper is that formal increases in judicial independence have potentially been crucial to the self-redefinition of the role of courts and judges with respect to human rights and the larger goals of court legitimacy and the rule of law. In the narrowest sense, de jure judicial independence entails legal or constitutional guarantees of judges' freedom from undue political influence—so-called structural independence. A series of different structural/constitutional measures are believed to contribute to a measure of de jure independence. I consider it useful for the purpose of this analysis to narrow the focus to five observable institutional variables that have formally increased the powers and autonomy of the Supreme Court vis-à-vis the executive.[15] They are (a) *length of tenure* of Supreme Court justices; (b) *appointment procedures*; (c) the establishment of *judicial councils*; (d) measures to increase the *judicial review powers* of the Supreme Court through the creation of constitutional courts or by other means; and (e) constitutional guarantees of *financial independence* for the courts.[16]

A note of caution, though: Constitutional guarantees of judicial independence constitute merely a *minimal requirement* for the actual exercise of judicial independence. They do not ensure that it will happen. The exercise of judicial independence is influenced by a number of factors. A judge is not always free to interpret the law, nor free to apply the law conscientiously. Due to the hierarchical structure of Latin American judiciaries, lower court judges often rely on the goodwill of their superiors for appointments and promotions. Actual judicial independence therefore requires freedom from undue executive interference (structural independence) as well as freedom from undue interference by other judges higher up in the court hierarchy (internal independence).

Moreover, judges may be subject to military threats as well as to political pressures. In Latin America, judges could find themselves out of a job if they took on unpopular cases that threatened the integrity and reputation of the military during or after military rule; in the event of a coup, the entire court might be replaced. As a result, they do not always operate freely or independently in applying the law. Human rights cases from the dictatorship period have been a particularly sensitive issue in many countries because the military has a direct interest in not having these cases resolved through the courts and has often openly opposed trials. The threat or hint of a military coup is but one expression of military dissatisfaction. Death threats against judges who take on human rights cases, and against their families, are another. In an analysis of changing institutional arrangements and shifting civil-military relations in a post-transitional setting, it may therefore be reasonable to assess the presence of the military in politics. We might expect a reformed judiciary to rule independently only where the military is considered to be safely in the barracks. This condition may be reformulated into a testable

[15] Another important factor that might usefully have been included in the analysis is the autonomy and jurisdiction of military tribunals. (Keith 2002) found this to be a statistically significant measure in explaining the improvement in respect for human rights.

[16] For further details on each of these factors and what they entail, see (Skaar Forthcoming), Chapter 2. These five indicators were dominant in the judicial reform literature dealing with the concept of judicial independence during the period that will be analysed in later sections of this paper. The five indicators partly overlap with and partly differ from several other attempts to capture de jure independence (Ríos-Figueroa 2006) and several of the datasets described and analyzed by (Ríos-Figueroa and Staton 2009).

claim: *The absence of credible military threat is necessary for the judiciary to operate independently.* More specifically, one would expect a judge to be more disposed to take on cases of human rights violations when the military is weaker.

In addition, before judges can take on human rights cases, somebody must bring these cases to court. Judges can only rule on matters that are brought before them; they cannot initiate cases on their own.[17] Human rights cases are typically forwarded by victims, their families, and their legal supporters, sometimes in alliance with transnational networks. Therefore, there must be a sustained or persistent demand for "justice" in criminal cases and for "truth" in civil cases. A key feature of human rights violations stemming from prior authoritarian regimes, distinguishing them from ordinary crimes committed during a democratic regime, is that they are old cases: years have passed since the crime took place. Much of the evidence of human rights violations may have been recorded during the dictatorship. In many instances, these cases have already been reported to the police and dismissed. They may even have been brought to court and dismissed by judges (often because of an alleged lack of evidence) during the dictatorship period. For these cases to be dealt with by the courts after the return to democratic rule, somebody needs to activate or reactivate them and present a claim and evidence to the relevant court. In Latin America, human rights organizations and their lawyers have to a large extent been the ones to present cases on behalf of victims and their families to court.

This gives a second testable claim: *A sustained demand for justice is necessary for an independent judiciary to take on cases of human rights violations.*[18] Assuming this is correct, we would expect judiciaries to take up human rights cases only when there is a sustained, though possibly latent, domestic demand for trials from sectors such as human rights NGOs, lawyers' associations, and the public. That means that countries that have a strong and active civil society should be more likely to see trials than countries that do not.

There is one final important point to be made: How judges respond to claims for justice depend on the laws that form the basis for their decisions and on the procedures that they are legally bound to follow. To legally pursue gross human rights violations, judges must have a sufficient legal basis on which to prosecute. Executives or legislatures may effectively hinder legal prosecution of human rights violators by putting in place amnesty laws or other legislation that restricts the type of cases on which a judge may act. It is therefore crucial that courts have *sufficient legal basis* on which to prosecute. The crimes in question must be punishable and thus prosecutable under domestic law. If the crimes violate international law (such as the International Covenant on Civil and Political Rights), the constitutional status of the international law in domestic legislation will be important. A final legal point: criminal acts are subject to statutes of limitation under most domestic laws.[19] That means that

[17] This raises the important issue of standing, that is, the question of who can initiate court cases (individuals, collectives, the police, prosecutors, etc.).

[18] This is in line with the writings of (Epp 1998).

[19] A statute of limitations in common law systems defines the maximum time after an event that legal proceedings based on that event may be initiated. In civil law systems, such provisions are often known collectively as "periods of prescription." This means that in civil law countries the public prosecutor in criminal cases must prosecute within a given time limit. The time limit varies from country to country and increases with the seriousness of the alleged crime. In most

prosecution may be precluded if a certain number of years have gone by (typically 15 to 25 years, depending on the country and the type of crime). This is of particular relevance to human rights cases, where violations may have taken place in the distant past. This gives a third testable claim: *If there is sufficient legal basis and the judge is free to apply the law, there will be trials, assuming that there is sufficient evidence to prosecute the offender.* Linking this claim to my claim on judicial independence: If my hypothesis is correct, we would expect to see new interpretations of existing amnesty laws in countries and in years where there is more judicial independence and where at least some judges are either liberal, activist, or both in these matters. These reinterpretations should extend the scope of human rights cases on which the judiciary can rule.

To sum up, the main argument proposed here is that judges have become more active protectors of human rights and that changes in judicial behavior in human rights cases are due primarily, though far from exclusively, to institutional changes.[20] In other words, judges, partly because of judicial reforms, have gone from being unable and/or unwilling to take these kinds of criminal cases to gradually becoming either more willing or more able to do so, or both.

As a starting point, I would expect a judge to take on human rights cases brought before her and examine every aspect of relevant national and international laws when she is not dependent on the outgoing regime (and hence does not want to protect the interest of the military who committed the abuses); not dependent on the executive (who may not favour trials); and not dependent on superior judges (who may be reluctant to deal with these cases or hold a conservative attitude to the application of international human rights law). How the judge handles the case would depend in turn on the laws in force, which affect important aspects such as statutes of limitation, which crimes are punishable, and the sentences that can be meted out—or, alternatively, the crimes that are shielded from prosecution under national law. If my argument is correct, I would expect more independent judges to be more likely to reinterpret existing amnesty laws designed to protect the military and accept cases of serious human rights violations that they would have rejected earlier, other factors remaining constant. Given that judges always operate in a social and political context, external factors are, however, also likely to influence their decision making. These influences complicate the analysis and need to be addressed as well.

VI A comparative analysis of Argentina, Chile and Uruguay

Judicial reform, particularly constitutional reforms that increase judicial independence, is suggested as the single most important, though not the only, factor that explains changes in judicial behaviour. However, before the military of any country can be prosecuted successfully, three preconditions must be met: the military must not present a credible threat to the democratic order, cases of human rights violations must be brought to court, and there

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jurisdictions, murder, the most serious crime, has an indefinite statute of limitations. According to customary law, genocide, crimes against humanity, and war crimes are usually not subject to statute of limitations, nor to prescription.

[20] (Hilbink 2007) makes a similar argument for Chile.

must be a sufficient legal basis for prosecution. In Argentina, Chile, and Uruguay, the first two conditions were met by the mid-1990s. The third one, which principally has to do with amnesty laws, requires more discussion.

It is clear that the military presence in politics in all three countries has diminished over time. After repeatedly rebelling against prosecutions at the end of the 1980s, the Argentine military gradually yielded to civilian control. The Chilean military wielded substantial influence over policy making and decisions, particularly with respect to human rights, until Pinochet stepped down as the head of the armed forces in 1998; it has been safely back in the barracks since then. Similarly, although there has historically been a close connection between the Uruguayan military and the Colorado Party, Uruguay's military has for all practical purposes been subjected to civilian rule.

Courts in the three countries have received systematic and more or less continuous claims for truth and justice from victims, victims' families, and the human rights movements, from the beginning of the dictatorship period until the present. Though the pressure on the courts has waxed and waned, it has never stopped completely. The human rights movements in Argentina and Chile are particularly strong, but in all three countries, activists and lawyers have worked together to maintain momentum and push for cases against the military to be resolved through the courts.

This domestic pressure for truth and justice has, of course, been exerted on the governments as well as the courts. Except for the initially human rights–friendly presidents who took office in Argentina and Chile right after the transition to democratic rule, executives in all three countries responded negatively to these pressures for many years—including during 1995–2000, a period that saw the onset of post-transitional justice in Argentina and Chile. The two Menem governments and the government of de la Rúa in Argentina and the two Sanguinetti governments in Uruguay stand out as being particularly nonreceptive to domestic demands for truth and justice. Similarly, governments in all three countries have as a general rule been hostile to external demands for justice, such as requests from foreign courts, especially European courts, to turn over nationals to stand trial.

Where the executive does not control the courts, it has sought to restrict the scope of judicial action on past human rights violations by issuing amnesty laws. The Chilean government under Aylwin inherited a self-amnesty law proclaimed by the military, and Uruguay's Sanguinetti crafted an amnesty law in collaboration with the military before the transition to democracy took place. Argentina opened up for limited prosecutions immediately after the transition, but Alfonsín too soon tried to curb judicial action through amnesty laws when the prosecutions happened on a larger scale than anticipated.

Although amnesty laws are not direct attacks on judicial independence, they serve as legal ways of bringing court activity on human rights into line with official anti-prosecutorial policies. Whether we consider them as legal obstacles to judicial action or as direct infringements on judicial freedom and review powers, the amnesty laws certainly offer a potent explanation for judicial *inaction*. Most notably, the Ley de Caducidad in Uruguay has impeded judicial advancements in the human rights field, particularly because the law's Article 4 directly involves the executive in deciding whether or not a particular case may be investigated. This has blurred the line between politics and judicial affairs. The fact that the

amnesty law has been democratically approved by majority vote in two referendums has, no doubt, complicated the situation in Uruguay and delayed the onset of post-transitional justice.

Given the absence of a political climate favourable to prosecutions, and given the presence of powerful legal obstacles to prosecution, why have some judges in some courts chosen to defy these obstacles and push ahead to hold the military accountable for past human rights violations?

VII Does judicial independence matter?

I have proposed that independent judges are more likely to prosecute the military for past human rights violations than those who are not independent. If this holds up to empirical scrutiny, we should observe more trials in periods when the judiciary is more independent. With less partial appointment procedures, greater review powers, and more financial independence, the institutional space for individual judicial decision making should be broadened. Judges who favour prosecuting the military (for ideological, ethical, or other reasons) should thus have more freedom to act in accordance with their convictions when formal guarantees of judicial independence are in place. This in turn should have a positive impact on judicial decision making in the human rights field. Yet I have cautioned that a constitutional guarantee of judicial independence constitutes the *minimal* requirement for—rather than a real guarantee of—independent judicial action. Constitutional guarantees matter in practice only when they are respected and implemented, that is, when judges may operate free from undue external or internal pressure.

Table 2 sketches the conditions under which trials have occurred (or not) under the 16 governments that have held office in Argentina (A), Chile (C), and Uruguay (U) since the demise of military rule. Each government's first year in office is indicated by two numbers (83 = 1983, 00 = 2000, etc.). "Trials" means that trials occurred. A blank space either means that no trials occurred or, alternatively, that the circumstances corresponding to that table cell did not exist (this will be further clarified in Table 2). The information in the top row of Table 2, for example, would be read as follows: "Trials occurred under the government of Alfonsín, who assumed the presidency of Argentina in 1983, when the judiciary was formally independent and had at least some judges on the bench who were liberal or activist or both."

Some caveats are in order. First, judges' independence in the table refers to the overall degree of *formal* judicial independence of the courts, as stated in the countries' constitutions. For the sake of simplicity, independence is presented as a dichotomous variable. Next, to capture the dominant policy trend under each government, the policy preference of the executive has been simplified as "favours trials" and "opposes trials." Third, judges are divided into two groups for convenience: those who are liberal and/or activist and those who are neither. The underlying assumption is that judges who are liberal/activist will be more likely to be human rights–friendly than those who are conservative and/or believe in practicing restraint. Fourth, both the executive and the judiciary are presented as monolithic actors.

Table 2: Trials in Argentina, Chile, and Uruguay

		JUDGES			
		Not independent		Independent	
		Liberal/activist	Other	Liberal/activist	Other
	Favours trials				
EXECUTIVE	Alfonsín (A 83) [21]			trials	
	N. Kirchner (A 03)			trials	(slow trials)[22]
	C. Kirchner (A 07)			trials	(slow trials)
	Aylwin (C 89)				(few trials)[23]
	Bachelet (C 06)			trials	
	Vásquez (U 05)	trials			
	Opposes trials				
	Alfonsín (A 83)			trials	
	Menem I (A 89)				
	Menem II (A 94)			trials	
	de la Rúa (A 00)			trials	
	Duhalde (A 02)			trials	
	Frei (C 94)			trials	
	Lagos (C 00)			trials	
	Sanguinetti I (U 85)				
	Lacalle (U 90)				
	Sanguinetti II (U 95)				
	Batlle (U 00)	(trials)[24]			

Source: Author's analysis.

[21] The Alfonsín government appears twice in the table because the government changed its policy position. At the outset it wanted (limited) prosecutions, but it later attempted to severely restrict prosecutions once they occurred on a larger scale than anticipated.

[22] "Slow trials" indicates that trials under certain judges proceeded much more slowly than anticipated, with the judiciary accused by the government of deliberately dragging its feet. This was the case under both Kirchner governments, even though other trials proceeded normally under liberal/activist judges during the same period.

[23] Only one trial was held under the Aylwin government. This was the Letelier-Moffitt case pushed hard by both the Chilean and U.S. governments and taken on only reluctantly by a Pinochet-friendly Supreme Court.

[24] Trials started under the Batlle government, but their purpose was truth finding and not prosecution.

As Table 2 demonstrates, trials are much more likely to occur where the judiciary is (formally) independent than where it is not. Indeed, there is only one government under which a non-independent judiciary has held trials against the military: that of Vásquez. But Vásquez's official policy was to favour trials and refrain from applying article 4 of the Ley de Caducidad, an approach that opened the legal space for judicial action. Not unexpectedly, the table suggests that trials are likely to occur where the executive favours prosecutions, the judiciary is independent, and there are liberal/activist judges on the bench. The most interesting finding, however, is that *trials may be held even if the executive does not favour prosecution*—as happened under the four Argentine governments of Menem II, Alfonsín, de la Rúa, and Duhalde, and the two Chilean governments of Frei and Lagos.

Table 3 presents the empirical material in a slightly different way. Expectations according to the arguments summed up in Table 1 earlier in this paper, are shown as "trials" or "no trials." Each of the governments is listed according to the prevailing executive policy preferences and degree of judicial independence plus judicial preference. The governments that were in office at the onset of post-transitional justice are shown in bold.

Table 3: Executive policy position, judicial preferences, and formal judicial independence

		JUDGES			
		Not independent		Independent	
		Liberal/activist	Other	Liberal/activist	Other
EXECUTIVE	Favours trials	TRIALS Vásquez (U)	TRIALS	TRIALS Alfonsín (A) Bachelet (C)	NO/SLOW TRIALS Aylwin (C) N. Kirchner (A) C. Kirchner (A)
	Opposes trials	NO TRIALS Lacalle (U) Battle (U)	NO TRIALS Menem I (A) Menem II (A) Sanguinetti I (U) Sanguinetti II (U)	TRIALS **Alfonsín (A)** **Menem II (A)** **de la Rúa (A)** **Duhalde (A)** **Frei (C)** **Lagos (C)**	NO TRIALS

Source: Author's analysis.

Note: Two governments appear twice in the table because of changes over time. The Alfonsín government changed its policy position, and under the second Menem government the degree of formal judicial independence changed after judicial reforms had been enacted.

Four broad "lessons learned" can be drawn from Table 3.

Lesson 1: When the judiciary lacks independence, no trials will occur unless the executive favours trials.

In line with expectations, no trials were held under the first Menem government and the beginning of his second government in Argentina or under the two Sanguinetti governments and the Batlle government in Uruguay. In all five cases the executive was explicitly opposed to trials, and the judiciaries, which for all practical purposes lacked independence, endorsed official policies.[25] The empirical analysis has provided ample support for the assumption that in situations where judicial independence is lacking—that is, where a close connection exists between the executive and the courts, especially the Supreme Court—*and* the executive explicitly does not favour prosecutions, judges will be reluctant to pursue an aggressive prosecution agenda. This may be for either of two reasons. First, judges may simply share the ideology of the executive who appointed them and therefore not favour prosecution for past wrongs. This was clearly the case of the Menem-packed Supreme Court in Argentina. Alternatively, judges may fear jeopardizing their positions, promotions, and career opportunities if they choose to push a human rights agenda not palatable to the executive that controls their career path. Furthermore, in hierarchically organized judicial systems, Supreme Court judges may in practice wield a great deal of power over lower court judges by controlling their salaries and promotions. In sum, it is relatively straightforward to attribute judicial inaction in human rights cases to conformity with official executive strategies of nonprosecution.

Investigating judges Jubette and Reyes, under the Batlle government in Uruguay, attempted to dig into cases of disappearances, with truth finding and not prosecution of the military as an aim. Both were sanctioned by the executive and by higher-level judges, showing what can happen to judges who stick their necks out. It is perhaps not surprising, then, that such displays of individual judicial activism have remained, for the time being, isolated incidents.

When a more prosecution-friendly executive, that of Vásquez, came to power in Uruguay, prosecutions began against former high-level officials, although the judiciary remained unreformed and hence lacked formal judicial independence. Executive endorsement provided space for judicial action and some liberal/activist judges made use of it, no longer fearing sanctions.

Lesson 2: Trials will occur in situations where the executive favours trials and an independent judiciary favours trials.

Also in line with expectations, the table shows that trials are likely to be held when the executive favours trials and the judiciary is considered relatively independent, as long as there are individual liberal/activist judges who also favour trials. This was the case at the beginning of the Alfonsín government in Argentina and under the Bachelet government in Chile. When

[25] Given the fact that the Uruguayan judiciary remains unreformed up to the present and thus scores low on formal indicators of independence, all the post-dictatorship Uruguayan governments are listed on the left-hand side of the table where judges are considered "not independent." However, convincing arguments have been made that although Uruguayan judiciary may lack formal independence, it ranks among most de facto independent judiciaries in Latin America (Brinks 2008).

executive policy preferences and judicial preferences coincide, it is hard to attribute the occurrence of trials to one or the other. Most likely, coinciding preferences have a synergistic effect, but further empirical analysis is needed to confirm that.

Lesson 3: Trials may be slowed down or reduced in number if the judiciary is independent but does not favour prosecution—even if the executive is in favour of trials.

This situation occurred under three governments, those of Aylwin in Chile and the two Kirchners in Argentina. These experiences show that an independent judiciary cannot be expected to automatically favour large-scale trials. There are two issues here: the meaning of "independence" and the policy preferences/personal orientations of judges. The first issue is particularly tricky in the Chilean case, as it raises the question of independence *from whom*. The Supreme Court inherited by Aylwin, packed with Pinochet appointees, was Pinochet-friendly and thus independent of the new democratic government. The judges fiercely expressed their independence by opposing prosecution of the military and any attempts at judicial reform. De facto and de jure judicial independence from the incumbent government is hence no guarantee that trials will occur. It is the combination of formal judicial independence *and* judicial preferences for prosecution that makes judges prone to prosecute.

In the Argentine case, two very prosecution-friendly presidents in a row have, with legislative backing, made political moves to advance prosecutions more rapidly and on a more extensive scale than the judiciary has been able or willing to handle. The result has been unexpectedly slow trials that have produced few convictions during the Kirchner presidencies.

Lesson 4: Trials may occur when the judiciary is independent, even if the executive does not favour trials.

The most interesting and important lesson to be drawn from our empirical analysis is that trials may occur even when the executive is passively or explicitly opposed to prosecution. This is precisely the situation that prevailed at the onset of post-transitional justice in Argentina (under the second Menem government and the de la Rúa government) and Chile (under the governments of Frei and Lagos).[26] This requires further explanation.

VIII Accounting for the onset of post-transitional justice

When the executive has sent a political message to the judiciary that says "do not prosecute," judges at times have done so anyway. This study has sought to identify the factors and causal mechanisms that have enabled certain judges to ignore executive preferences and press ahead with prosecutions. We may distinguish between two broad types of situations where this has happened.

First, some judges who issued decisions counter to official policy came under undue pressure from the executive or from their superiors within the judicial system. They lost their jobs, were transferred, or were denied promotions. The disciplinary actions against judges Cerda in Chile and Jubette and Reyes in Uruguay serve as examples. These judges' bold but isolated attempts to push for truth or justice did not immediately lead to broad changes or spur

[26] This was also the situation toward the end of the Alfonsín government in Argentina, where the judges pushed human rights cases after the transition to democracy and the government tried to limit the scope of prosecutions by issuing two amnesty laws.

large-scale trials, mainly because they took place in the context of an unreformed judiciary and an unreformed legal framework.

Second, some judges have mounted pioneering judicial efforts that have resulted in criminal trials and convictions. It is these initiatives that led to the onset of post-transitional justice in Argentina and Chile. Apart from Argentina under the Alfonsín government, we find five empirical situations in which governments opposed, or at best were indifferent to, widespread prosecutions while individual judges pushed them, resulting in trials and convictions: Argentina under the second Menem government and the de la Rúa and Duhalde governments, and Chile under the Frei and Lagos governments.

By defying executive policy preferences and issuing courageous rulings not sanctioned by the executive or by superior judges, judges broke new ground. The innovative rulings of judges Bagnasco, Cavallo, and Corral in Argentina and Cerda, Guzmán, and Correra Bulo in Chile, among others, introduced new ways of interpreting existing laws and of applying international law that were soon followed by fellow judges. Novel interpretations of forced disappearance as a continuing crime and child kidnapping as a crime against humanity gradually evolved into uncontroversial interpretations and applications of law. They started in the lower-level courts, principally the Santiago Court of Appeals and the Buenos Aires Federal Appeals Court, but were eventually upheld by the Supreme Courts in both countries. My argument has been that the new institutional and legal framework facilitated the dissemination of these new ideas and interpretations so that they did not remain isolated incidents of judicial activism.

Although judicial reforms were multifaceted in both Chile and Argentina, some reforms had more influence on human rights matters than others. The single most important institutional change preceding the onset of post-transitional justice in Chile was the Supreme Court reform of 1998, which brought more liberal-minded justices to the Court and created a special chamber for criminal cases. In Argentina, the constitutional reform of 1994 granted constitutional status to international human rights law; this broadened the scope for judicial review, which proved decisive. By contrast, the absence of judicial reform in Uruguay made the judiciary slower to respond favourably to demands for truth and justice. Here executive support helped judges overcome legal obstacles in the form of domestic amnesty laws and set in motion post-transitional justice.

The Argentine case highlights the complex nature of judicial activism. Menem's moves to pack the Supreme Court in 1990 and staff the rest of the enlarged judiciary with his cronies initially diminished the overall level of de facto judicial independence. Nonetheless, not all judges were sympathetic to Menem and his policies. Toward the end of Menem's second government, some judges, primarily in the federal courts, started diverging from formal human rights policies, taking steps to hold the military to account. They actively broadened their basis for legal action by reinterpreting national amnesty laws and invoking international law as superseding national amnesty laws. This display of judicial activism was made possible by the incorporation of international human rights treaties into the 1994 Constitution, which broadened the scope for judicial review in human rights cases.

However, an important empirical finding is that judicial reform that increases de jure judicial independence does not guarantee greater de facto judicial independence. When judges

have displayed judicial independence, the explanation for this may involve factors beyond mere institutional guarantees. In Argentina, one plausible scenario is that liberal/activist judges existed in the judicial system all along and only became able and willing to display their true preferences when the opportunity structure was altered, in this case by constitutional reform. Another plausible explanation is that judges and courts changed their dominant legal culture, ideology, and self-perception over time and became more liberal and human rights–friendly. The little evidence that we can gather from the empirical analysis of Argentina suggests that both explanations may have been true to some extent.

One factor that seems to matter for the presence or absence of trials in Argentina, Chile, and Uruguay is the composition of the Supreme Court. Here the ideological orientation of judges certainly plays a role. This was most notable in the Alfonsín and Menem courts in Argentina, but also in Chile after the Supreme Court reform. A constraining factor in all three countries is domestic legislation, notably the amnesty laws, which have hampered or precluded prosecution. This has been most detrimental in Uruguay, where the amnesty law was explicitly tied to executive action, and inaction on the part of the executive enforced the intent of the amnesty law. When the executive finally relaxed the application of the amnesty law, post-transitional trials started.

Another important finding across all three cases is that lower-level judges were the first to use innovative interpretations of the domestic amnesty laws and the first to refer to international treaties in their rulings. This raises the issue of geographic jurisdiction: it mattered where the crimes were committed, under whose jurisdiction they fell, and in which courts the different cases started. The Santiago Court of Appeals and the Buenos Aires Federal Appeals Court have played a notable protagonist role. It also mattered which judges sat on which courts. Although I did not examine the personal motivations of individual judges, anecdotal evidence suggests that judicial role models may have been an important factor in the early phase of post-transitional justice. When certain judges issued bold judgments that received a flurry of media attention, their fellow judges took notice. Once the Supreme Courts followed—much later—by upholding these liberal rulings, they left lower court judges with less freedom to choose whether or not to hear cases of past human rights violations. New jurisprudential standards were set and institutionalized. Once that happened, there was no way back: progress in post-transitional justice would continue, though Argentina raises the issue of *slow* progress.

Is there enough empirical evidence to say that judicial independence is a necessary, though not sufficient, condition for trials to take place? The overall conclusion of this paper (based on a much more comprehensive comparative analysis) is that for trials of the military to happen, there must be at least some judges in some courts who are willing to hear the cases brought before them *and* who are willing to work around legal obstacles through innovative interpretation and application of domestic and international law. The analysis has strongly suggested that this is more likely in situations where the judiciary enjoys formal judicial independence, since this potentially widens the scope for judicial action. However, judges must have freedom from undue pressure if they are to exercise their constitutional guarantees of judicial independence. Once these conditions are in place, the motivation and ideological conviction of the individual judge becomes important.

The inclination to pursue or not pursue human rights cases thus reflects an array of different factors at different levels: the judge's background (such as training and social class), her view on the role of law and courts in society, and her direct exposure and receptiveness to regional and international legal and jurisprudential developments in human rights cases, to mention but a few. At a broader contextual level, the judge's receptiveness to and sympathy with the surrounding, non-quantifiable norm shift that has slowly taken place in Latin America and the world may also carry weight. Indeed, as noted in resent research, "ideas about law are undergoing dramatic change in Latin America" (Huneeus, Couso, and Sieder 2010). These regional and international shifts, I conclude, have contributed to a favourable environment in which post-transitional justice has become possible.

IX Some final reflections on post-transitional justice

Since the start of the new millennium, Argentina and Chile have led the way as Latin American protagonists of post-transitional justice. Uruguay has followed suit, albeit slowly and on a much smaller scale than its neighbours. This comparative empirical analysis of has underlined the importance of increases in judicial independence as a factor in the early onset of post-transitional justice and the subsequent exponential growth in trials.

It may be tempting to see the increased propensity of Latin American courts to prosecute perpetrators of gross human rights violations in the broader context of increased court activity in the human rights field generally over the past ten to 15 years. Partly because of the strengthened position of Latin American courts after the wave of judicial reforms, Latin American judges have become more concerned with rights matters broadly speaking. Judges in Costa Rica and Colombia, among other countries, have turned into proponents of health rights, HIV/AIDS rights, and minority rights (Espinoza 2005, ; Wilson 2009, ; Wilson and Cordero 2006). This trend, referred to as the judicialization of politics, concerns matters that traditionally should belong to the sphere of politics but which, for complicated reasons, have been catapulted into the courts (Sieder 2005).[27] This has happened principally because citizens have become more active in presenting cases to the courts, though judges too have become activists in the way they rule in rights matters. A similar pattern may be discerned in post-transitional justice situations. Civil society has brought cases to court, where lawyers and prosecutors have pushed legal arguments rooted in international law, conventions, and jurisprudence, such as the right to truth, the right to identity, and disappearance as a continuing crime not eligible for amnesty. This is turn has contributed to a more activist judicial interpretation of amnesty laws.

Yet, I would argue, there is one important point that distinguishes the prosecutions in question from judicial activism in general: the state's guarantee to its citizens to abstain from torture, extrajudicial killings, and forced disappearance—and in extreme cases, genocide and ethnic cleansing—belongs to the sphere of the judiciary. In contrast to, for instance, health

[27] Judicialization of politics is a worldwide rather than a specifically Latin American trend. Although definitions vary, one of the core meanings is "the process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other governmental agencies, especially legislatures and executives." This "alludes to court-led social change—typically exercised by high courts or specially created constitutional courts" (Tate and Vallinder 1995, cited in Couso 2005: 106).

rights, which a well-functioning health system and health ministry could largely take care of, the practice of using state agents such as the military to kill, maim, and torture citizens gives rise to grave criminal offenses that the judiciary *should* respond to, since courts are the guarantors of the rule of law. Yet, historically speaking, human rights violations were long considered a political rather than a judicial matter, to be resolved by the executive rather than by the courts. Courts have, at best, been invited by the executive to handle specific matters identified by the executive a priori. Now that Latin American courts are showing an increased tendency to prosecute the military for past violations, this trend should not be interpreted as a judicialization of politics but rather as a concerted effort to return human rights violations to the place where they rightfully belong: the courts. One may thus speak of a *rejudicialization of judicial matters*. Holding citizens (including state officials, such as the military) accountable for human rights violations should be the work of judges, not of politicians. As we have seen, at least some judges in some countries have become increasingly able and willing to take on this task.

Many Latin American scholars have expressed concern about the sorry state of the region's judiciaries. The effects of the judicial reforms carried out in the 1990s have, no doubt, been mixed (Calleros 2009; Domingo 2001; Hammergren 2007; Ungar 2002). At the turn of the millennium, many scholars expressed misgivings about the prospects for democratic consolidation given the general failure of judicial reforms to make courts more independent, efficient, and accessible. A plausible worse-case scenario at the time, based on the reform experiences of a number of Latin American countries, envisioned "executives unchecked by counterbalancing institutions, societies unable to contain rising violence and crime, and a public increasingly willing to rely on mob justice rather than the courts—in short, a far less civil civil society" (Prillaman 2000).

A decade later, there seems to be far more reason for optimism regarding the state of the courts as well as the state of democratic consolidation. Though some societies continue to experience high levels of violence—such as Brazil, Colombia, Guatemala, and Mexico—there are positive signs of democratic consolidation elsewhere. With the exception of Honduras, countries in the region have enjoyed decades of uninterrupted democratic rule, which is no mean feat in a Latin American historical perspective. While there is great variation from country to country, judiciaries in general have become more active agents of accountability and better protectors of human rights. Most notably, a shift of norms is apparent in many judiciaries. In a recent study by regional legal experts, (Couso 2010) notes that the "new constitutional orthodoxy, in which the human rights provisions of the Constitution—and even international human rights law—can be invoked to void legislation by judges empowered with the power of judicial review, represents a crucial cultural factor encouraging the judicialization of Latin American politics." The same could be said with respect to the *rejudicialization of judicial matters*.

In Argentina, Chile, and Uruguay the courts seem to have gradually carved out a role for themselves as protectors of the rule of law. Pushing ahead with prosecutions, individual judges have dared stand up against executive policy preferences and in some cases have even defied direct pressure. Accountability for past abuses has been placed firmly on the regional agenda, with Chile and Argentina the undisputed pioneers. The winds of justice, which had

not yet reached Uruguay in 2000, now have reached that country and are blowing north. Peru has successfully prosecuted and imprisoned its former president for gross human rights violations. Brazil has called for an official truth commission more than four decades after atrocities were committed under military rule.

Courts in the countries formerly involved in Operación Cóndor repression are now aiding each other in bringing implicated military officials to court. In 2001 Argentina's Jorge Rafael Videla became the first former Latin American dictator to be indicted for Operación Cóndor crimes. The first trials reached the oral stage in 2010, implicating high-level officials from Argentina, Chile, Uruguay, and other countries involved in the network of repression. As the saying goes, "la justicia tarda, pero llega".

The constitutional reforms undertaken in the 1990s laid the groundwork for strengthening the courts in other Latin American countries. The extent to which these constitutional guarantees of judicial independence will translate into independent judicial action on human rights remains to be seen. My bet is that we may expect the winds of justice to blow further north, beyond Peru. The regional and international climate has never been more supportive of retributive justice than it is now. But ultimately, it is the responsibility of the individual judge to use these new opportunity structures and legal tools to hold the military accountable for past atrocities.

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