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Transitional Justice and Human Rights:

The Cases of Chile and Uruguay in a Comparative Constitutional Perspective

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Introduction

This dissertation aims to provide a constitutional assessment of transitional justice in Chile and Uruguay with regard to the promotion and protection of human rights. As a young field of academic inquiry, transitional justice has stemmed from the third wave of democracy starting in the 1970s and developed as a result of the reflections concerning the legacies of human rights abuses committed by authoritarian regimes. Therefore, the first chapter illustrates through a theoretical approach how the discipline has changed and assumed distinct connotations with respect to different eras. Indeed, the chief conundrum that dominated scholarship's discussions since the inception of transitional justice as a proper field is represented by the very definition of the doctrine, which explains why observers and policymakers have embraced disparate mechanisms in order to attain the common purpose of justice and truth. Overall, transitional justice encompasses a variety of theories and instances that strengthen the legitimacy of the field as an inquiry of its own.

The significant variety that characterises the transitional justice discourse is reflected also in the vast array of mechanisms employed in order to deal with the past human rights violations. Thus, the second chapter explores the benefits and pitfalls of transitional justice instruments that all the countries facing heinous and systematic offences have implemented; the dissertation's analysis of judicial and non-judicial remedies reveals that, depending on the political context inherited by newly democratic governments, a state could investigate and prosecute the responsible parties or could opt for an amnesty shielding offenders; by the same token, newfound regimes could also set up a truth commission to provide an official national narrative, recommend reparations of either symbolic or material nature to the injured parties and also ensure institutional reforms. The latter consideration is relevant because of its direct connection with the domestic sphere, thus taking into account the shifts in constitutionalism and acknowledging that the development of transitional justice mechanisms depends not only on the evolution of international jurisprudence but also on the specific context.

Accordingly, different normative frameworks interact to the point that the measures to ensure transitions to democracy have to be approved with the interpretation of constitutional provisions. Since the focus of the research project comprises two Southern

Cone countries, it is noteworthy to underline that the research project also includes the regional dimension and examines the workings of the inter-American system for the protection of human rights because they significantly contributed to the advancement of law-abiding stances within countries in Latin America. The heterogeneity of transitional justice, with its many facets expressing the constant dialogue among the international, regional and national spheres, has been then applied to two specific nations in Latin America in order to assess the effectiveness of transitional justice mechanisms.

Chile and Uruguay have historically enjoyed a solid democratic tradition of governance whereby important values and inalienable rights were respected. In 1973, both countries experienced an abrupt interruption of civil and political liberties when the armed forces took over the institutional order and imposed repressive regimes under the aegis of Operation Condor in the Southern Cone. Nowadays, Chile and Uruguay are at the forefront of the promotion and respect of human rights,[1] appreciating favourable levels of freedom and possessing an overall positive record with respect to other countries in the region. The profound gap between the periods of ante- and post-transition is riveting, and it leads the inquiry to ask how Chile and Uruguay have dealt with the past in order to achieve such remarkable results. In other words, how did the two countries pick up the pieces? What types of remedies were implemented to grant justice and truth?

In order to provide an answer to these matters, the final chapter carries out a comparative analysis between the two countries firstly by putting under examination the fundamental jurisdictional norms that have consolidated authoritarian enclaves and led the way to gross violations of human rights, such as forced disappearances and torture. Subsequently, the research project evaluates the various transitional justice mechanisms adopted by each country with the purpose of dismantling the vestiges of oppression and establishing a democratic order; the inquiry mainly focuses on public legislation issued before and after the transition to democracy, with the examination of judicial norms but also conventions and treaties that have supported the progress of human rights in both case studies.

[1] As it will be explored later in the dissertation, Chile has recently witnessed civil protests in response to a raise in the Santiago Metro's subway fare that soon turned to more substantial matters such as the elaboration of a new Constitution, thus evidencing the strong hold of the human rights question in the country.

The research emphasises that general schemes for the protection of human rights must be associated to context-specific methods appropriate to Chile and Uruguay, respectively. The resulting balance sheet is ambiguous: while the contribution of transitional justice measures has been positive for the process of democratisation and the establishment of new standards for human rights in order to protect the citizenry and assure non-repetition of past abuses, the nature of transitions per se had strongly burdened this process in terms of impunity. Indeed, the negotiated transitions that Chile and Uruguay share indicates that legacy of systematic atrocities is somehow still present. Perhaps, transitional justice in these two countries should be re-evaluated through a more flexible lens, owing to the fact that transition seems to be an unsettled question in constant evolution. Justice constitutes a long path, but significant steps have already been taken.

CHAPTER I

The establishment of transitional justice in between international law and human rights theories

In this chapter, the object of analysis will be the field of transitional justice. The first section will focus on its inception and formation, discussing at length the third wave of democracy starting in the 1970s and affecting a plethora of countries that had to deal with the legacies of past authoritarian regimes and employ innovative mechanisms for this aim. The second section will involve the conceptualisation of transitional justice in the globalised era and list some of the most prominent approaches to the field. Therefore, the dissertation will follow with the examination of the chief drawbacks and criticism that the discipline is currently experiencing. Finally, there will be a conclusive assessment about whether transitional justice holds as an inquiry of its own or if it just a blanket term that includes a variety of theories and instances.

1. Transitional justice: defining a historically heterogeneous field

In past and current scenarios, human rights have been at the forefront of numerous debates and controversies. Indeed, the very "discovery" of human rights as entitlements; and as duties and responsibility for individuals has shaped multiple considerations and opinions which advance the scope of human rights themselves. Moreover, this constant momentum has encouraged and cemented the formation of new fields within academic circles; in particular, due to major historical events, the post-World War II human rights movement has given paramount importance to "transitions" from authoritarian regimes to democracies. Therefore, beginning in the late 1980s, the field of transitional justice has gained its own relevant position in discussions about how to deal with the past and look forward to the future in relation to severe violations of human rights.

However, the definitions attributed to transitional justice have ranged from an institutional-judicial focus to a more socioeconomic awareness. Nowadays, scholars and practitioners still provide various interpretations of this young discipline; consequently, the subject matters linked to transitional justice encompass law, political science, philosophy, psychology, sociology and so on, with their respective goals, methodology

and mechanisms.[2] Yet, before exploring the interdisciplinarity and the subsequent ramifications of transitional justice, it is essential for this research project to define accurately the term 'transition' and delineate what type of 'justice' the field actually entails.

The concept of transition implies a wide array of variations and explanatory factors. Nevertheless, the word transition per se generally reflects the passing from one condition to another; specifically, transitional justice relates to a regime change envisaging the collapse of authoritarianism and the installation of democracy.[3] According to Morlino, there can be said to be a transition when there is a shift or breakdown of limited pluralism, level of mobilization and regime institutions. Additionally, the transition assumes a democratic dimension when all the conditions for a minimal definition of democracy are set up accordingly. Thus, a democracy is in place when the presence of universal suffrage is combined with free, competitive, recurrent and fair elections and supported by more than one party, alternative media outlets and the lack of constraints by 'non-elected actors' or exponents of other external regimes.[4]

Nevertheless, this minimal definition of transition to democracy reveals only partially the scope and the contents of transitional justice. In fact, institutional arrangements must be associated with the notion of justice so as to subsequently analyse and delineate the main pillars of this new human rights' branch. The central issue with justice is directly connected to its different conceptualisations: for this reason, the several theories of justice and their undertakings can be arranged along a "justice continuum" that moves from narrower on to broader understandings.[5] In addition, this indicative template refers to the demand for compensation – either moral or material – requested by those whose entitlements and expectations have been depleted, mirroring the context of transitions and the overarching purpose of transitional justice.

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[2] Buckley-Zistel Buckley-Zistel, Susanne, and Et Al. 2015. *Transitional Justice Theories*. London; New York: Routledge, p.2

[3] Arthur, Paige. 2009. "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice." *Human Rights Quarterly* 31 (2), p.331

[4] Morlino, Leonardo. 2011. *Changes for Democracy: Actors, Structures, Processes*. Oxford: Oxford University Press., p.78

[5] Laplante, Lisa J. "The plural justice aims of reparations". 2015. In *Transitional Justice Theories*. London; New York: Routledge, p.68

As stated by some observers,[6] a narrow interpretation of justice is represented by reparative justice, which exclusively envisages an adequate material compensation in order to balance out a damage or harm; following payments, there is restorative justice, which strives to involve every stakeholder in the process of restoring their dignity and mending a wide-ranging damage. Moving toward a broader endeavour, civic justice provides the opportunity to re-gain a citizenship dimension and culture by facilitating the dialogue between the State and those governed. Finally, the most encompassing form of justice outlines socioeconomic needs, aiming at fighting entrenched inequalities and fostering development. Since these approaches are not mutually exclusive, it is safe to affirm that the concept of justice is certainly extensive and transitional justice «is not a particular type of justice» but rather «the application of a human rights policy in particular circumstances».[7]

By all means, the innovative character of transitional justice as an academic inquiry stands in its pluralist denotation which testifies various shifts in the interpretation of the field over time. Because of its recent establishment, transitional justice keeps scholars engaged regarding its content, justification, legal status and so on. Being a contested domain, it is necessary to make a digression to focus on its notion and precise development in historical, philosophical and most importantly legal terms. In light of the considerations made about 'transition' and 'justice', transitional justice can be provisionally defined as «the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes»;[8] therefore, an account concerning the principal periods of political change that assume a significant role for the creation of transitional justice is required.

As Ruti Teitel suggests, the genealogy of transitional justice is intrinsically connected to a political context. Following conventional divisions into historical turning points, it is possible to observe how the field of transitional justice has expanded and modified its

[6] Ibid., pp. 70-78; cfr. Lambourne (Infra note 189, p. 46) encourages practitioners to «be inclusive and mindful of the complexity of human needs and responses in order to avoid the tendency to oversimplify and impose limited or one-size-fits all solutions»; cfr. Radzik, Linda and Murphy, Colleen, "Reconciliation", *The Stanford Encyclopedia of Philosophy* (Fall 2019 Edition), Edward N. Zalta (ed.), available at: https://plato.stanford.edu/archives/fall2019/entries/reconciliation/

[7] International Center for Transitional Justice (ICTJ) available at: https://www.ictj.org/about/transitional-justice at the section "What is transitional justice not?"

[8] Teitel, Ruti G. 2003. "Transitional Justice Genealogy." *Harvard Human Rights Journal* 16 (69), p. 69

conceptual boundaries; as a result, the analysis of distinct phases will correspond to different tools for the implementation of justice and conceptions of the relation among the international scenario, the state and civil society. Building on Teitel's work on the genealogy of transitional contexts, the very first phase expressing a feeble orientation towards transitional justice is linked to the post-war period and, in particular, to the Nuremberg trials after the Second World War.

1.1 The Nuremberg Trials

The post-war period exemplifies one of the pivotal historical cycles which are instrumental to fully grasp the inception and development of the transitional justice field. To look at this another way, the Nuremberg International Criminal Tribunal embodied the first attempt to come to terms with mass atrocities through supranational judicial means and marked the emergence of transitional justice within the international legal landscape[9]. In spite of strong criticisms regarding their political nature[10], the trials held by Allied powers presented progressive aspects in terms of human rights protection during a transitional period.

The Nuremberg Tribunal was formally instituted and set up through the Charter of the International Military Tribunal, also known as London Charter, by the four Allied powers[11]. The accord underlined that certain standards of civilised coexistence had been consistently and grievously violated, and so the measures adopted by the Tribunal were exceptional in their character. In particular, this unique judicial mechanism led to the ground-breaking assignment of responsibility to individuals[12] and the creation of new categories of crimes[13]. As a matter of fact, the resulting proceedings of Germany's leading Nazi figures with the aim of «a just and prompt trial and punishment of the major war

[9] Ibid., pp.72-73
[10] Giada Girelli. 2017. *Understanding Transitional Justice: A Struggle for Peace, Reconciliation, and Rebuilding*. Cham, Switzerland: Palgrave Macmillan, pp.129-131
[11] United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945, art. 1
[12] Ibid., art. 6
[13] Ibid.

criminals of the European Axis[14]» held important implications for the future development of international norms.

Indeed, the jurisprudence emerging from the trials attested the existence of the individual within a scheme of international law which traditionally acknowledged the state as the subject and the individual as an object[15]; in other words, there was a general understanding that a single person could now be held criminally accountable for a new set of crimes.[16] Particularly, the Charter formalised individual criminal liability for the category of crimes against humanity, thus highlighting the seriousness of the horrors and emphasizing the exceptionality of the situation. Described as «murder, extermination, enslavement, deportation and other inhumane acts against any civilian population, before and during the war[17]», crimes against humanity were formulated in such a way as to address and embody specific thresholds to guarantee shared human dignity for the future. Undeniably, it set fundamental guidelines for safeguarding a civil order.

Equally significant in pioneering the protection of human rights was the attention focused on the sovereignty of the state. As formulated by the Charter, the prosecution of individuals for crimes against humanity was mandatory «whether or not in violation of the domestic law of the country where perpetrated»;[18] this meant that the principle of *nullum crimen sine lege* was somehow superseded by the realization that international law was to be considered 'the law of mankind' rather than legislation exclusively among states.[19] This legal milestone suggests that the international community was to regulate and, in certain cases, check the discretionary power that governments possess over their own citizens[20]. Because of its function as a legal supranational instrument, the Nuremberg experience revealed the state's responsibility to investigate, prosecute, and punish international crimes.[21]

[14] United Nations, supra note 10
[15] McGonigle Leyh, Brianne. 2016. "Nuremberg' s Legacy Within Transitional Justice: Prosecutions Are Here to Stay." *Washington University Global Studies Law Review* 15 (4), p. 560
[16] Ibid., p. 561
[17] Supra note 10, art.6
[18] Ibid.
[19] Klabbers, Jan. 2016. *International Law*. Cambridge: Cambridge University Press, p. 220
[20] Supra note 9, p.132
[21] Supra note 14, p. 563

Considering past abuses, the legacy of Nuremberg within transitional justice lies on a variety of elements that influenced forthcoming insights. Firstly, the trials showed how strictly legal instruments such as tribunals have the capacity to promptly deal with the typology of aforementioned violence and hold individuals responsible for protracted harms and damage. Secondly, the establishment of judicial devices serves the purpose of prosecuting criminals in transitional contexts and, in this way, obliging to the demand for redress from international players and victim populations.[22] Lastly, as a by-product, the operations of the court were foretelling for future trials and deliberations, but also contributed to discussions around transitional justice beyond criminal deterrence.[23]

In conclusion, the first step for an analysis of transitional justice in the long run has centred on the Nuremberg International Military Tribunal and its contribution in laying the groundwork for human rights law. Although the Nuremberg prosecution was meant to support a "victors' justice", it still became an important point of reference due to its internationalist approach to ensure that the rule of law was respected.[24] Moreover, the post-war phase has been influential in the development of following legal landmarks such as the Convention on the Prevention and Punishment of the Crime of Genocide in 1948, the Universal Declaration of Human Rights, and the Nuremberg Principles of 1950 to quote a few.[25] Most importantly, the Nuremberg proceeding illustrates an initial robust connection of justice to criminal trials, which will be critical for further reflections on the fundamental pillars of transitional justice.

On the other hand, the Nuremberg's narrative only tells one part of the story. While Teitel recognises both ongoing developments and limited precedent of the post-war phase, the very nexus between modern transitional justice and the Tribunal's dynamics might be too distant from actual reality. Rather, the genealogical point of view can be deemed as a useful approach which needs to be carefully handled when investigating transitional justice; in this specific case, ideas of transitional justice during the immediate post-World War II period were unlikely to have been considered by the actors involved in the first

[22] Ibid., p.574
[23] Supra note 9, p. 140
[24] Supra note 7, p. 73
[25] Besmel, Parwez, and Alex Alvarez. 2018. "Transitional Justice and the Legacy of Nuremberg: The Promise and Problems of Confronting Atrocity in Post-Conflict Societies." *Genocide Studies International* 11 (2), p. 184

place.[26] A more conscious identification of the transitional justice field among theorists and practitioners was carried out in the late 1980s due to the political transitions in South America and Europe after the collapse of the Soviet Union. Therefore, the next section will focus on a post-Cold War phase and the resulting contribution to the normative lens of transitional justice.

1.2 The aftermath of the Cold War

As already mentioned, the rise of transitional justice as a discipline is inherently political, in the sense that justice mechanisms were chiefly implemented by the political leadership during moments of regime transitions, and it was recognised accordingly by scholars and practitioners who analysed the phenomena.[27] Specifically, in academic discussions after the Cold War, the general perception at the international level was that something different had occurred with respect to earlier regime changes. As a matter of fact, the single term "transition" was chosen among a plethora of words (e.g. revolution, transfer of power, governmental change, political development etc.) that could have still efficiently described the breakdown of authoritarianism in various nations;[28] this element reveals that a strong sentiment resonated with a specific audience and so the transitions paradigm emerged in order to answer to delicate and complex questions about reckoning with the past.

1.2.1 Democracy's third wave

Transitional justice intended as a systematised field of study can be conventionally associated to a specific historical moment, when a series of regime transitions to a more democratic order throughout the world became the propelling force for academic debate. Indeed, scholars confronted the new political shifts that took place starting from the late 1970s until the 1980s and the extensive body of knowledge that was produced in response to these different realities still informs the academia in meaningful ways. Nowadays, the experiences of countries coping with justice, reconciliation, truth and the formation of a

[26] Supra note, p. 328
[27] Supra note 2, p.336 cfr. Ruti Teitel's genealogical approach, although their conception of the field's history is different and sometimes at odds.
[28] Supra note 2, p.337

steady democracy during the late 20th century are famously classified as the "third wave of democratisation". [29]

It is essential to recall that political scientist Samuel Huntington exemplified through the expression "democracy's third wave" the transitions from nondemocratic to democratic regimes[30] beginning in the 1970s until the aftermath of the Cold War in Southern Europe, Latin America and Eastern Europe and, in doing so, he furthered the link between politics and justice into a single field of inquiry. The latter factor can be understood in light of a particularly interesting component about the third wave and it is worthwhile recalling the words of Posner on the topic:

> «These transitions were the purest. The sudden rather than gradual, changes that typified this wave created a sharp divide between an old regime and a new regime and gave the new regime opportunities to bring members of the old regime to justice. Because these transitions were not the direct result of foreign influence on a defeated regime or intervention against an aggressor, there is relatively little confusion about whether transitional justice reflected the needs of the local population or the interests of a foreign occupier».[31]

During the period of changes universally recognised as "transitions to democracy" at the time, transitional justice problems were severe because repressive rules had taken a hold of societies for a long time and, therefore, re-establishing an order where silence could be broken and questions could be asked represented an innovative dilemma for theorists and policy makers across the affected countries.

However, transitions were not virtually unheard of before this turning point. Already prior to the "third wave of democratisation", Rustow found structural gaps in former accounts referring to how a democratic government arose and proceeded to inspect the genesis of democracy, a theoretical facet that had yet to be explored for countries on the verge of a sweeping transformation of their political system. He finally argued that transition to democracy was not a «world-wide uniform process, that it always involves the same

[29] Huntington, Samuel P. 1991. "Democracy's Third Wave." *Journal of Democracy* 2 (2): 12–34.
[30] Ibid., p. 15
[31] Posner, Eric A., and Adrian Vermeule. 2004. "Transitional Justice as Ordinary Justice." *Harvard Law Review* 117 (3), pp.771-772

social classes, the same types of political issues, or even the same methods of solution»[32]. This notion led to one of the central elements characterising the emergence of the transitional justice project after the collapse of the Soviet Union: that is, the awareness of a local context.

Human rights activists had to face numerous issues in response to new practical conditions in the most diverse countries such as Argentina, Chile, Uganda, Poland and so on which were attempting to achieve a democratic system of governance.[33] New and different situations posed new legal questions; while transitional justice as analysed until this moment leaned towards universalising human rights, the justice policies that were discussed and implemented during the last two decades of the 20th century seemed to go beyond this stance so as to include a multiplicity of values for the rule of law and involve harmed communities.[34] Hence, historical contingencies and their repercussions on both international and national scenarios are a critical part to explain the origins of the transitional justice discourse.

Indeed, the phenomenon of transitional justice found a solid stimulus when the bipolar balance of power dictated by the United States and the Soviet Union came to an end. This historical juncture provoked the fragmentation of many consolidated realities and triggered the spread of attempts at democratisation across different regions. The resulting overlap between domestic and international spheres prompted a constant interaction among the relevant actors; in this respect, the presence of widely different national circumstances was juxtaposed to the shared and grievous duty of coming to terms with past abuses by former perpetrators. As a consequence, a great deal of attention was posed to the dimension of victims and survivors.

The focus on those who had been hitherto deprived of their human rights further attested the necessity to properly set an intellectual framework for what was already happening in

[32] Rustow, Dankwart A. 1970. "Transitions to Democracy: Toward a Dynamic Model." *Comparative Politics* 2 (3), p. 345

[33] Diane Orentlicher specified examples such as Uruguay, Chile, Argentina, Brazil, Peru, Bolivia, Honduras, El Salvador, Guatemala, Haiti, Nicaragua, Panama, Uganda, Zimbabwe, Namibia, Benin, the Philippines, South Korea, Nepal, Hungary, Poland, Czechoslovakia, Romania, the former German Democratic Republic, Albania, Bulgaria, and Turkey in Orentlicher, Diane F. 1991. "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime." The Yale Law Journal 100 (8), p.2539

[34] Teitel, Ruti G. 2002. "Transitional Justice in a New Era." *Fordham International Law Journal* 26 (4), p.896

praxis. For instance, when military rule in the Southern Cone of Latin America eventually ended, successor regimes confronted important transitional justice questions such as whether to follow the template provided by the Nuremberg trials or to find new models for accountability. The deliberations over justice were coupled with the widespread understanding that 'transition' was a key word to grasp the changes throughout emerging democracies; this cognitive development can be outlined and examined in an exhaustive manner by means of some dynamics explaining the rise of a transition paradigm.

According to Arthur, the lens of transition to democracy became the dominant interpretative outlook since democratic arrangements were seen as a desirable goal in many countries undergoing political change along with other concomitant features like market liberalisation. Yet, the transition model proved to be a more suitable pattern because earlier theories of democratisation related to modernisation had lost their legitimacy and thus institutional-legal options were brought to the foreground. Along with the critique of previous theories, transitions acquired a different connotation with respect to the prevailing Marxist socioeconomic ramifications and started to refer to judicial and political reforms. Finally, the newfound use of transitions in the context of democratisation was justified by the worldwide decline of the radical Left during the 1970s and the simultaneous rise of ideological prestige for human rights. Moreover, another distinguishing element, related to the latter process, was that many on the Left discarded class struggle as the key to comprehend state violence in favour of the language of human rights[35].

1.2.2 The academic codification of transitional justice

Having attainted a broader overview of the reasons behind crucial events occurring before and right after the end of the Cold War, it is safe to assess that the existence of the transitional justice field is historically rooted in the context of transitions to democracy[36]. The correlation between the two has been notably highlighted by the efforts of activists and scholars who discussed at length how governments should tackle the crimes

[35] Supra note 2, pp. 337-340. Arthur encompasses these dynamics always within the historical momentum of the Cold War cfr. Also Teitel quotes the withdrawal of support to guerillas as a result of the end of Soviet Union/US bipolarism.

[36] Iverson, J. 2013. "Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics." *International Journal of Transitional Justice* 7 (3), p.416

committed by preceding authoritarian regimes. Among these debates, the event that certainly prompted a structured conversation about matters of transitional justice in significant ways was the Aspen Institute conference.

Taking place in 1988, the meeting was organised by the Justice and Society Program of the Aspen Institute with the support of the Ford Foundation in order to inspect the common problem of how countries in transition to democracy deal with past abuses. The event gathered a group of human rights scholars and advocates for a conference which ought to clarify the political, jurisprudential and moral disputes that those pursuing a just order in spite of state crimes confronted and gain knowledge about transitions to rights-abiding democracies throughout the 1980s.[37] The starting point were the issues born out of the dramatic events in South America, yet the conversation soon encompassed more inclusive reflections and reached important answers on the phenomenon.

The Aspen Institute's "State Crimes: Punishment or Pardon" conference, as suggested by the title, presented only two available options which implied a series of assumptions standing at odds. Specifically, the main points of contention rested on: whether international law obliged states to punish violators of human rights; whether successor regimes had a minimum duty to establish the truth after the abuses; whether discretion and prudence were necessary in particular circumstances when seeking justice; and how to cope with the challenges arising out of human rights abuses made by military authorities.[38] Therefore, the members of the conference attempted not only to find criminal liability for breaching human rights, but they also tried to accommodate victims' requests and listen to survivors. This dualism equally mirrors the approach adopted by the participants in solving the central issues mentioned above.

First of all, the topic concerning a duty to punish a severe violation of human rights under international law did not bring to sharp disputes and «it was agreed that there was no general obligation under customary international law to punish such violators. Various international treaties, however, may require punishment expressly or by implication»;[39]

[37] Supra note 2 cfr. Henkin, Alice H. 2002. "The Legacy of Abuse Confronting the Past, Facing the Future.", p. 1. Arguably, the conference was Henkin's brainchild.
[38] Henkin, Alice H. "State Crimes: Punishment or Pardon (Conference Report)". 1995. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: General Considerations, Volume I*. Washington, Dc: United States Institute Of Peace, pp.185-187
[39] Ibid., p.186

in other words, the jurisprudence of that time was rather narrow and showed that there was still difficulty in making appeals at the international level for these concerns, as demonstrated also by the 1988 Velásquez Rodríguez case.[40] Nevertheless, there was a general agreement that post-repressive regimes had to create a single national narrative in terms of truth about past abuses; truth-telling was considered paramount in order to respond to the request of justice for the victims and keep an official account regarding the violations. In fact, conference organizer Alice Henkin in her summary report asserted that:

> «Even in situations where pardon or clemency might be appropriate there should be no comprising of the obligation to discover and acknowledge the truth».[41]

Therefore, truth became an imperative for what was going to be a proper transitional justice field. However, this concept would often stand in tension with the demand for criminal accountability, creating several disagreements about the extent to which discretion and prudence should play in decisions to carry out justice policies. During the conference, many admitted that fledgling democracies did not present the ideal conditions to implement effectively the general mechanisms for dealing with the past; cases such as Chile and Uruguay, which will be analysed in the following chapters, led some participants at the meeting to observe that measures of governmental discretion might be the best option if there are insufficient institutional devices to prosecute violators and install a human rights regime. On the other hand, other members of the conference refused the suggestion of a compromise between justice and politics, arguing for the absolute legal stand of human rights and their superiority vis-à-vis political decisions.[42]

Finally, another sensitive aspect related to the role of prudence in democratic transitions and discussed in depth during the conference involved the peculiar difficulties when military authorities were the main agents of violence. This condition revealed the frailty

[40] Velásquez Rodríguez v. Honduras was a landmark case decided by the Inter-American Court of Human Rights regarding the forced disappearance of the student Angel Manfredo Velásquez Rodríguez, who was detained by the Honduran police force and never seen again. The court ruled that the government had a responsibility to prevent, investigate and punish disappearances. Since there was no follow-up from the Honduran government, the latter had to pay compensation to Mr. Velásquez Rodríguez's family. See: *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR), 29 July 1988 (judgement)

[41] Supra note 37, p.186

[42] Supra note 2, pp. 353-354

of subsequent governments since bringing culprits to trial was vital for national reconciliation and cohesion but, at the same time, high military echelons still retained a strong hold in the new political setup and justified their actions as matters of national security. Moreover, due to the extended period of time and the sheer quantity of subordinates engaged in the abuses, the resultant protraction of trials for assessing the due obedience principle might had the potential to destabilise the recent democratic order altogether.[43]

Thus, the Aspen Institute conference was one of the first instances of academic effort for codifying the main foundational pillars and problems which will continue to arouse the interest of scholars in the inquiry of transitional justice. Similar conversations gathered the academia and other relevant actors in Salzburg for a conference organised by the New York-based non-governmental organisation "Charter Seventy-Seven Foundation" in 1992 and promoted by the United States Institute of Peace; the "Justice in Times of Transition" meeting came about to compare experiences and structure the transitional justice discourse through the scrutiny of a set of measures that would ease the process toward a democracy.

Scholars, lawyers and activists attended the conference in Austria with the aim of evaluating to what extent the former Soviet countries in Central and Eastern Europe could find any valuable lesson from the transitions in the Southern Cone occurred in the prior decade. In fact, the vast diversity of specialisations and competencies among the attendees was counterbalanced by a common feature: «each came from a country which had suffered through a brutal and repressive regime, been liberated, and was obliged to cope with the legacy of that ousted system».[44] Despite this universal realisation, no one knew precisely which lesson could be applicable to each state; yet, the main purpose was to instil confidence in the incumbent regime so as to underline a solid division with the old and coercive government.

Tellingly, grappling with the serious vestiges of authoritarianism to move forward was linked in a considerable manner to the question of responsibility for human rights

[43] Supra note 37, pp. 187-188

[44] Kritz, Neil J, and United States Institute Of Peace. 1995. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: General Considerations, Volume I*. Washington, Dc: United States Institute Of Peace, p. xix

violations; the latter subject was framed to express a nexus between two crucial matters: acknowledgement, intended as the decision either to remember or forget about the crimes, and accountability, elaborated as whether or not to implement sanctions or otherwise take to court the responsible parties.[45] Since accountability and acknowledgment became key issues during the post-Cold War phase, the conference overviewed the most fundamental questions that transitional regimes had to face in this regard inasmuch as every state had different political, legal and economic cultures.

Hence, trials and punishment were discussed as to whether they were the most suitable means to achieve a satisfying level of justice or if leaving the past behind through amnesties could have been a more desirable option. Along with criminal sanctions, when debating other measures to accept the past, it was approved that an official historical account of previous abuses constituted an important component of a successful transition. Lastly, the pursuit of justice for victims was also demonstrated through compensation and restitution for the misdeeds even if some might have argued that a nascent democracy might have many hurdles for the allocation of its finances.[46]

The seminar represented the official inauguration of the Project on Justice in Times of Transition organisation which was fully developed by 1993[47]. Among its other impressive achievements, the Salzburg conference led also to the production and publication of the first seminal work in the field, namely the three-volume compendium 'Transitional Justice: How Emerging Democracies Reckon with Former Regimes' edited by Neil J. Kritz in 1995. This ground-breaking work confirmed the binding interconnection between processes for democratisation and transitional justice, as it referred to states that had undergone a change of regime;[48] moreover, it legitimated the term 'transitional justice' and crystallised its employment of specific measures in what were understood to be transitional contexts.

The considerable similarity of the discussions occurring in the span of a few years indicate that transitional justice clearly represented the zeitgeist of the post-Cold War order and

[45] Albon, Mary. "Project on Justice in Times of Transition: Report of the Project's Inaugural Meeting" 1995. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: General Considerations, Volume I*. Washington, Dc: United States Institute Of Peace, p.42
[46] Supra note 43, pp. xix-xxvii
[47] Supra note 2, p. 324
[48] Ibid., p. 331

reflected genuine necessities not only within academic circles. Additionally, the cross-cultural and comparative approach adopted by this cluster of meetings further attests that the numerous countries' pragmatic difficulties were interpreted by both participants and various segments of society in analogous ways; as a result, the broad range of feedbacks to those problems and necessities were assumed to form a legitimate path towards democracy. Weighing all of these factors, there is one consistent outcome: the emergence of transitional justice as a distinctive discipline, formed by a set of practices that could be applicable to the most disparate transitional situations.

1.2.3 The shifting conception of law during transitions

Having briefly analysed the period during which transitional justice gained momentum and acquired academic legitimacy through essential considerations of its dilemmas, the *vexata quaestio* still concerns a potentially univocal identification of the field. In the literature so far reviewed, there seems to be no general definition of transitional justice and this condition still haunts the field since the matter has yet to be determined. Nevertheless, starting from the late 1980s there were some attempts at delineating what transitional justice was about, and which characterising features had to be in place.

Despite the fact that this research project has been applying Ruti Teitel's definition of transitional justice associated to periods of political change and judicial responses[49] with the intention of providing a genealogical account and giving a coherent order to the conceptual development of the field, it is possible to find multiple definitions that fit the discourses in the aftermath of the Cold War and conform to the reflections about facing the past. For example, Paige Arthur recognises that transitional justice as a new field is:

> «An international web of individuals and institutions whose internal coherence is held together by common concepts, practical aims, and distinctive claims for legitimacy beg[inning] to emerge as a response to these new practical dilemmas and as an attempt to systematise knowledge, deemed useful to resolving them.»[50]

[49] Supra note 7
[50] Supra note 2, p. 324

Indeed, the set of interactions among personalities with different professional competencies contributed largely to the advancements of the academic agenda, as demonstrated by the Aspen Institute conference and the Charter Seventy-Seven meeting.

More specifically, thorny questions emerging from the debates led to a proper systematisation of devices, mechanisms and processes that significantly expanded the instrumentation at the disposal of the human rights movement. In fact, before the political turmoil caused by the breakdown of the bipolar world order, techniques such as shaming repressive governments which mistreated their citizens represented the only area of intervention.[51] The political shifts in the 1980s and the subsequent strategies for accountability and acknowledgement gave rise to the modern-day notion of transitional justice, which instantly assumed a comparative nature; in this respect, it recognised both local dimensions and single states' necessities. Consequently, a definition of transitional justice referring to the shifts from authoritarian regimes to democracies at the end of the 20th century must appreciate the distinctiveness of measures chosen by each nation among a codified set of practices.

It is meaningful to underline that this set of practices was already well-developed by the time that discussions for the sake of the discipline occurred. Remarks concerning the implications of past abuses stemmed out of the events in the Southern Cone between the late 1970s and early 1980s, followed afterwards by other geo-political regions, and focused on policy tools for legitimising successor regimes; as a matter of fact, post-repressive countries applied transitional justice standards for prosecution and political reform apt to regulate the lawlessness that had dominated the periods when human rights were regularly and severely violated. In particular, observers noted that issues connected to these newfound field and practice remained well within the discretion of states.

Considering the phenomenology of legal responses, Nuremberg's legacy rested upon a universalising discourse about human rights, since it broadened the scope of action of tribunals vis-à-vis states; the claims of jurisdiction over Nazi military leaders by the Allies initiated the branch of international law recognising and protecting human rights and put

[51] Supra note 2, p. 334

emphasis on the principle of universality against certain categories of crimes[52]. In spite of this inherited international legal dimension, which stressed an obligation to respect human beings as bearers of inalienable rights and punish perpetrators guilty of serious crimes with the purpose of deterrence,[53] judicial applications during transitional contexts changed their reach and role.

Building on these insights, a pre-eminent feature of the law in transitional justice was its centrality since «[it] is not a mere product but itself structures the transition».[54] Yet, as already stated, politics and law concurrently shaped transitional justice and their indissoluble connection influenced national outcomes in a consistent manner; to be exact, the aforementioned mutual reciprocity curbed the chief function of the law owing to the fact that new democracies required the construction of a robust and reliable government. Therefore, universal structures of justice had to be arranged in terms of local circumstances and parameters: "hyper-politicised" periods implied that traditional values attributed to justice such as due process might have not be fully carried out because of the nation-building goals that ensued after the downfall of authoritarian regimes.[55]

When pursuing accountability for past abuses in transitional contexts during the post-Cold War moment, this tug-of-war took over and the core task of the law assumed contradictory traits. Above all, as Teitel observed, «in its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order even as it enables transformation».[56] In exchange of more local understandings of legal action, law enabled transformation to the extent that measures were conducted by nation states with a view of improving the fabric of institutions and obtaining a high level of legitimacy in respect of the old regime.

State-led practices represented a novelty in the approach to human rights violations and voiced the necessities of current times: in essence, pragmatic dilemmas could only find an answer in pragmatic compromises. Thus, nations designed and enforced arbitrarily

[52] Orentlicher, Diane F. 1991. "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime." The Yale Law Journal 100 (8), p. 2555
[53] Zalaquett, Jose. 1992. "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations." *Hastings Law Journal* 43 (6), p. 1428
[54] Teitel, Ruti G. 2000. *Transitional Justice*. Oxford University Press on Demand, p.6
[55] Teitel, Ruti G. 2014. *Globalizing Transitional Justice*. Oxford University Press, p.4
[56] Supra note 53, p.6

trial, truth-telling, reparation, lustration and other types of reforms on the basis of a transformative project that mainly responded to contextual situations. Hence, the transitional justice inquiry had to negotiate the conception of the rule of law: in fact, the institutive actions taken did not respond only to the question of holding someone criminally liable, but rather expressed the willingness to move forward and recover an entire society.[57]

1.2.4 Pragmatism and the state-building project

Having previously listed some of the concerns which framed the development of a concrete conceptual field of transitional justice, the leitmotif of deliberations stemming from events such as the "State Crimes: Punishment or Pardon" conference and so forth was to display and comment ongoing practical efforts. This normative strand prompts a crucial query: how were the examined models and procedures for fostering democratic factors actually translated from blueprint to reality? Since law and policy makers in transitioning settings formulated the most beneficial instruments to heal damaged communities, international law was not taken into account in a significant way[58] and very few states proceeded along the path of prosecution while the majority decided to forego trials.[59]

As the discipline eschewed the objective of international liability, the leading mindset was to seek justice within feasible terms and the principle of pragmatism found fertile grounds in a twofold fashion. Firstly, states resorted to ignore large-scale abuses committed by the outgoing regime through the institution of amnesty laws; secondly, nations could also decide to establish a truth commission to inspect human rights violations without a complementary trial.[60] Along these lines, prosecutions were not usually included in the transitional justice toolbox because nations had to deal with

[57] Supra note 7, p. 77
[58] Grover, Leena. 2019. "Transitional Justice, International Law and the United Nations." *Nordic Journal of International Law* 88 (3): 359–97, p.362
[59] Newly democratic governments in Greece and Argentina during the Alfonsin government in 1983 (cfr Zalaquett supra note 52, p.1427) were successful in this task and brought the military generals to trial.
[60] Burt, Jo-Marie. "Challenging Impunity in Domestic Courts: Human Rights Prosecutions in Latin America." *Transitional Justice: Handbook for Latin America* (2011), p.287

perpetrators who still maintained a fair amount of influence over government institutions.[61]

Provided that policy options evaluated democratic stability and legitimacy as the ultimate goal, transitional justice imposed to society the burden of judging itself[62] and this exacerbated tensions in the creation of a human rights regime. Indeed, several critics have recorded the obstacles that new political leaders had to address when military elites kept their political presence intact and could even negotiate the conditions for democratic transitions;[63] consequently, the compromises that were granted to the previous regime shielded wrongdoers and strongly limited the possibility of trials after the oppression, with a resulting moderate transitional justice.[64] However, these dynamics did not restrain the need for post-conflict accountability, but the melange of mechanisms in place were often interpreted as clashing.

Based on these elements, there were no hard or fast rules on how to confront and process the authoritarian experience. Shattered societies had to create meaningful responses for catharsis so as to avoid that the perpetrated atrocities could contaminate also the present and the future; thus, the subsequent level of flexibility which characterised the choice of institutional devices has contributed to the construction of a dichotomous tension between forms of retribution and reconciliation. Due to the necessity of operating within the realm of the possible and concrete, some practitioners and scholars identified truth as a preferred form of justice because it endorsed reconciliation and did not threaten the development of democracy.[65]

This binary system outlined the perception that alternative sources for the guarantee of human rights could play a significant role and attain a certain equilibrium in periods of political flux. Therefore, the primary issue of the transitional justice field during the post-Soviet Union era conveyed and encompassed two main pillars which scholars will elaborate and explore even at a later stage in the discipline: justice and truth; then, reconstructing the authority of a state by means of democratic attributes and advancing

[61] The matter was already discussed during the Aspen Institute conference, see Henkin supra note 42.
[62] Elster, Jon. 1998. "Coming to Terms with the Past. A Framework for the Study of Justice in the Transition to Democracy." *European Journal of Sociology* 39 (1), p.14
[63] Supra note 52, p. 1426 cfr. Elster supra note 61, p. 14 cfr. Burt supra note 59, p. 917
[64] Supra note 30, p.770
[65] Benomar, Jamal. 1993. "Justice After Transitions." *Journal of Democracy* 4 (1), p.4

its legitimacy in the wake of inalienable rights breaches depended on a shift from a retributive to a restorative model of justice.[66] The latter phenomenon has been commonly denominated the truth versus justice dilemma, also formulated as whether a newly elected government could or should endorse criminal trials.[67]

The collapse of the bipolar world order sparked transitions that mostly juxtaposed truth to justice; consequently, debates among scholars focused on the dilemma by delving into the two notions and estimating both of their differences and ramifications. On one hand, the concept of justice was chiefly identified with the retributive domain and represented the byword for criminal prosecutions; in this sense, advocates of retribution claimed that trials have the capacity to restore national dignity and deter further attempts at violating human rights. Most importantly, justice conceived as punishment for the guilty must be upheld in order to prevent the repetition of the same atrocities[68] and avert impunity.[69] Moreover, the argument goes, failure to bring offenders to court could destabilise the rule of law and jeopardise the legitimacy of the new regime.[70] Ultimately, the retributive justice rationale stressed not only the nature of the crime, but also the blameworthiness of perpetrators and their ensuing punishment.[71]

On the other hand, benefits for survivors and victims' relatives constituted the core preoccupation of newly democratising countries which adopted a restorative justice model; this meant that the trial process was not the only way to "restore" a balance in the civil world that was once lost because of heinous crimes.[72] Since post-authoritarian leaders often had to tackle influential agents of past violence without robust institutions such as the judicial system,[73] criminalisation was surpassed by other alternatives in the

[66] Supra note 7, p. 78
[67] Laplante, Lisa. 2009. "Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes." *Virginia Journal of International Law* 49 (4), p. 917
[68] Supra note 64
[69] Supra note 52, p.1427
[70] Supra note 64
[71] Aukerman, Miriam J. 2002. "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice." *Harvard Human Rights Law Journal* 15 (39), p. 58
[72] Leebaw, Bronwyn Anne. 2008. "The Irreconcilable Goals of Transitional Justice." *Human Rights Quarterly* 30 (1), p. 104
[73] Lefranc, Sandrine, and Frédéric Vairel. 2013. "The Emergence of Transitional Justice as a Professional International Practice." In *Dealing with Wars and Dictatorships*, edited by G. Mouralis, 235–52. TMC Asser Press, p.238 cfr. Laplante supra note 66, p 917 the author mentions "compromised justice schemes" cfr. Teitel supra note 7, pp.76-77 the author takes into account rule-of-law dilemmas such as law retroactivity, high degree of prosecutorial selectivity and a compromised judiciary.

name of peace and stability. Thus, countries in transition preferred following the path of truth instead of "justice" to assure social readjustment. This overarching pattern found its chief embodiment in the establishment of truth commissions, charged with assembling and disclosing an official account of prior misdeeds for a lasting record in the national conscience.[74]

Accordingly, practitioners and policy makers facing the truth versus justice dilemma put at issue contextual difficulties and tipped in favour of conciliatory aims. While judicial efforts to determine criminal liability or innocence were not deemed possible for every occasion, the goal of reconciliation could be more easily carried out through truth-seeking measures that emphasised both the harm done and the desire to repair broken relationships within society.[75] The prospect that there could be an interconnectedness between truth emphasised the harm done, and the consequent crave to repair broken relationships within society and justice went largely unquestioned at the time because the two principles were considered as mutually exclusive. The main vision was that a trade-off had to be made, yet reconciliation appealed in a climate of compromises and amnesties vis-à-vis the old elites; as a consequence, despite the fact that all the initiatives were run by the state to acquire a higher level of authority than the previous political experience, they still resulted in eliding the new democratising state itself.[76]

Objectives linked to reconciliation had to come to terms with the presence of the "nation" as the main perpetrator of violence on its own citizens. The problem of state-sponsored repression was already grappled by Guillermo O'Donnell and Philippe Schmitter in their pivotal series 'Transitions from Authoritarian Rule' with this view:

> «Consensus among leaders about burying the past may prove ethically unacceptable to most of the population (…) By refusing to confront and to purge itself of its worst fears and resentments, such a society would be burying not just its past but the very ethical values it needs to make its future livable. Thus, we would argue that, despite the enormous risks it poses, the 'least worst' strategy in such extreme cases is to muster the political and personal courage to impose judgment upon those accused of

[74] Zalaquett, Jose. 1990. "Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints." *Hamline Law Review* 13 (3), p.629
[75] Mallinder, L. 2007. "Can Amnesties and International Justice Be Reconciled?" *International Journal of Transitional Justice* 1 (2), p. 220
[76] Supra note 7, p. 897

> gross violations of human rights under the previous regime. No doubt, the first of such trials will be a traumatic experience, but it is to be hoped that it can be made clear that judgments with respect to even widespread atrocities by military officers do not imply an attack on the armed forces as an institution.»[77]

Therefore, the concept that post-conflict accountability regarded as criminal prosecution could represent a valid policy was implanted and started to be strongly invoked in the ongoing fight against impunity during the 1990s, in regions such as in South America.[78] For instance, some critics argued for exemplary trials that could fulfil a duty to prosecute[79] without major disruptions for the transitional government.[80]

In conclusion, a codified field of transitional justice emerged by the end of the 20th century in response to the numerous transitions towards a democratic regime that were occurring across the globe. Due to manifold circumstances of sovereign states, transitional justice shifted from a largely legal and internationalist paradigm of human rights violations to a jurisprudence of forgiveness and reconciliation in order to deal with the past and respect local necessities. Moving beyond concepts of liability and accepting pragmatic principles, nations witnessed the rise of alternative transitional justice resolutions and forewent a universalising notion of human rights in favour of an *ex post* and backward-looking justice[81]. Contemporary political conditions imposed the need of state-building project whose aims were modestly expressed in terms of peace and stability.

Nevertheless, the importance of tribunals did not disappear in the mist of practical necessities. The sentiment of preferring alternative methods to prosecution did not hinder the obligation of states to investigate and punish mass violations of humanity's rights; indeed, post-Cold War nation-building politics were sometimes disrupted by actions

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[77] Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule. Tentative Conclusions about Uncertain Democracies,* Vol. 4 (Baltimore, MD: The John Hopkins University Press, 1991, p. 30

[78] Works such as Orentlicher's were published in response to the propensity to use truth commissions in that area.

[79] Duty to prosecute for punishing human rights crimes find relevancy in the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (Orentlicher supra note 51, p. 2562), this aspect will be further explored in following chapters. The legacy of Nuremberg can be also considered since the Universal Declaration of Human Rights in 1948 and the International Covenant on Civil and Political Rights in 1966 codified the internationalization of human rights and placed certain rights within a transnational rather than merely domestic context cfr. Newman infra note 92, p. 36)

[80] Supra note 51, p. 2598

[81] Supra note 7, p.85 cfr. supra note 33, p. 896

taken independently of state actors and in other arenas. Namely, globalisation and the evolution of international law have been catalyst for a new period of the transitional justice inquiry. Following always Teitel's genealogical order, the next section will inspect the so-called "steady-state" phase, in which transitional justice uncoupled from the exceptionality of transitions.

1.3 The new era of Globalisation

The fin-de-*siècle* transitional justice started to shift again its prerogatives and characteristics with respect to contemporary political developments. Namely, the phenomenon of globalization revealed fragmentations and interdependencies among states while broadening horizons and challenging perspectives; as a result, charges of human rights violations could not be easily dismissed as a purely domestic matter.[82] States had to engage with the diffusion of human rights norms and local and transnational human rights activism: in other words, the doctrine of universal jurisdiction came to the foreground due to pervasive conflicts that did not share the same exceptionality of transitions. Consequently, commentators have noticed that transitional justice widened its conceptual boundaries and its mechanisms became fairly normalised.[83]

The "steady-State" era[84] of transitional justice echoed concerns that perpetrators might go unpunished altogether for grave breaches such as mass violence, genocide or war crimes because of the precedence given to the advancement of authority and legitimacy for newly democratic governments. Therefore, the massification and normalisation of transitional rule of law, intended as the persistent assimilation and regularisation of transitional justice processes and measures within the fabric of a highly globalised world,[85] revived the importance of the interplay among national and international judicial norms. In fact, the increase in the transitional justice discourse between the 20th and the

[82] Henkin, Alice H. 2002. "The Legacy of Abuse Confronting the Past, Facing the Future", p.16
[83] Teitel, Ruti G., 2008. "Editorial Note-Transitional Justice Globalized." *International Journal of Transitional Justice* 2 (1), p. 2 argues that exceptional transitional justice responses have shifted towards steady-state justice, see infra note 83.
[84] Supra note 7, p. 89 et seq.
[85] Supra note 33, p. 902

21st centuries can be seen in particular through the return of international judgement by means of the creation of international tribunals.[86]

The most vivid instances which signal how the transitional justice inquiry has been further recognised and codified as an international norm are the emergence of new institutions detached from the sole national sphere. The exemplifying symbol of this trend is most certainly the establishment of the International Criminal Court (ICC), yet also the works of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) must be underlined. Due to the ample material on these matters, the setup of these judicial tools will be briefly discussed in light of the contributions to the transitional justice discipline.

In response to the violent events and atrocities occurring in the former Yugoslavia and Rwanda, the United Nations Security Council created in quick succession two tribunals to confront each difficult situation respectively. Pursuant to the powers provided by Chapter VII of the UN Charter, the Security Council invoked the enforcement of powers with respect to threats to the peace, breaches of the peace, and acts of aggression;[87] with these decisions, the UN body was recognising that violations of international humanitarian law constituted a threat at the international level. Consequently, the International Criminal Tribunal for the former Yugoslavia was convened by landmark Resolution 827[88] in 1993, and the next year the International Criminal Tribunal for Rwanda was created through Resolution 955.[89]

Both judicial devices presented innovative aspects and contained key provisions in expanding transitional justice beyond prior debates and introduce new notions. One of the most relevant developments that these UN-mandated tribunals catered was an explicit answer regarding the question of political leadership prosecutions inasmuch as upper

[86] Ibid.
[87] United Nations, *Charter of the United Nations*, 1945, VII available at: https://www.un.org/en/sections/un-charter/chapter-vii/
[88] UN Security Council, Resolution 827 (1993) (UN Doc. S/RES/827 (1993)) explicitly states that the international tribunal was established "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia (…)"
[89] UN Security Council, Resolution 955 (1994) (UN Doc. S/RES/955(1994)), art.1, in the same manner as the ICTY Statute, states that "the International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda (…)"

governmental echelons could be potentially responsible for mass atrocities. In particular, criminal proceedings of the likes of Milosevic in Yugoslavia or Jean Kambanda in Rwanda were envisaged in Article 7 of the ICTY Statute[90] and Article 6 of the ICTR Statute.[91] Accordingly, individual criminal responsibility was recognised and immunity from jurisdiction for heads of state or government was lifted.[92]

These *ad hoc* tribunals, with a specific mandate and a temporary nature,[93] signalled that there was a newfound commitment from the international community to contribute in building a new regime which recognised the obligation of states to investigate and punish human rights offenders;[94] in this sense, the spread of universal jurisdiction through a more substantial presence of actors outside of national borders resulted in a 'culture of accountability'[95] to ensure global peace and security. Finally, the internationalisation of norms of transitions that started with the efforts of the ICTY and ICTR was crucial for

[90] UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 7 July 2009)*, 25 May 1993, art. 7 par. 2 states that "The official position of any accused person, whether Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment"

[91] UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as amended on 13 October 2006)*, 8 November 1994, art. 6 par. 2 repeats the same formula of art. 7 para.2 from the equivalent Statute for former Yugoslavia.

[92] The inception of the two tribunals signified that an extra-national organ had jurisdiction over offences committed within a single country's borders among the citizenry, thus eroding the Westphalian model of state sovereignty for judicial matters. These judicial bodies were given competence to try individuals for a specific cluster of crimes: breaches of Geneva Conventions, genocide and crimes against humanity; the implementation of universally recognised rules and principles was pivotal for the tribunals' authority. Significantly, the tribunals were also charged of bringing about reconciliation with an eye towards the future, but this could not be accomplished due to the fact that the tribunals' main task was to assess criminal accountability, without necessarily having to provide causal factors behind the conflicts. However, the *ad hoc* tribunals managed to bring about improvements for the future by removing perpetrators from the political, military and administrative spheres. The promotion of accountability owes much to the proceedings showing that anybody could face international prosecutions: the arrest and extradition of Slobodan Milosevic is a landmark event for the ICTY, since he was the first head of state to ever face trial in an international court. The most relevant adjudications in this regard have been the conviction of former Prime Minister Jean Kambanda for genocide in the ICTR, marking the first adjudication in an international arena for crimes of genocide, and the sentencing of former Bosnian Serb President Plavsic. See: Supra note 9, pp. 152-163; cfr. Barria, Lilian A., and Steven D. Roper. 2005. "How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR." *The International Journal of Human Rights* 9 (3), pp. 368-361; See the judgments: *Jean Kambanda v. The Prosecutor (Appeal Judgement)*, ICTR 97-23-A, International Criminal Tribunal for Rwanda (ICTR), 19 October 2000; *Prosecutor v. Biljana Plavsic (Sentencing Judgement)*, IT-00-39&40/1, International Criminal Tribunal for the former Yugoslavia (ICTY), 27 February 2003.

[93] Supra note 14, p. 562

[94] Supra note 59, p. 287-288

[95] Newman, Edward. 2002. "'Transitional Justice': The Impact of Transnational Norms and the UN." *International Peacekeeping* 9 (2), p. 38

the establishment of the very first criminal court of international level: the International Criminal Court.

Building on the two tribunals created by the UN, a number of states concluded in 1998 the Rome Statute of the International Criminal Court which entered into force in 2002. The Rome Treaty channelled the value of former efforts into specific categories of offences: individuals may be prosecuted for genocide, war crimes, crimes against humanity and crimes of aggression[96]. The reason behind this great level of detail in drafting the Statute's wrongdoings lies behind the Court's permanent nature, which suggests that subjects must know at all times about the crimes *ex ante*.[97] Indeed, this new international institution symbolised a new regulatory model of individual criminal accountability;[98] specifically, given the doctrine of universal jurisdiction[99], the hallmark of the ICC is represented by its attention to the domestic dimension.

The latter element expressed a dramatic shift in the enforcement of individual criminal trials due to the introduction of what is referred to as the principle of complementarity, which outlines that the ICC can only fulfil its duties and adjudicate over cases under certain conditions. Whereas *ad hoc* tribunals had primacy over national courts, the Rome Statute under Article 17 lays down the criteria for admissibility of domestic cases before the Court. Firstly, the doctrine of complementarity rests on the fact that the case must not be being investigated or prosecuted by a state which has jurisdiction over it;[100] secondly, if proceedings have been carried out or a final judgement has yet to be announced, the case cannot be brought to the ICC;[101] accordingly, the Court can exercise its jurisdiction only if the domestic court concerned is «unwilling» or «unable» to genuinely prosecute or investigate.[102]

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[96] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998.
[97] Supra note 18, p.222 cfr. Art. 5, with the specifications in art. 6,7,8 and 8bis
[98] Sikkink, Kathryn. "Models of accountability and the effectiveness of transitional justice".2012. *After Oppression: Transitional Justice in Latin America and Eastern Europe*. United Nations University Press, p. 25
[99] "Universal" here is intended as applying to the states which are actually parties of the Treaty, highlighting that ICC jurisdiction is limited in this sense.
[100] Supra note 95, art. 17 par.1(a)
[101] Ibid, par.1(b)
[102] The unwillingness and inability of the state is further determined in Art. 17 par. 2 and 3

Despite this more domestic dimension, the International Criminal Court confirmed an explicit commitment towards personal criminal accountability and, much like its *ad hoc* predecessors, condemned immunity of relevant participants to the grievous atrocities; getting into more detail, provisions 27 and 28 of the Statute unambiguously highlight the irrelevance of official capacity and target responsibility of commanders and other superiors.[103] However, retribution is not the only precept legally formalised in this setting; influenced by contemporary contingencies, the Statute also enshrines the need for reconciliation and ought to consider other non-punitive mechanisms for social healing[104]. On said matter, it is worthwhile recalling Article 53 of the Treaty regarding the initiation of a prosecution, which takes into account the «substantial reasons to believe that an investigation would not serve the interests of justice».[105] Hence, this provision ought to be interpreted in the sense that prosecutorial discretion not to investigate and defer the issue to another typology of measure would be consistent with reconciliation beyond retribution.[106]

Having considered this second generation of tribunals for the protection of human rights, with *ad hoc* tribunals paving the way for a crucial milestone in the «ethos and process of internationalisation of humanitarian law»[107] through the Rome Treaty, the transitional justice discourse has been energised in significant ways. Both national judicial systems and international tribunals significantly added to the accrual of experience which transitional justice came to comprise.[108] The reciprocal dialogue between these two dimensions, manifested in formal legal documents, urged states to change their practices as global norms also changed. Simply put,

> «Transnational standards or expectations of behaviour constitute a minimum level of behaviour that transcends the tendency for transitional societies to fudge the issue of justice in the interests of political trade-off».[109]

[103] Supra note 95, Art. 27 and 28.
[104] Panepinto, Alice. 2014. "Transitional Justice: International Criminal Law and Beyond." *Pisa University Press* 14 (3), pp.7-8
[105] Supra note 95, art. 53 par.1(c)
[106] Supra note 103, pp.7-8; cfr.Teitel also cites "teleological goals" supra note 82
[107] Supra note 94, p. 40
[108] Siegel, Richard L. 1998. "Transitional Justice: A Decade of Debate and Experience. (Review)." *Human Rights Quarterly* 20 (2), p.448
[109] Supra note 94, p. 41

Therefore, international tribunals manifested that accountability shall always be granted even when political elites lack the commitment or the capacity to pursue it.[110] Moreover, they clearly referred to enduring purposes, such as preventing the recurrence of other human rights abuses while guaranteeing the restoration of victims' dignity and long-lasting peace.[111] Of course, these concepts hinted at the presence of distinct agents and *fora* seeking justice and truth with respect to the state-centric notion which dominated discussions in the wake of democratisations across the globe. If the early scholarship on transitional justice had been focusing much attention to contextual situations and practical dilemmas, then this new radical shift propelled by the active involvement of third parties brought about new inputs to the field. National politics were impinged by international actors promoting transitional justice mechanisms even in contexts devoid of entirely transitional situations.[112]

In conclusion, the present era of globalisation brought about fundamental modifications to the discipline of transitional justice. According to Teitel, the global phase of this field has been delineated in three chief aspects. First, as already mentioned, transitional justice did not form anymore on the exceptionality of its application; rather its responses were classified as "steady-state" justice in the aftermath of a persistent state of conflict, including civil wars. Second, there was a growing consideration of non-state actors within the globalised world vis-à-vis prior focus on solely nation-led practices. Lastly, the function of jurisprudence broadened to include multiple aims: from the more traditional development of democracy and consolidation of the state, the law now included also peace and security as its principal purposes.[113]

2. Current approaches to transitional justice

In light of the above considerations, is there actually a unique definition for transitional justice? The current knowledge and practice related to the field have emerged as a rection to the period of political disruptions lasting two decades and affecting several countries

[110] Hansen, Thomas O. "The vertical and horizontal expansion of transitional justice. Explaantions and implications of a contested field." 2015. In *Transitional Justice Theories*. London; New York: Routledge, p.107
[111] Andrieu, K. "Political liberalism after mass violence. John Rawls and a 'theory' of transitional justice" 2015. *Transitional Justice Theories*. London; New York: Routledge, p.91
[112] Supra note 94, p. 41 cfr. Teitel supra note 7, p.
[113] Supra note 82, p.2

conventionally known as the "third wave of democratisation". Over these twenty years, many institutions apart from the state appeared as mechanisms to deal with past horrors and each one mirrored different political, legal and philosophical approaches to transitional justice.[114] Describing its genesis and evolution, the field of transitional justice remains indeed elusive due to its multiple and undefined designation, a feature further attested by the fact that the conceptual boundaries defining the field continue to expand over time.

More precisely, the vast array of instruments devised by transitional societies to fight past human rights offenders from outgoing repressive regimes have ended up with encompassing a plethora of different and divergent circumstances along the accountability spectrum.[115] Notwithstanding if there could truly be one way to describe this young discipline, its complexity contributes to the constant search for ethical, legal and practical answers and adds to its relevance in an ever-increasing globalised world. In fact, it is from the phenomenon of globalisation that additional considerations regarding the field have stemmed and conveyed supplementary nuances to the discourse. Consequently, due to the turn of events, a thorough description of the different approaches to transitional justice today must be made so as to understand the current state of the art.

After the sequence of legal-institutional events starting from the 1970s and including post-Cold War instances, transitional justice acquired major self-awareness as a field of practice and study around the early 2000s onwards. By this point, globalised facets have changed the connotation of the term and extended its scope to include transitions occurring in societies with a protracted state of conflict.[116] Transitions to a democratic government uphold a sort of "exceptionality" pre-condition, whereas nowadays the era of globalisation informs the constant normalisation of transitional justice's notions and mechanisms. Teitel's "globalised justice" era reflects the uncertainty of current times explicated by ongoing conflict and security issues;[117] yet, the evolution of the field has been observed by many and other approaches have been elaborated in order to explain

[114] Call, Charles T. 2004. "Is Transitional Justice Really Just?" *The Brown Journal of World Affairs* 11 (1), p. 103
[115] Truth commissions were still concomitant with international tribunals and enjoyed ample consensus.
[116] Bell, Jared. 2015. "Understanding Transitional Justice and Its Two Major Dilemmas." *Journal of Interdisciplinary Conflict Science* 1 (2), p. 8
[117] Supra note 33, p. 906

the increasing interconnections among a vast range of actors and reformulate transitional justice within contemporary terms.

The following analysis will reveal some alternative approaches to transitional justice in light of different considerations. Indeed, Lutz & Sikkink's "justice cascade" focuses on an increase in accountability dictated by combined efforts involving individuals and states within transnational networks; then, the examination will turn to the approach adopted by one of the most authoritative voices, namely the United Nations, because of its globally-recognised guidelines and definition regarding transitional justice. From the holistic outline provided by the UN, the analysis will indeed include the holistic approach to transitional justice intended as a combination of both judicial and non-judicial means in the pursuit of justice and truth. Finally, a transformative formulation advocates for further social and economic concerns in such a way as to lay the groundwork for a more prosperous future for transitional societies.

2.1 The Justice Cascade

One of the most significant terminologies emerging among the scholarship of transitional justice in recent times has been "justice cascade". Referring especially to human rights trials in Latin America, Lutz & Sikkink have coined this prescriptive term to generally describe a global trend of holding political leadership liable for past human rights abuses by means of international and national efforts of prosecution.[118] Similar to other academic works,[119] this conceptual frame builds upon the political events set during the third wave of democratisation and underlines a significant shift towards the recognition of legitimacy of human rights norms along with increasing actions taken transnationally and regionally to comply to those norms.[120]

Accordingly, the last two decades of the 20th century have contributed to the propensity in world politics towards the development of new models of accountability, which trace the history of the human rights regime. Sikkink encapsulates the regulation for past abuses

[118] Lutz, Ellen, and Kathryn Sikkink. 2001. "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America." *Chicago Journal of International Law* 2 (1), 1-34
[119] See: Teitel supra note 7; cfr. Arthur supra note 2
[120] Supra note 117, p.4

in three models of this kind: the immunity or impunity[121] model; the state accountability model; and the individual criminal accountability model.[122] The first model refers to situations prior to the Second World War in which attempts of accountability were firmly resisted and state officials were never tried; sovereign immunity started to be erased according to the second model, under which the state as a whole was recognised as responsible for human rights violations and had to adopt measures to remedy its misdeeds. The state accountability model is implemented virtually in the entire human rights apparatus, at both regional and international levels.[123] Nonetheless, it is the third model that entrenches the notion of justice cascade.

Individual criminal accountability constitutes the third model formulated by Sikkink in her attempt at describing the most influential changes of trajectories in transitional justice experiences and addresses the progressive focus on the identity of the liable actors and the way in which these agents are held responsible.[124] In this institutional-legal environment, initiating by the 1980s, states began to pair individual trials[125] with the several transitional justice instruments, like truth commissions and reparations. Thus, the justice cascade is situated in a much greater human rights norms and rule of law cascade driven by the interrelation between the bundle of certain inalienable rights and democratic governance.[126]

Reshaping the legal landscape, as the argument goes, this systemic approach reverberated through the creation of international legal bodies such as the International Criminal Court, which altered outlooks about the balance between political expectations and universal jurisdiction. As specified by the author:

> «By justice cascade, I *do not mean* that perfect justice has been done or will be done, or that most perpetrators of human rights violations will be held criminally accountable. Rather justice cascade means that there has been a shift in the *legitimacy*

[121] Intended as the "failure to allocate responsibility for serious human rights violations" see infra note 121 Skaar et al, p. 6
[122] Skaar, Elin, Jemima García-Godos, and Cath Collins. 2017. Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability. London: Routledge, p. 6
[123] Supra note 97, pp.20-21
[124] Ibid, p.21
[125] It must be underlined that practices of state accountability continued to exist side by side with trials for individual criminal accountability (Sikkink supra note 97, p.21)
[126] Supra note 117, pp.3-4

> *of the norm* of individual criminal accountability for human rights violations and an increase in criminal prosecutions on behalf of that norm».[127]

Thus, the law, whether expressed through a domestic or international legal instrument, must be recognised as the ultimate arbiter for it to be well operational. Nowadays various arenas for action in order to fulfil accountability purposes are in place simultaneously: for instance, international and regional institutions and courts, foreign courts, domestic policies and courts of the countries where human rights abuses occurred.[128]

Indeed, the scope of the justice cascade is ample because it envisages three overlapping dimensions: domestic; foreign; and international. Following Sikkink's theory, the domestic level involves a single country conducting trials for human rights abuses committed within its borders; conversely, the same violations can be brought before the court in another country and assume a foreign categorisation. Lastly, international instances involve judgments about individual criminal responsibility in a particular country or conflict and originate from the cooperation of states under an overarching apparatus like the United Nations (i.e. ICTY or ICTR).[129] Having analysed this interesting point of view regarding a specific model of accountability and its implementation through concurrent channels, an aspect which has not been fully explored until this point is the participation of foreign courts to the trend.

In fact, during the period under examination, adjudications could also be carried out for breaches of human rights in a court that did not correspond to the country where the abuses had actually been committed; as a result, states of rights-violating defendants had more pressure from the outside and increasingly removed obstacles to the access of their own domestic courts.[130] This standard became part of the justice cascade especially after the foreign trial of former President Pinochet, who was one of the pivotal figures in the

[127] Sikkink, Kathryn. 2011. Justice Cascade: How Human Rights Prosecutions Are Changing World Politics. W W Norton & Company, p.5
[128] Supra note 97, p.19
[129] Ibid., pp. 22-23
[130] Supra note 117, pp.4-5

perpetration of human rights violations in Chile.[131] Therefore, the use of foreign judicial processes and their implications have sometime been referred to as "Pinochet effect".[132]

The ripple impact of the 1998 arrest of Augusto Pinochet in London, upon request of a Spanish court,[133] affected the long quest to justice in many ways and materialised the unthinkable: namely, bringing to court a highly positioned figure in the political hierarchy since Pinochet had recently been sworn 'honorary lifetime Senator'. In spite of Pinochet's eventual return to Chile, the Judicial Committee of the House of Lords' landmark decision that Pinochet was not entitled to claim state immunity[134] from criminal proceedings set a vital legal precedent and underlined that neither impunity nor amnesties could protect violators of fundamental human rights anymore. Hence, the *Pinochet* cases have shown that existing universal jurisdiction laws could be instrumental in assessing individual criminal accountability and fostered their employment among advocates and courts.[135]

Within the context of an emergent International Criminal Court, these transnational cases boosted the global trend towards a promotion of accountability and created new incentives for domestic courts; successive empirical considerations about the justice cascade have led to the conclusion that human rights trials have indeed occurred with more frequency with respect to the past.[136] Interestingly, the increase in the number of countries judging for those who were involved in grave violations of human rights, war crimes and crimes against humanity reveals that prosecution might also not be implemented immediately after the transition in order to be effective.[137] A model of of

[131] The *Pinochet* case(s) will be further analysed in the following chapters with respect to Chile; right now, the definition provided is only instrumental for the clarification of foreign courts' intervention and the advancement of a universal jurisdiction principle.
[132] Roht-Arriaza, Naomi. 2006. *The Pinochet Effect: Transnational Justice in the Age of Human Rights*. Philadelphia: University Of Pennsylvania Press.
[133] Acting under *Ley Organica del Poder Judicial,* art. 23(4), (1985) permitting universal jurisdiction over certain crimes.
[134] Pinochet claimed state immunity under United Kingdom's State Immunity Act 1978, but this was rejected in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* (*Pinochet III*)
[135] Supra note 131, p. 197
[136] Sikkink & Walling (see infra note 136, p. 433) surveyed data on human rights trials in 192 countries, covering a 26-year period (1979-2004) and noticed a widespread use of both trials and/or truth commissions.
[137] Sikkink, Kathryn, and Carrie Booth Walling. 2007. "The Impact of Human Rights Trials in Latin America." *Journal of Peace Research* 44 (4), p. 434

transitions might not necessarily embrace a steady process with a linear conception of time[138] and its effects could be captured more easily in the long run.

Finally, the justice cascade owes much to the singular actors who created and propagated the sentiment for international accountability and universal jurisdiction. In their seminal work, Sikkink & Lutz explain how joint efforts on the part of activist lawyers are behind the impetus for the cascade, by virtue of their attempts at planning effective strategies, collecting evidence and constantly challenge legal obstacles.[139] In fact, the justice cascade might as well be identified as a global network which manifests features analogous to those of activist and epistemic communities at the same time;[140] its advocacy aspect emerges in terms of shared values and exchange of information,[141] while knowledge in a given field and relevance to policymaking[142] resemble epistemic communities' attributes. At any rate, the transnational nature of this global network coupled with its willingness to intervene for the amelioration of justice regardless of governmental indifference or resistance remain unquestioned.

In conclusion, the justice cascade mirrors the transformations starting from the 1980s within international criminal law vis-à-vis domestic situations and the quest for accountability until the current era of globalisation. Human rights practices that were adopted right after political transitions between 1970s and 1980s were deeply impacted by the rise of new developments and actors; the justice cascade gained momentum through some pivotal judicial cases and, mostly, through the contributions of legal activists. The interplay between states, transnational networks and courts is the basis of an agentic constructivism which creates, develops and responds to this cascade; the subsequent thickening of norms diffusion is consistent with the normalisation of transitional justice.

2.2 The United Nations and transitional justice

[138] Supra note 31, p. 345
[139] Supra note 117, p. 2
[140] Ibid.
[141] Keck, Margaret E., and Kathryn Sikkink. 2018. "Transnational Advocacy Networks in International and Regional Politics." *International Social Science Journal* 68 (227–228), p. 89
[142] Mayntz, Renate. 2010. "Global Structures: Markets, Organizations, Networks - and Communities?" In *Transnational Communities Shaping Global Economic Governance*. Cambridge University Press, p. 43

Dealing with the end of violent conflicts or the replacement of injustice by legitimate governments has proved to be a difficult challenge. Societies need to reorganise the way their people coexist, both victims and perpetrators, while acting upon the violence that had dominated the outgoing regime. Within this scenario, transitional justice has developed a set of practices and policymakers have attempted to provide a valid conceptual framework for their use. Among these efforts, the United Nations (UN) established a number of precedents in order to shed some light on the issues of impunity, reparations and best procedures of transitional justice. Having already mentioned the UN's commission of *ad hoc* tribunals which ultimately led to the establishment of the first international criminal court, it is important to underline how this organisation built international standards for the integration of global experiences with a solid theoretical basis.

The elaboration of an international conceptual understanding of transitional justice, available to a vast plethora of stakeholders, started to form when the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (Sub-Commission) mandated the composition of a structural inquiry about the administration of justice and the question of impunity;[143] UN Special Rapporteur Louis Joinet was charged with the task of covering the issue of impunity for the violation of political and civil rights[144]. In 1997, the publication of its final report[145] represented a signal step with regard to question involving the duty to prosecute former perpetrators under international law, which had already been discussed in the prior decade.[146] Yet, the true innovation of these principles is to be found elsewhere.

Since the fundamental basis of transitional justice rests upon regulatory advancements of international law alongside the integration of standards of practice by singular countries to combat impunity and deliver effective measures of justice to victims, Joinet's work became a fundamental point of reference in the field because it advocated the rights to

[143] Brody, Reed, and Felipe González. 1997. "Nunca Mas: An Analysis of International Instruments on Disappearances." *Human Rights Quarterly* 19: 365–405, p. 372
[144] Supra note 57, p. 365
[145] UN Sub-Commission on the Promotion and Protection of Human Rights, *Question of the impunity of perpetrators of human rights violations (civil and political)*, 26 June 1997, E/CN.4/Sub.2/1997/20, Final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119.
[146] Supra note 2, pp. 352-353

know,[147] to justice[148] and to reparations[149] in the UN's systematisation of transitional justice. The so-called "Joinet Principles" became an important guidance for the minimum obligations that states must assume while strengthening victims' rights and fighting against impunity. In order to have a more comprehensive picture, these principles were re-affirmed in 2005 through another UN report edited by American law professor Diane Orentlicher.[150] Therefore, it is best to focus on the Joinet/Orentlicher Principles for the sake of completeness.

Upon request of the Commission on Human Rights, a new report was prepared to further flesh out Joinet's work: the "Updated Set of Principles for the Protection and Promotion of Human rights through Action to Combat Impunity" was officially codified.[151] These principles involve four main areas that deal with impunity and represent a foundational scheme for future initiatives on the part of many actors; however, it is important to recall that the UN Commission on Human Rights has not formally affirmed the Joinet/Orentlicher Principles, but it has just «take[n] note of them with appreciation».[152]

Nevertheless, these fundamental principles cover key issues that can be useful to all those participating in the constant tug-of-war between political constraints and the build-up of trust and accountability. Indeed, the report(s) define impunity as «the impossibility *de jure*[153] or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims».[154] Due to

[147] UN Sub-Commission on the Promotion and Protection of Human Rights, *Question of the impunity of perpetrators of human rights violations (civil and political)*, 26 June 1997, E/CN.4/Sub.2/1997/20, para. 17-25
[148] Ibid., par. 26-39
[149] Ibid., par. 40-43
[150] Sisson, Jonathan. 2010. "A Conceptual Framework for Dealing with the Past." *Politorbis* 50 (3), p. 12
[151] UN Commission on Human Rights, *Promotion and Protection of Human Rights: Impunity – Report of the independent expert to update the Set of Principles to combat impunity*, Diane Orentlicher. Addendum: Updated Set of Principles for the Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, (UN Doc. E/CN.4/2005/102/Add.1)
[152]UN Commission on Human Rights, *Human Rights Resolution 2005/81: Impunity*, 21 April 2005, E/CN.4/RES/2005/81, preamble (19)
[153] Emphasis of the author
[154] Supra note 148, p. 6 item A.

the extensiveness of this definition, four key rights have been categorised to envisage proper responses and remedies.

The first pillar is the right to know, a fundamental prerogative that includes the right of individual victims and their relatives to learn the truth about events and circumstances surrounding cruelties on loved ones. This concept reverberates on society at large and drives the state in its duty to remember the history of oppression for preventing the recurrence of other systematic human rights violations.[155] The measures proposed by the Joinet/Orentlicher Principles to guarantee this right is the establishment of commissions of inquiry, including truth commissions,[156] to investigate all persons allegedly responsible;[157] its function also consists of preserving the memory related to past heinous crimes through the preservation of the commission's archives and information.[158]

The second right refers to justice, intended in a twofold manner: the right of victims to fair remedy and the duty of the state to investigate, prosecute, and punish accordingly. Indeed, judicial means constitute an instrument for victims who want to ascertain that those guilty will be criminally accountable; moreover, the principles also include individual action from the wronged parties as *partes civiles.*[159] Mostly, the right to justice stresses the direct involvement of domestic courts in the prosecution of perpetrators within repressive regimes under international law. Once assessed primary responsibility of the state to exercise jurisdiction, international or internationalized criminal tribunals might hold concomitant jurisdiction in accordance with their statutes.[160] Lastly, the right to justice imposes some restrictions on certain rules of law concerning prescription, amnesty, extradition and so on insofar as they do not obstruct the fight against impunity.[161]

The right to reparation features as the third area for an inclusive scheme responding to impunity. Individual victims or their beneficiaries have the right to ask for reparation,

[155] Ibid. II, A, principles 2-5
[156] Ibid. II, B, principle 6
[157] Ibid. II, B, principle 8(c)
[158] Ibid. II, B, principle 8(f)
[159] Ibid. III, A, principle 19 par.2
[160] Ibid. III, B, principle 20
[161] Ibid. III, C, principle 22

while the state needs to satisfyingly oblige.[162] The measures entailed in the term "reparation" shall be delivered through various programs and touch upon different scopes. Indeed, the Principles envision reparations interpreted as: restitution of the previous situation to the victim; compensation for what was lost physically and mentally; and rehabilitation in terms of medical care.[163] Additional measures to satisfy the victims should be achieved through the public dissemination of knowledge about reparations provided by the state.[164]

Finally, the guarantee of non-recurrence was introduced in order to assume a forward-looking stance and protect the society from further violations; thus, this area mainly deals with the state's ability in promoting good governance by means of targeted institutional reforms. In particular, notable mentions involve the reforms of the security apparatus and the judiciary, considered as main priorities for the sustainable culture of human rights.[165] Other measures include the disbandment with subsequent re-integration of parastatal groups[166] and the repeal of legislations and other regulatory documents that obstructed justice and contributed to the endurance of human right violations.

This brief overview of the Orentlicher/Joinet principles caters the idea that synergies between different stakeholders, adopting either judicial approaches such as criminal prosecution or non-judicial approaches like truth-seeking processes, contribute significantly in achieving adequate results in transitions to democracy and/or peace. Although the report pertains to the realm of soft laws,[167] it addressed what states "shall" or "must" do and was an important milestone for the identification of a conceptual framework. All things considered, these principles signaled the adoption of a holistic perspective to dealing with the past; this is further attested by a report that was prepared and presented by UN Secretary-General Kofi Annan.

[162] Ibid. IV, A, principle 31
[163] Ibid. IV, A, principle 34
[164] Ibid. IV, A, principle 33
[165] Ibid. IV, B, principle 36
[166] Ibid. IV, B, principle 37
[167] Grover (see supra note 57 p. 366) claims that soft laws are «best understood as lying along a spectrum with three axes that measure the extent to which they assent obligations for their addressees (usually States), their linguistic precision and their delegation of authority to interpret and implement their content»,

In 2004, the organisation consolidated its own understanding of transitional justice in the 'Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies' in which both national and international dimensions were recognised. Accordingly, transitional justice is defined as:

> «The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof».[168]

Since much of the current literature refers to this definition of transitional justice, there are several implications for normative discourse and political practice. In fact, the report based UN action vis-à-vis transitional justice on international «norms and standards» that «bring a legitimacy that cannot be said to attach to exported national models» which might not reflect «the best interests or legal development needs of host countries»;[169] Grover critically notices that the report did not question the appropriateness of international actors in exporting the scope and content of transitional justice.[170]

However, Annan recognised that the international community must assess national needs and capacities while embracing «nationally led strategies of assessment and consultation carried out with active and meaningful participation of national stakeholder».[171] The interplay between international and national dimension is further delineated by the boundaries of universal norms and standards that apply to the organisation, such as the meticulous compliance with human rights by the judiciary or the complete rejection of amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.[172]

Overall, the definition of transitional justice provided by the UN expresses content shaped *inter alia* by international and state actors alongside a balanced combination of law and

[168] UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General*, 23 August 2004, S/2004/616, par. 8
[169] Ibid., par. 10
[170] Supra note 57, p.370
[171] Supra note 167, para. 15
[172] Ibid., para. 21

politics; reprising debates of the 20th century, it would seem that the truth versus justice dilemma had been surpassed and the principles were now seen as joint components employed for the same purpose. The organisation's effort is purely supportive of countries invested in transitional situations and, through time, international transitional norms and standards widened further their scope until new guidelines for transnational justice were introduced.

The delineation of transitional justice shifted after UN Secretary-General Ban Ki-Moon provided the 'United Nations Approach to Transitional Justice' Guidance Note in 2010. Kofi Annan's 2004 definition was narrowed through the addition of a new formulation: indeed, referring to the judicial and non-judicial processes and mechanisms that constitute transitional justice, the Note stated that «whatever combination is chosen must be in conformity with international legal standards and norms».[173] In this statement, the UN shifted its role from supportive to assertive with respect to states' action, posing the conditions to possibly restrict their conduct;[174] in other words, optionality has been deleted and there is more international agency for the designation of transitional justice measures. Consequently, states are bound also to international legal standards, meant as the body of soft laws developed through time (e.g. Orentlicher/Joinet Principles).[175]

As a result, entitlements and practices conceded state actors were superseded by the growing management of the UN. Indeed, commentators have described this phenomenon as "managerialism" which is:

> «An ideology under which the strategic leadership of an institution (or regime) is separated from its assumed beneficiaries in the belief that when a specialised elite of managerial experts carries out strategic choices, then the outcomes for the beneficiaries will be optimal».[176]

Transitional justice articulated as such paves the way for an institutional appropriation of the term that focuses dominantly on the final results without proper attention to the

[173] UN Secretary-General (UNSG), *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, March 2010, p. 2
[174] Supra note 57, p.375
[175] Supra note 172, p. 2 underlines that a guiding principle is for the UN to "support and actively encourage compliance with international norms and standards when designing and implementing transitional justice process and mechanisms"
[176] Koskenniemi, Martti. 2012. "Hegemonic Regimes." In *Hegemonic Regimes. Regime Interaction in International Law: Facing Fragmentation*, 305–24. Cambridge University Press, p. 305

process as a whole. Technical expertise might end up being preferred to the more appropriate notion that no size fits all. The UN's managerial approach has led transitional justice to be strongly associated with international law and expert standards, denying the presence of national efforts and the influence of politics.[177]

2.3 The holistic approach

The historically dominant paradigm for transitional justice was characterised by the predominance of legal justice in response to violence and breaches of civil and political rights more generally.[178] Deriving from the transitions to democratic governments in Latin America and drawing from the subsequent practical yet at odds solutions, this model has been adopted virtually wherever there was necessity to do so. At the beginning of the millennium, some critics have decided to challenge this default norm through a more holistic approach to transitional justice; the main catalyst had been the growth in the internationalisation and institutionalisation of the field which led many to reconsider its scope and contents through a different lens.[179]

In 2006, Alexander Boraine[180] put at issue the definition of transitional justice and conceptualised it as a «convenient way of describing the search for a just society in the wake of undemocratic, often oppressive and violent systems».[181] In spite of sceptics arguing for a notion of transitional justice that undermined criminal accountability, the scholar claimed that the discipline offered a wider and deeper vision of justice that would not contrast with but be a support of criminal prosecutions, in conjunction with the aims of addressing the victims' needs and encouraging reconciliation.[182] Therefore, he advocated for a holistic approach to transitional justice because criminal accountability was not the only instrument or model to supplement a form of justice, especially with regards to recovering societies. Said otherwise, retributive justice should have been

[177] Supra note 57, p. 379
[178] This dominant preoccupation casted its shadow even over the Joinet Principles
[179] Sharp, Dustin N. 2019. "What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice." *International Journal of Transitional Justice* 13 (August), p.577
[180]Alex Boraine was a member of the South African Truth and Reconciliation Commission from 1996 to 1998 and founded the International Center for Transitional Justice in 2001.
[181] Boraine, Alex. 2006. "Transitional Justice: A Holistic Interpretation." *Journal of International Affairs* 60 (1), p. 18
[182] Ibid.

complemented with restorative justice in such a way as to provide a holistic approach to transitional justice based on five key pillars.

«No society can claim to be free or democratic without strict adherence to the rule of law»:[183] in this way, Boraine introduces the pillar of accountability. While acknowledging that transitional justice has a vast array of mechanisms, legal prosecutions play a crucial part in three significant ways; firstly, the prevention of the resurgence of high-ranking wrongdoers' power in the political panorama; secondly, the certainty of punishment for those with the greatest blame by the intervention of courts and tribunals; thirdly, due process to avoid summary reprisals. Yet, an overenthusiastic attention to retribution does not automatically imply peace and stability.[184] The other four elements of Boraine's analysis focus on precepts for the sake of a mended society.

Truth recovery is arguably one of the cornerstones of reconciliation, exemplified by the non-judicial mechanism of the truth commission to examine authoritarian instances within the broader political, economic and social context. Mirroring the wide range of situations, truth itself can be defined as forensic with an association to hard facts and evidence; it could present itself in the form of crude storytelling, fuelling its narrative component; the process of dialogue, intended as interaction among people from all walks of life, constituted social truth; finally, the fourth kind of truth is healing or restorative in the sense that accountability is formally acknowledged.[185]

The third pillar is reconciliation itself, which is difficult to measure because it incorporates a process and a means to achieve peace. The procedural aspect must pass through a common memory among the chief agents either committing or undergoing violence; this can be ultimately achieved if victims actually believe that their calls for help will be heard and tackled in an effective way.[186] The pillar accommodating this purpose is represented by institutional reforms, which set the entire basis upon which truth and reconciliation can flourish. Through this measure/prerequisite, societies learn how to trust their own state again and commit to robust change in various areas.[187] Finally,

[183] Ibid., p.19
[184] Ibid., p.19-20
[185] Ibid., p.20-21
[186] Ibid., p.22-23
[187] Ibid., p.23-24

the author also takes into account reparations programs, which are concrete proof of a nations' commitment toward its citizens since they represent efforts taken directly on behalf of the wronged parties; however, proper documentation of the truth is required beforehand or reparations could just be understood as payment for keeping the status quo.[188]

In conclusion, Boraine's approach to transitional justice reveals that a return to the rule of law should be coupled with processes of reconciliation; the answer lays in surpassing the "either/or" formula and share an inclusive perspective where measures interrelate and influence each other. While retributive and conciliatory methods, simplified under the trademark of trials and truth commission, were once deemed as furthering incompatible agendas, they were now seen as tools for mutually reinforcing goals;[189] similarly, other scholars have underlined that the joint adoption of multiple instruments can overcome potential shortcomings of the individual measures.[190]

Transitional justice has extended its meaning through time and now comprises the establishment of courts, truth commissions, institutional reforms, settlement on reparations along with political and societal initiatives[191]. Hence, this variety of already set options can benefit from a holistic approach in that it can channel diverse overtones to the "usual suspects" in the transitional justice menu. Indeed, this model's strength lays on the complementarity of the means, which encourages a plurality of combinations among retributive and restorative notions of justice; mechanism are now viewed as resolutions to be adopted in isolation anymore. As a result, the holistic approach can be said to reiterate the growing acceptance that every transitional justice component is instrumental to justice on its own right, rather than qualifying only as a second best alternative to prosecutions; specifically, this approach reckons with the transformation of norms, structures and power relations through both truth and justice.

2.4 Transformative justice

[188] Ibid., p.24-25
[189] Supra note 71, p.105
[190] De Greiff c.d. in supra note 1, p.18
[191] Fischer, Martina. 2011. "Transitional Justice and Reconciliation: Theory and Practice." Berghof Handbook for Conflict Transformation, p. 406

While scholars have been engrossed with the advancement of new approaches to transitional justice, others have devised a new typology of justice altogether. This impressive vision was brought to prominence by Wendy Lambourne in her formative work 'Transitional Justice and Peacebuilding after Mass Violence' in which she supports a shift from transitional justice to transformative justice.[192] Her main argument in favour of the adoption of a transformative model for justice is prompted by the increasing participation of international actors in peacebuilding and transitional justice when oppressive regimes come to an end; indeed, the academic stresses the relationship between justice, reconciliation and peacebuilding[193] to contend that transitional justice must be reframed as an analytical category to support peacebuilding.[194]

Hence, her reconceptualization of transitional justice as transformative justice follows the logic that peacebuilding implies a transformation rather than a transition within society, bringing about long-term and sustainable processes for future stability. In this sense, transitional justice is reconceptualised to comprise multifaceted aspects like the construction of structures, institutions and relationships such that specific cultural and conflict contexts are well distinguished.[195] Accordingly, in order to achieve these results, the transformative model of justice is based on four constitutive elements: namely, accountability, truth, socioeconomic justice and political justice.

Legal justice is conducive for consolidating the rule of law and combating impunity through the use of trials; although it does not bridge societal divisions, it represents the minimum standard to which states must comply.[196] Nevertheless, the pursuit of prosecution acquires meaning only if there is an informed historical record; indeed, the second aspect of transformative justice is truth,[197] a crucial component to gain a

[192] Lambourne, W. 2008. "Transitional Justice and Peacebuilding after Mass Violence." *International Journal of Transitional Justice* 3 (1): 28–48.
[193] The definition of peacebuilding is "a multifaceted task conducted at the macro level by UN agencies, nongovernmental organisations (NGOS) and the government of the country in question, ibid. p. 34 cfr. Lambourne, W. "Transformative justice, reconciliation and peacebuilding". 2015. In *Transitional Justice Theories*. London; New York: Routledge, p. 21 she recurs to the definition provided by the UNSC: peacebuilding encompasses a wide range of political, developmental, humanitarian and human rights programs and mechanisms designed to prevent the outbreak, recurrence or continuation of armed conflict.
[194] Supra note 191, p. 29
[195] Ibid., p. 35
[196] Ibid., pp. 37-39
[197] Curiously, Lambourne defines truth as a concept encompassing the same four meanings of Boraine (forensic, narrative, social and restorative).

comprehensive view of the events and involve victims and survivors in a process of mutual knowledge and acknowledgment with perpetrators.[198] In this vein, socioeconomic justice corresponds to a type of justice addressing the root causes of violent conflict in order to eradicate them and promote structures for sustainable peace; it encapsulates material compensation for the past through reparations and willingness to look optimistically at the future.[199] Finally, political justice must be spread in terms of good governance practices and promote a positive representation of society in a democratic system.[200]

Finally, Lambourne maintains that six chief principles apply to the aforementioned aspects of transformative justice. Briefly, the principles include symbolic aspects of justice, an overall vision spanning from dealing with the past to adopting future-oriented resolutions; there is also a focus on local ownership and capacity-building, structural reforms and relationship transformation with reconciliation; finally, the approach must be integrated and comprehensive.[201] Thus, contrary to transitional justice, the scholar holds that transformative justice possesses more suited characteristics for lasting commitments. This latter aspect is entrenched in Lambourne's consideration for the affected population; former participants in mass violence are subjects, not objects, in the layout and application of whatever transitional justice mechanism.[202]

This regard towards local communities has been applauded and reprised also by other observers, such as Gready & Robins, who criticise transitional justice for treating the symptoms rather than causes and propose a new agenda for practice.[203] In their view, transitional justice needs a radical reform which holistic definitions and promises could not maintain; indeed, although holism has moved beyond mere legal-institutional answers and avoided the dichotomous trap between trials and truth commissions by having them coexist, this approach presents an important deficiency in that «it has not dislodged the legal and state-based approaches from their dominant position, and it comes with no

[198] Supra note 191, p. 39-41
[199] Ibid., pp. 41-42
[200] Ibid., p. 45
[201] Ibid., p. 46
[202] Ibid., p. 47
[203] Gready, P., and S. Robins. 2014. "From Transitional to Transformative Justice: A New Agenda for Practice." *International Journal of Transitional Justice* 8 (3), p. 340

decision-making mechanism for the selection, prioritisation or sequencing of intervention».[204]

By contrast, transformative justice is defined as the transformative change which brings attention to local agency and resources and focuses on the process rather than predetermined outcomes.[205] The emphasis on the tangible realities of population in need of healing challenges relations and structures of exclusion while supporting the integration of both economic and social rights, considered as core elements to prevent further abuses. Further attesting the priority of socioeconomic concerns, the scholars' agenda for practice considers peacebuilding, actor-oriented approach and human rights-based approaches to development in order to outline transformative justice.[206]As a result, the instruments for practice will revolve substantially around the participation of civil society.

Whereas the complementarity of means is still underlined, transformative justice promotes social justice in the sense that it takes into account expectations of affected actors and considers effective participation of civil society as main driver for a true stability within broken societies. This sort of emancipatory peacebuilding with a prospective outlook results from the notion that participation is a tool of transformation, whereby actors are able to play their part and create the right conditions for empowerment. Likewise, this desirable purpose is a testament to the unleashing of transformative dynamics and the superseding of transitional justice itself.[207] Indeed, a transformative approach requires the «adoption of psychosocial, political and economic, as well as legal perspective on justice».[208]

Having illustrated just a small but significant amount of current approaches to transitional justice, it is possible to draw some conclusions on the current state of the art. Notwithstanding many of the stances that could not be listed in this brief overview, all approaches have in common the overcoming of the truth versus justice dilemma that dominated the first years of the field; the recognition that there is no "one-size-fits-all"

[204] Ibid., p. 345
[205] Ibid., p. 340
[206] Ibid., pp. 350-355
[207] Ibid., p. 360
[208] Supra note 191, p.30

formula propels reflections in the same direction, namely underlining the constant broadening of transitional justice's definition(s) and mechanisms, yet the interpretations are distinct and sometimes opposing. From these approaches, it is meaningful to deduce that conceptions of justice were stretched out and redefined to encapsulate other significances; however, they all held on to the significant pillar that transitional justice now must necessarily include both retributive and restorative dimensions. This dissertation will now turn to analyse some of the pitfalls that still taint the discipline, in order to gather the main reasons why practitioners and academics field proceed to supplement new viewpoints on the matter.

3. Modern pitfalls of transitional justice

Current approaches to transitional justice stem from recent drawbacks that scholars have noticed and examined. Apart from a genealogical excursus, the cycles of change within a field are not only delimited by historical convention but reveal genuine shifts in the notion of transitional justice due to new obstacles that underline major pitfalls and the ensuing reaction to them by practitioners and intellectuals. Transitional justice is not exempted from this phenomenon, since changes attributable to the rise of conundrums foster further discussion. This section will briefly assess the impact of some criticisms, which have already been indirectly discussed, in the wake of a "steady-state" era of the discipline.

Starting from the mid-1990s, human advocates and scholars increasingly started to claim that many of the dilemmas relating to transitional justice which had affected prior phases of the field were based on normative biases about the range of shapes that transitional justice might assume.[209] Already defined by Méndez as "false dichotomies",[210] these dilemmas found their natural end through the ideological shift regarding the relation that connected transitional justice to reconciliation. Contemporary transitional justice advocates and scholars contend that tensions summarised with the overall formulation "truth versus justice" were surpassed; both concepts, with their corresponding practical

[209] Supra note 71, p. 102
[210] Méndez, Juan E. 1997. "Accountability for Past Abuses." *Human Rights Quarterly* 19 (2), p. 266

mechanism, were believed to have mutually reinforcing and complementary role in achieving the aims of transitional justice.[211]

Nevertheless, the field of transitional justice is still highly criticised despite/because of its cross-cutting nature. Among the controversies maybe one of the most assertive voices has come from Carothers, who presented doubts regarding the purpose of the transitions' paradigm per se; in fact, he argues that the theory of transitional justice should be abandoned altogether because the momentum of political upheaval has long been surpassed by new realities. The main explanatory factors that led to this conclusions were connected to the fact that "third wave" countries did not deliver the expected results; in the words of the author, «only a relatively small number are clearly en route to becoming successful, well-functioning democracies».[212] A more realistic point of view, he underlines, is based on the recognition that supposedly transitional countries are now in a political grey zone: their status is in between authoritarianism and democracy, without completely fitting into either one of them.[213]

Thus, Carothers concludes that advocates of democratisation should let go of transitional justice to explain concurrent national realities because, among other aspects, most of the tested countries were not in transition, new governments could still present weaknesses in terms of accountability and state-building was a more difficult task to achieve.[214] The appeal of an end of the transition paradigm owes much to the acknowledgement that:

> «What is often thought of as an uneasy, precarious middle ground between full-fledged democracy and outright dictatorship is actually the most common political condition today of countries in the developing world and the post-communist world».[215]

Yet, advocacy for the removal of the paradigm did not occur; time proved the scholar wrong in the sense that transitional justice is still considered a useful lens through which

[211] Crocker, David. 2000. "TRUTH COMMISSIONS, TRANSITIONAL JUSTICE, AND CIVIL SOCIETY." Princeton University Press, p. 10, cfr. Leebaw supra note 71, p. 103
[212] Carothers, Thomas. 2002. "The End of the Transition Paradigm." *Journal of Democracy* 13 (1), p. 9
[213] Ibid.
[214] Ibid., p. 17
[215] Ibid., p. 18

portray modern events.[216] Still, Carothers' considerations can be conveniently recalled when applying the paradigm in order to take on more cautionary attitudes.

A cautionary attitude is the one adopted by Posner and Vermeule, who question the validity of transitional justice as a type of justice on its own accord. Sceptically speaking, the observers argue that «legal and political transitions lie on a continuum, of which regime transitions are merely an endpoint»;[217] following this thought, transitional justice does not possess distinctive elements of the law that could separate it from ordinary situations. Correspondingly, they analyse the rule of law with respect to the idiosyncrasies of political transitions and conclude that ordinary justice should be appreciated in more meaningful ways. Indeed, ordinary law-making is already well-equipped for responding to policy shifts due to adjustments within citizenship or legal leadership.[218] In this way, the scholars anchor transitional justice law with non-transitional normative provisions and, in a sense, transitional justice should be understood as a natural development of ordinary justice.[219] There is nothing extraordinary about it.

A reinterpretation of the concept of justice occurs also through a different perspective, not contesting the existence of a transitions' paradigm nor its validity and according to which the intrinsic foundational bases of transitional justice will always pose certain limitations to the field. Since transitional justice is attained when «liberal norms are respected to the extent necessary for, and consistent with, the consolidation of liberal democratic institutions»,[220] some critics have underlined that certain deficits on these observations remain largely unchallenged. In the context of an increasing globalisation which is reflected also in a growing network of human rights norms linked to the purpose of liberalism, two main drawbacks are identified within the discourse: liberal peace and state-based processes.[221]

According to Gready & Robins, liberal peace is the product of two interacting dominant strands of the globalised world. The first one is the emphasis of civil and political rights

[216] Diamond, Larry, Francis Fukuyama, Donald L. Horowitz, and Marc F. Plattner. 2014. "Reconsidering the Transition Paradigm." *Journal of Democracy* 25 (1), p.87 referring to events such as the "Arab Spring"
[217] Supra note 30, p.763
[218] Ibid., p. 764
[219] Supra note 103, p. 17
[220] Supra note 30, p. 769
[221] Supra note 202, p. 341

which underlines backward-looking mechanisms to seek truth and justice; complementary to this, the second strand is purely based on the notion of the market. As a result, liberal peace cannot satisfy citizens' needs because it depends on the creation of institutions lacking a serious engagement with the uniqueness of the contexts. Similarly, top-down, state-based, processes attempt at dealing with the past but wronged populations are usually excluded by elites managing the transitional context and claiming rights on behalf of victims.[222] These limitations of transitional justice are considered with special reference to the very inception of the field; however, other scholars argue that the chief problems of the discipline are represented by current neglected aspects of the human rights project.

Because transitional justice has been prompted by the human rights movement, the normative deficits pertaining to the project are shared by its relative subset.[223] Mutua has argued that it is difficult to assess the effectiveness of transitional justice mechanisms, with empirical evidence being inclusive at best and experiences revealing high chances of collapse;[224] thus, this has led to considerations regarding the effectiveness of the field. Ultimately, the scholar has found that the main conceptual defects are part of a sort of dogmatic universality that affects understandings of transitional justice and prevents professionals from challenging the true pitfalls.[225]

Therefore, Mutua explores three main normative drawbacks of the human rights project in order to clarify transitional justice's challenges. The first challenge, as already mentioned, is the lack of true universality; Western liberal tradition had dominated the human rights corpus and the absence of a multicultural perspective must be addressed. The second normative objection indicates a disregard towards economic, social and cultural rights, with the subsequent codification of customised inclusivity in order to focus more on civil and political rights. Finally, the third point of contention is represented by the concept of the individual: namely, the human rights corpus is accused

[222] Ibid.
[223] Mutua, Makau. 2015. "What Is the Future of Transitional Justice?" International Journal of Transitional Justice 9 (1), p. 3
[224] Ibid., p. 2
[225] Ibid., p. 5

of putting the individual right at the centre, while ignoring the crucial role of communitarian dimensions and social bonds.[226]

Along these lines, Grover denounces a hierarchy of interests emerging from the transitional justice field and states that some injustices run the risk of being marginalised. Large-scale abuses have been confronted in an incomplete manner because those who dealt with the shift from an authoritarian regime to a democracy have left out important aspects belonging to transitional issues. First of all, there is one important instance where no culprit can be processed; namely, systemic or structural injustices point at rooted discrimination of certain segments of society, laying a pattern of further social exclusion and violence. The second category of injustice involves the socioeconomic order to the extent that transitional justice mechanism cannot effectively remedy due to lack of time and resources; indeed, this realm should be properly addressed through wide-reaching national policies for social and economic reform.[227]

Grover's systematisation of marginalised injustices follows with the analysis of ordinary injustices, such as corruption and other crimes linked to economy, that might be erroneously omitted; arguably, this element is conductive of possible exploitation of resources that could be channelled towards post-conflict development.[228] Finally, the fourth type of injustice is connected to transitional injustices addressed through ordinary legislation or politics; in this case, the fundamental requirement for contrasting deceptive uses of the law is to regulate properly public sector goods like education, media, elections and security.[229] While investigating them separately, these categories of injustices are often overlapping and indicate systemic symptoms that cannot be faced only in the short term.

Grover's analysis of biases in the content of transitional justice is instrumental for his main critique towards the United Nations. Denouncing its non-neutrality in defining transitional justice's priorities and aims, the scholar points out that the main result is:

> «Prioritising individual culpability over systemic discrimination, civil and political rights over economic and social rights, crimes under international law over ordinary

[226] Ibid., p. 3-4
[227] Supra note 57, pp. 383-385
[228] Ibid., p. 385
[229] Ibid.

> crimes, law over politics and exceptional short-term justice over ordinary long-term justice to address large-scale past abuses».[230]

Indeed, voices critiquing organisations such as the UN and its managerial approach have recently been louder than the past. In the milieu of transitional justice, Rosemary Nagy observes that the idea of trying individuals under international law has come to monopolise the construction of understandings of transitional justice at the international level[231]; this phenomenon arises when the international community tends to impose an application of justice that is depoliticised and decontextualized. Technocratic solutions can dangerously lead to narrow interpretations of the field, whereas "one-size-fits-all" solutions must be strongly discouraged in favour of new practical reflections.

The increasing presence of experts, lawyers and NGOs activists has led some observes to argue that the field is progressively being reconceptualised in professional terms; in this sense, the model of transitional justice composed by a multiplicity of stakeholders has become an instrument to expand an international job market.[232] The international promotion of human rights has been professionalised and re-casted as a component under the sphere of technocracy. Yet, is the talent deployed by various organisations capable of arousing the interest of varied localities and implementing a true best practice?

The realm of practicality seems to indicate contrasting results. In this regard, Nickson & Neikirk argue that one drawback resulting from the implementation of transitional justice measures has been the so-called expectation gap, intended as «the space between what it is hoped transitional justice will achieve and what transitional justice most frequently can deliver»;[233] specifically, hopes regarding the scope of justice, the answers provided and forward-looking perspectives are put at issue vis-à-vis the actual contributions of transitional justice mechanisms. First of all, in the wake of mass violence, some customary expectations concerning justice both as a means and goal will not be satisfied;[234] in a similar vein, the goal of truth-telling might be contested in specific

[230] Ibid., p. 383
[231] Nagy, pp. 275-276
[232] Supra note 72, p. 245
[233] Nickson, Ray, and Alice Neikirk. 2019. MANAGING TRANSITIONAL JUSTICE: Expectations of International Criminal Trials. S.L.: Palgrave Macmillan, p. 5
[234] De Greiff c.d. supra note 103, p. 5

contexts.[235] When these goals are coupled together, the delivery of solid results can be summed up with McEvoy's contribution to the extent that:

> «The 'overselling' of the capacity of major legal institutions to deliver forgiveness, reconciliation or other features associated with post-conflict nation-building may well encourage unrealisable public expectations and ultimately an unfair assessment that such institutions have 'failed'».[236]

Other scholars have confronted the issue of expectations with respect to institutions and identified it as one of the most problematic in the contemporary transitional justice field.[237] Adding to the expectation gap, current literature is engrossed with transitional justice institutions and their related structural problems, often underlining politicisation, insufficient resources and impunity for wealthy countries.[238] Taking a further step, critiques regarding the ramifications of transitional justice institutions with respect to local accountability conclude that the role of greater powers' interventions is removed and replaced with the sole focus on local responsibility.[239]

Therefore, it is safe to assess that the new generation of approaches to transitional justice has been capable of overcoming dilemmas from the early discussions about the field while responding to emerging ones. The present criticisms of the discipline span from discussions on its very notion and validity within the academia to its more specific normative contents and ultimate praxis. These scholarly reproaches are directly connected to the fact that conflict or post-conflict contexts are replacing post-authoritarian situations as the most common settings for transitional justice application in an ever-increasing trend. In fact, what was viewed as a legal phenomenon[240] responding to extraordinary

[235] Supra note 232, p. 17
[236] McEvoy, Kleran. 2007. "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice." *Journal of Law and Society* 34 (4), p. 426
[237] Bell, Jared. 2015. "Understanding Transitional Justice and Its Two Major Dilemmas." *Journal of Interdisciplinary Conflict Science* 1 (2), p. 11 defines it the "Reality versus Expectations" dilemma, while Aukerman supra note 70, p. 80 refers to «unrealistic expectations».
[238] Supra note 113, p. 102
[239] Supra note 71, p.111
[240] It is useful perhaps to recall Teitel's definition of transitional justice, which is directly connected to "legal responses", supra note 2

events is now becoming a reflection of ordinary times that could affect the integrity of the field.[241]

4. One field or too many fields?

The examination of history, current approaches and main drawbacks relating to transitional justice allows to draw some conclusions and shed light on important dynamics affecting the field's coherence. During the 1980s, the codification of a discipline that was able to explain the phenomenon of transitions from an authoritarian to a democratic regime did not exist in a vacuum; indeed, the project of human rights originating from the Nuremberg experience exercised a strong influence on the minds of the international community and resonated decades later in many of the discussions concerning how to deal with past human rights violations. More precisely, the legacy of the Nuremberg trials was the acknowledgment of individual criminal responsibility of the persons carrying out heinous acts against humanity.[242] This is mirrored in the subsequent legal approach that transitional justice as a field of inquiry and practice adopted and implemented.

The model was developed in a more systematised manner through important seminal works, such as Kritz's volumes, and numerous practical initiatives further cemented the discourse while also broadening its margins; exemplary cases are the creations of *ad hoc* Tribunals for the former Yugoslavia and Rwanda with the concomitant rise of truth-seeking mechanisms. Both of these instances illustrated two trends within the field: international tribunals testified the exaltation of individual responsibility for preserving peace and security whereas truth commissions shaped debates to overcome societal divisions[243]. The tension between traditional justice mechanisms and alternative strategies took form due to the inability of just one instrument to effectively confront complex challenges.

According to Girelli, an overreliance on legalism coupled with the disregard of victims' presence promoted the creation of truth commissions, which soon became popular within the transitional justice toolbox.[244] Yet, current approaches have revealed that the

[241] Bell, Christine, Colm Campbell, and Fionnuala Ní Aoláin. 2007. "Transitional Justice: (Re)Conceptualising the Field." *International Journal of Law in Context* 3 (2), p. 86
[242] Supra note 9, p. 294
[243] Supra note 240, p. 82
[244] Supra note 9, p. 295

discipline presented shortcomings within either its foundational bases or its contextualised application. Most importantly, the underestimation of social, economic and cultural rights along with overlooking structural causes of conflict and violence led to a new evaluation of dilemmas and problems; strong criticisms of the field shaped "steady-state" transitional justice, a phase of the discipline characterised by the normalisation of exceptionality. As a result, concepts have broadened and extended to include a plethora of areas of study and issues.[245]

Finally, the growing acknowledgment of the field by institutions such as the United Nations, with the 2004 report stating a normative commitment to transitional justice and providing a comprehensive definition, explicitly reflects a paradigm shift from pure retribution to reconciliation as complementary means and ends beyond strict accountability. Due to this persistent and consistent broadening of the field «from human rights accountability in democratic transitions» to «transition involving a range of legal regimes and mechanisms, as well as complex set of goals beyond those of accountability and democratisation»,[246] concerns have been brought to the foreground regarding the validity of transitional justice as an organic field.

The state or non-state of the field[247] has been thoroughly explored by Christine Bell, who takes note about the expansive understanding of transitional justice and argues that its fact trajectory from establishment to critique is a common step for every inquiry. This "paradoxical moment of fieldhood" reflects the fact that transitional justice is confronting many conceptions and contexts, expressing a true coming of age;[248] indeed, the field is definitely engaged in a larger array of inquiries regarding, for instance, the role of law and its implications.[249] Thus, issues and agendas are reframed under new perspectives and settings, where the common denominator is interdisciplinarity.[250]

[245] Supra note 236, p. 10
[246] Ibid., p. 9
[247] Bell (see supra note 236 pp. 6-7) intends field as «a sphere of knowledge, interest and activity, held together by distinctive claims of legitimacy», which is not interchangeable with the word discipline, intended as «a body of knowledge with its own background of education, training, procedures, methods and content areas».
[248] Ibid., p. 13
[249] Supra note 240, p. 87
[250] Supra note 236, p. 17

However, interdisciplinarity might show an important normative bias. Bell argues that transitional justice cannot be properly defined as a field, but more as:

> «A cloak that at once seeks to cover and to rationalise a diverse set of practices with quite different justice and political implications, then assertions of interdisciplinarity are revealed to be part of a project of labelling transitional justice as a distinctive field. Transitional justice is legitimated as a field through the assertion that legal discourse must be more open to other disciplinary insights (…) and through arguments that law may not be the primary discipline in the field at all».[251]

Thus, Bell suggests that contemporary transitional justice broadening concepts and purposes might ultimately not constitute a field at all, due to the different legitimacies and practices that it now incorporates without an actual coherent "whole". [252]

However, it is not possible to deny that increased pragmatism and politicization had influenced law and the role of legislation within transitional justice. Moreover, every new local case has the potential to outline new developments and requires different point of view coming from other subjects. Accordingly, the different *foci* of research that characterise modern-day transitional justice should be considered as a discipline and an approach at the same time; by leaving its retributive notion as the sole prerogative, this "field" does not currently present a single theory that encapsulates its nuances because, more than interdisciplinarity, the negotiability applicable to disparate contexts represents its essence.[253] In other words, transitional justice can be considered «a principled application of justice in distinct circumstances».[254]

The differences relating to the distinct objectives, experiences, interests and values that constitute this heterogeneous field should be considered as an important opportunity for three reasons: firstly, following the field's traditional inception, they open the possibility for retribution, rebuilding and redress; secondly, they lay the groundwork for consistent change within a society through the redesign of structures and institutions; finally, they are not exclusively backward looking, but reveal important chances to prevent further

[251] Ibid., p. 19
[252] Ibid., p. 24
[253] Supra note 1, p. 4
[254] De Greiff c.d.supra note 103, p. 17

conflicts.[255] Additionally, other formal elements attest that transitional justice should not be considered a field void of coherence that can only be explained through other practices.

By the early 2000s, transitional justice had journals dedicated such as the International Journal on Transitional Justice, which launched the first issue in 2007, and its growing bibliography of almost 2.500 academic publications[256] keeps on providing various insights on new situations and dilemmas. The transitions' paradigm gained additional momentum through various conferences, institutes for research and even international non-governmental organisations; the International Center for Transitional Justice was instituted in 2001 to «explore strategies for helping societies focus on the rights of victims in dealing with legacies of massive human rights abuses and pursuing the search for sustainable peace».[257]

For the sake of completeness, the definition of the field provided by the International Center for Transitional Justice will also be quoted in order to highlight that transitional justice is not a monolithic field, but it is constantly evolving and adapting to new realities. Correspondingly,

> «Transitional Justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades».[258]

Born as inherently "political" and rooted in accountability and redress for victims, the concept of transitional justice will continue to change and evolve as the needs of global society for achieving justice develop along future global challenges and conflicts. The evolution of the discipline has brought to the coexistence of a dual soul comprising the past and the future together. Having analysed the state of the art, the next chapter will

[255] Supra note 9, p. 300
[256] The Transitional Justice Bibliography, edited by Andrew G. Reiter, includes 2.497 entries and has not been updated since 2010
[257] International Center for Transitional Justice. "When was ICTJ created?". Available at: https://www.ictj.org/about
[258] International Center for Transitional Justice Factsheet. "What is transitional justice?". Available at: https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf

investigate more in detail the chief mechanisms that comprise the field to get a more comprehensive picture of the field.

CHAPTER II

Mechanisms of transitional justice for gross violations of human rights

This chapter can be considered as an essential complementary part to the first one because it explores more in-depth the mechanisms broadly discussed and evaluated by the transitional justice community. Therefore, the first section will carry out an overview of the chief transitional justice measures, with a focus on the most employed in Latin America. Having assessed the general and international measures, the second section turns to the domestic realm and, in particular, to the shift in constitutionalism which had significant consequences for transitional countries. The chapter also illustrates another dimension of transitional justice, namely the regional efforts in promoting justice and truth; thus, the inter-American system for the protection of human rights is thoroughly analysed. Finally, the last section will forward tentative conclusions, while leaving open some dilemmas and questions.

1. Dealing with a legacy of violence: from narrow to broad undertakings

As transitional justice expanded, one of its priorities – and constitutive feature – remains unvaried; namely, the dynamic under which successor regimes seek effective and factual responses to human rights violations of their predecessors. The debates have been plenty and were partly described in the first chapter; in this section, the main theoretical positions will be examined in practical terms with an assessment of the mechanisms that were actually implemented in order to manage stakeholders' competing demands. Since the field of transitional justice has come to encompass a plethora of measures, this analysis will move along an accountability spectrum to provide a prospective order and underline the constant tension between pragmatism and principle. Moreover, given the focus of this research project, only the most commonly operational actions undertaken in Latin America will be reviewed. Thus, advantages and disadvantages of each formal device will be discussed and, finally, empirical research will be invoked to assert their performance.

1.1 Trials: a maximalist justice

Following Olsen et al., the most traditional policy adopted to reckon with heinous crimes of outgoing regimes has been criminal proceeding.[1] Indeed, the core understanding of accountability is directly connected to criminal accountability for past abuses perpetrated by former state actors or other agents; in spite of further conceptions that added to this notion, actions undertaken by courts to hold individuals liable and punish them are still considered the most effective remedy to victims. Even the most sceptical about a retributive approach cannot avoid the logic that certain atrocities deserve a due process with subsequent prosecution and conviction.[2] Therefore, trials are still widely held to be essential for establishing the rule of law and building a democratic order.

Without delving into details, individual liability is inflected by three dimensions which can operate simultaneously; namely, an affirmative obligation to prosecute those responsible for past violations of human rights can be carried out by means of state trials, third country trials and international trials. In particular, international treaties and legal theory have demonstrated repeatedly that crimes against the 'law of mankind' must automatically adopt respective relevant measures in defence of humanity. For instance, the International Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment obliges states to take effective actions to prevent acts of torture and requires them to either prosecute or extradite alleged criminals[3] following the principle *aut dedere aut judicare* in order to prevent torturers from escaping their responsibilities elsewhere.[4]

Indeed, this type of extraordinary jurisdiction gives a nation the legitimacy to prosecute a person even if the crime was committed outside its boundaries and the person does not present a specific bond with the states; in this sense, the only criterion that matters is the physical presence of the wrongdoer within the nation. Moreover, the country also has the authority to apply its own law to its proceedings for international crimes subject to

[1] Olsen, Tricia D., Leigh A. Payne, and Andrew G. Reiter. 2010. "The Justice Balance: When Transitional Justice Improves Human Rights and Democracy." *Human Rights* Quarterly 32 (4), p. 983
[2] Nino, Carlos Santiago. 1989. "Transition to Democracy, Corporatism and Constitutional Reform in Latin America." *University of Miami Law* Review 44 (129). p. 136
[3] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol 1465, p.85, art. 5 and art. 7
[4] Roht-Arriaza, Naomi. 1990. "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law." *California Law Review* 78 (2), pp. 463-464

universal jurisdiction because offenders in this case are recognised as universal enemies.[5] Thus, notwithstanding their site of origin, criminal prosecutions possess certain characteristics that induce their application and explains their popularity among scholars and practitioners.

The process of accountability can serve several purposes. The first and most predictable one is that prosecution delivers a means of punishing past perpetrators for their criminal conduct;[6] moreover, criminal courts represent a public forum where specific findings are confirmed and diminish the room for political speculation,[7] simultaneously accomplishing the education of citizenry about the extent of prior abuses.[8] Hence, indictments are instrumental to establish that atrocities were committed and someone will be held responsible: this a powerful formulation that marks a consistent strengthening of the rule of law, since it signals that the law is above individuals' own volitions and, in this case, violations. If the proceedings take place within a domestic court, prosecution also informs the affected society that there is resolute determination to reconstruct the judiciary system and create a *caesura* with respect to credibility, trust and legitimacy vis-à-vis the previous government.[9]

The maximalist approach promoting a perpetrator-focused retributive justice can offer for the victims and their survivors a sense of justice for what they had to endure[10] ; some argue that court proceedings might even identify a timid base for the compensation of past offenses.[11] Overall, analysts argue that trials are essential in contexts where transitional justice applies due to the fact that their designation satisfies two main narratives: restoration of dignity and deterrence, intertwined by the unfortunate relationship between abusers and abused. The chief consequences will be reflected in something more significant than the singular criminal proceeding per se.

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[5] Kobrick, Eric S. 1987. "The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes." *Columbia Law Review* 87 (7), pp. 1519-1520
[6] Landsman, Stephan. 1996. "Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions." *Law and Contemporary Problems* 59 (4), p.84
[7] Kritz, Neil J. 1996. "Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights." *Law and Contemporary Problems* 59 (4), p.128; cfr. infra note 11, p. 11
[8] Supra note 6, p. 83
[9] Supra note 7, p. 132
[10] Siegel, Richard L. 1998. "Transitional Justice: A Decade of Debate and Experience. (Review)." *Human Rights Quarterly* 20 (2), p. 439
[11] Supra note 6, p.83

Accountability intended as the functions performed by a court in order to punish alleged offenders annuls the supremacy that perpetrators had appreciated until the collapse of the repressive regime: this indicates that rulings bring about not only a correspondent punishment but also an inhibitive pull. Indeed, deterrence of violations is quoted as one of the main benefits that trials accomplish through their judgments in a twofold manner; firstly, potential perpetrators may be affected by the communicative function of punishment to the extent that they would fear isolation from society as a result of strong public opinion at the international and national level after the criminal sentences.[12] Secondly, deterrence means that society at large can strengthen its capacity to prevent that future violations will repeat again, thus dissuading likely wrongdoers.[13]

The involvement of society shows in a more significant way when trials establish the foundations to restore the dignity of victims after systematic abuse[14]; certainly, the sense of vulnerability can be bridged if the collective conscience gathers that «under no circumstances may a human being be treated as a base object, a means to a goal (…)»[15] since no segment of society is superior to the law. Population can feel safe again in a country which is attempting through trials to instil an enduring tradition for the respect of human rights and adherence to legislation, which are ultimately the foundations for the development and legitimisation of democratic institutions.[16] Consequently, societal wounds might be mended with trials' contribution to the identification of individual culpable parties and acknowledgment of their misdeeds at the expense of others, a phenomenon that breaks cycles of resentment and violence and helps reintroducing stigmatised categories.[17] Hence, trials can be drivers for true change and sponsor democracy.

Nevertheless, the mechanism of trials might prove to be more difficult to implement under certain conditions. Undeniably, many commentators have highlighted that criminal proceedings might not deliver the expected results in practical terms due to the

[12] Malamud-Goti, Jaime. 1990. "Transitional Governments in the Breach: Why Punish State Criminals?" *Human Rights Quarterly* 12 (1), p. 13; cfr. Supra note 6, p. 84
[13] Supra note 6, p. 84
[14] Supra note 12, p. 13
[15] Supra note 2, p. 136
[16] Supra note 6, p. 83; cfr. Supra note 10, p. 439
[17] Supra note 7, p. 128 and 141; cfr. Malamud-Goti (supra note 12, p. 12) states that «trials also provide an opportunity for the military institution to adapt itself to the democratic system»

extensiveness of abuses and violations covering the whole system. This poses several obstacles, among which the most prominent are associated with the collection of relevant information because it often leaves room for negotiation and, possibly, immunities of some sort to defendants in a tit-for-tat arrangement;[18] yet, trading prosecution for disclosure is not the only complication that incoming regimes face. Additionally, the problem of who and how many offenders should be put on trial has the risk of paralysing the entire mechanism. Although the ranks of violence start from minimal offences and rise until the worst ones, they all include guilty persons to an extent; accordingly, leaders who ordered such heinous crimes and committers who carried them out should be tried, while observers have noted that negligible crimes should be ignored to focus on the worst ones and respond to them proportionally.[19] In fact, tribunals, whether international or national, have limited capacity compared to the number of perpetrators and, beyond a certain amount of prosecutions, elites under scrutiny might feel that their entire institution is being harassed.[20]

Finally, drawbacks seem to aggravate if trials are carried out in domestic courts. Having already mentioned the advantages of prosecutorial efforts when national adjudicatory systems are used, the more common situation is that fledgling democracies cannot sustain fair and transparent trials.[21] Indeed, local courts can be a forum to address abuse, yet their capability to provide prompt and effective resolutions is often obstructed due to their structural weaknesses, intended as having biases or being corrupted;[22] a flawed judiciary may spoil prosecutions and ruin the victims' chances at seeking justice. This entails that «the judicial mechanism itself needs to be fixed, and reliance on the tainted institution will serve only to compromise the integrity of the new regime».[23] Moreover, precarious political balance might also play a part in avoiding trials, especially if the majority holds that they are not necessary through an e.g. plebiscite or election of representatives supporting this view.[24]

[18] Supra note 6, p. 86
[19] Supra note 7, p. 134
[20] Supra note 12, p. 14
[21] Supra note 7, p. 136
[22] Supra note 6, p. 84
[23] Ibid., p. 85
[24] Ibid., p. 86

Each mechanism has its own faults and merits; had trials demonstrated excellent results, alternative mechanisms would have not arisen. Trials have fallacies, not only with respect to ideological approaches but in practice, demonstrating that each political context matters. In fact, in spite of universal jurisdiction and international law attesting for criminal accountability to be always prosecuted, many countries have resorted to other methods to ensure that democracy and human rights goals would be attained. At the opposite end of the spectrum, amnesties emerged to question the effectiveness of trials.

1.2 Amnesties: a minimalist justice

It is argued that a minimalist approach to accountability, exemplified by amnesties, has more awareness about the transitional aspect of justice and prioritises political bargains to avoid the return of authoritarian realities;[25] this notion stems from the acknowledgment that anti-democratic forces are still influential and might threaten the fragile equilibrium.[26] Therefore, countries have relied on another mechanism from the transitional justice that could curb political spoilers and strengthen the construction and consolidation of democracy. Therefore, amnesties became a frequent tool to assure a modicum of protection to broken societies, even though they have been viewed with suspicion for their implied significance; the transitional justice community has long debated as to whether amnesties are just a byword for impunity or is they can actually guarantee accountability.

Arguably, due to their connection with national circumstances, amnesties' nature has been discussed in terms of reconciliation with a focus on political constraints; yet, amnesties are increasingly framed now as legal tools.[27] This trend owes much to the increasing concerns raised by actors in the international scenario about accountability, which is directly associated with the respect of human rights on part of the state and individuals alike through universal jurisdiction. Indeed, globalisation functions as a sounding board for local events and many issues are brought to the foreground; as a consequence, states are expected to provide measures to redress grievances and prevent the resurgence of violent conflict. Finally, legal arguments involving amnesties are

[25] Supra note 1, p. 985
[26] Ibid.
[27] Giada Girelli. 2017. *Understanding Transitional Justice: A Struggle for Peace, Reconciliation, and Rebuilding*. Cham, Switzerland: Palgrave Macmillan., p. 89

caused by the predominance of the international community in framing and addressing new categories of crimes which limited the use of this inherently national instrument.[28]

Since amnesties cover violations of core crimes in transitional contexts, these mechanisms currently undergo close scrutiny by the international community. In light of what has been noted until now, it is necessary to sketch an appropriate definition of amnesties before examining their ramifications within the field of transitional justice; the word amnesty derives from the ancient Greek word "amnestia", which means "obliviousness" rather than forgiveness and, in this vein, this measure has been considered as a way for states to eradicate certain crimes from the regime slate.[29] An operative definition that can cover the variety of cases where amnesties apply is provided by Freeman, who claims that:

> «Amnesty is an extraordinary legal measure whose primary function is to remove the prospects and consequences of criminal liability for designated individuals or classes of persons in respect of designated types irrespective of whether the persons concerned have been tried for such offenses in a court of law».[30]

From this definition, it is clear that amnesties do not follow a uniform model and their categorisation is complex. However, some considerations must be made in order to comprehend where they stand today in terms of accountability versus impunity. First of all, they are distinct from other institutional forms of leniency since measures like pardons are usually conferred to specific individuals without affecting the criminal accountability for the same or similar acts perpetrated by others or even the same person; instead, amnesties denote an act of forgiveness – or forgetfulness – that a government extends to a category of persons who satisfy the act's terms, which eliminates the criminality of past actions carried out, and declares that they shall not be deemed punishable.[31] It must be underlined however that "amnesty" and "pardon" terms are sometimes used interchangeably.[32]

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[28] Ibid., pp.89-91
[29] Orentlicher, Diane F. 1991. "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime." *The Yale Law Journal* 100 (8), p. 2543
[30] Freeman, Mark. 2011. *Necessary Evils: Amnesties and the Search for Justice*. Cambridge: Cambridge Univ Press, p.13
[31] Black's Law Dictionary available at https://thelawdictionary.org/pardon/
[32] Huyse, Luc. 1995. "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past." *Law & Social Inquiry* 20 (01), p. 52

On a similar vein, other scholars have emphasised that the process of amnesties is an exercise of the sovereign state that accepts the effective occurrence of a crime but does not allowing for the possibility of prosecution.[33] The legal effects that this condition creates are expressed through a dual notion of time: in fact, according to the UN High Commissioner for Human Rights, amnesties impact

> (a) Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or
>
> (b) Retroactively nullifying legal liability previously established.[34]

In short, amnesties ensure participants an immunity from *ex post facto* criminal prosecution and/or civil liability for past crimes.[35] More specifically, this condition has triggered many opposing views on this mechanism's efficacy and authority based on a variety of beliefs.

Those who hold that amnesties are not effective ground their arguments on the practical results stemming from the application of this legal measure. The first concern involves the possibility of amnesties to foster a "culture of impunity" and deny the demands of those who had to endure severe wrongdoings while eroding the rule of law enshrined both at the national and international levels. In sum, claims against amnesties can be divided into two main pillars: amnesties as denials of justice and amnesties as violations of victim's rights.[36] First, contrary to the chief purpose of justice, amnesties are blamed for not letting states carry out their primary duty to prosecute offenders in the name of accountability,[37] a pivotal notion codified also by international norms for the protection of human rights with all the subsequent implications and/or benefits as already stated in the dedicated section dedicated to trials.

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[33] McEvoy, Kieran, and Louise Mallinder. 2012. "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy." *Journal of Law and Society* 39 (3), p. 413
[34] United Nations, *Rule of Law Tools for Post-Conflict States: Amnesties*, 2009, HR/PUB/09/1
[35] Skaar, Elin, Jemima García-Godos, and Cath Collins. 2017. *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability*. London: Routledge, p.31
[36] Supranote 27, p. 93
[37] Pensky, Max. 2008. "Amnesty on Trial: Impunity, Accountability, and the Norms of International Law." *Ethics & Global Politics* 1 (1–2), p.21

Another strand of criticism stresses how the motivations put forward to defend and explain the implementation of amnesties cannot support the concrete factual reality that offenders are being shielded from prosecution for the sake of stability. In this regard, Bassiouni paints a harsh picture stating that «the practice of impunity has become the political price paid to secure and end to the violence of ongoing conflicts as a means to ensure tyrannical regime changes»[38]. Related to this condition, amnesties reprise their ancient roots and bring about an amnesia directly affecting the victims; thus, victims' rights become the currency in this political trade-off between a still influential outgoing regime and a fragile democracy attempting to grow.[39] In this sense, the suffering that wronged parties had to endure cannot be acknowledged and this might propel further societal divisions and conflict.

However, critical voices were quieted by others who have favourably campaigned for the employment of amnesties following the principle of pragmatism. Although amnesties may be an undesirable choice among the transitional justice mechanisms, their contextual understanding is fundamental to cease conflict and start swift resolutions to the point that the colloquialism "necessary evil" comes to mind. Indeed, amnesties can be instrumental to prevent further harms especially when old regime members keep their socio-political power; in essence, amnesties appear as crucial peace negotiations devices.[40]Therefore, can amnesties be considered a synonym of impunity? Or do they actually foster accountability?

Perhaps the reason why amnesties provoke contrasting responses within scholarship and practice is inherent to their nature. Because the definition of amnesty provided comprehends many nuances to embrace as many examples as possible, a more detailed categorisation to shed light on the various dynamics and implications for transitional justice is required. According to Ronald Slye, amnesties can be grouped into four chief categories: amnesic amnesties; compromise amnesties; corrective amnesties and accountable amnesties; the criteria to develop this model consist of three main characteristics: the first one is substantive content meant as acts covered, eligibility of the

[38] Bassiouni, M. Cherif. 1996. "Searching for Peace and Achieving Justice: The Need for Accountability." *Law and Contemporary Problems* 59 (4), pp.11-12
[39] Ibid., p. 12
[40] Supra note 27, pp. 94-95

subjects, procedural requirements, potential relief for victims and punishment for perpetrators; secondly, there are creation and implementation of amnesties which focus on context, timing, eventual combination with other programs, democratic compliance and so on; following the processes of formation and application, purpose of the amnesty was taken into account in terms as to whether this mechanism aimed at facilitating the transition, reconstructing the truth, end hostilities or others.[41]

The first category of amnesties identified by the observers are amnesic amnesties, on the end of a possible continuum leading to oblivion. In fact, these amnesties are designed to ease the transition process but do not aim at reconciliation, meaning that victims will not have access to information and no attempts at inquiry will be furthered; this typology is often approved by those who have terribly breached human rights with the purpose of concealing a whole category under a blanket of anonymity.[42]The main consequences are suppression of the truth in exchange of stability.[43] A more moderate category of amnesties regards the so-called compromise amnesties, which promote a small degree of acknowledgment only at the institutional level; moreover, along with many procedural limitations, they can only be promulgated simultaneously to other mechanisms and do not satisfy sufficiently victims although revelation is one of the objectives.[44]

The remaining two categories, more directed towards accountability, are corrective amnesties and accountable amnesties. The former are a peculiar category of amnesties since they apply either with the intent of overturning an injustice usually after a significant change in the political and social scenarios; this is accomplished through the reversal of an injustice created by an illegitimate law, yet they fail to remove the stigma attached to defendants accused of for the remedied abuse.[45]The latter are the only acceptable group of this kind for the author, who contends that accountable amnesties comply to six essential standards: they are created in a democratic setting, with the participation of the population; perpetrators of core crimes against human rights cannot be included in the provision; the measure must also "provide some form of public procedure or

[41] Slye, Ronald. 2002. "The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law." *Virginia Journal of International Law* 43 (173), p. 240
[42] Many scholars refer to amnesties with these characteristics as blanket amnesties (see: supra note 35)
[43] Supra note 41, pp. 240-241
[44] Ibid., pp. 241-243
[45] Ibid., pp. 243-244

accountability on its recipients"; amnesties should hold the possibility to be challenged by the public; the victims shall have some form of relief, preferably in the form of reparations; finally, accountable amnesties facilitate not only the transitional process, but construct the foundations of a democratic regime characterized by a comprehensive project to address structural divisions and injustices.[46]

This conventional division into categories reveals that many criticisms originate from the implementation of amnesic amnesties. Early literature describes amnesty as impunity and viceversa due to the fact that blanket amnesties were the most adopted typology in the 1970s, when exiting military authoritarianisms in Latin America designed this valuable method to protect perpetrators of atrocities and exclude them from domestic trials and universal jurisdiction proceedings.[47]While amnesty is obviously considered lawful under domestic rules,[48] it must be noted indeed that an attentive review of international treaties does not lead to an explicit obligation whereby states cannot adopt amnesty laws.[49]

Nowadays, amnesties are described as promoters of justice and catalyst to transitional settings. The upsurge of an international dimension that could condemn amnesties has contributed to diminish the scope of amnesty provisions, in particular when blanket amnesties are in place.[50] Concomitant to this, amnesties still enjoy ample deployment and are still adopted more often than other mechanisms of transitional justice;[51] this apparent paradox can be explained by recent developments, where states have started to draft amnesties in compliance with international commitments[52] and this shift in their designation has contributed to their resilience along with their prominence. Having revisited their original modalities, many amnesties have either been removed or mitigated

[46] Ibid., pp. 245-246
[47] Supra note 33, p. 41; cfr. Supra note 27, p. 101 but as Slyde (supra note 41, p.181) claims "human rights advocates generally oppose the use of amnesties for gross violations of human rights"
[48] Mallinder, L. 2007. "Can Amnesties and International Justice Be Reconciled?" *International Journal of Transitional Justice* 1 (2), p. 210
[49] Ibid., p. 214
[50] Laplante, Lisa. 2009. "Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes." *Virginia Journal of International Law* 49 (4), p. 941
[51] Olsen, Tricia D, Leigh A Payne, and Andrew G Reiter. 2010b. "Transitional Justice in the World, 1970-2007: Insights from a New Dataset." *Journal of Peace Research* 47 (6), p. 807 this empirical research of 91 transitions to democracy in 74 countries has coded the mechanisms implemented during the transitional process and found that amnesties are, indeed, the most frequently used form of justice.
[52] Supra note 50, p. 942

so as to let observers claim that they can provide accountability when associated with a broader set of measures; in particular, McEvoy & Mallinder state that

> «Where an amnesty is linked to truth-recovery mechanisms (...) the traditional notion that the crime has been obviated is removed, and such crimes may be investigated, acknowledged, recorded, and discussed in public discourse».

Despite highlighting the limitations imposed on national politics by international law, tailored amnesties carry the potential to surpass this tension and contribute in securing victims' rights if combined with other transitional justice mechanisms.[53] Hence, international courts should accept amnesties that share the ultimate aim of any accountable amnesty: promote peace and reconciliation, with previous democratic approval, while accommodating the sometimes problematic political and practical dimensions.[54]

1.3 Truth Commissions: a moderate justice

The two approaches to justice, symbolized by trials and amnesties respectively, examined so far share the belief that truth commissions are a second-best alternative to deal with past abuses. On the contrary, a moderate approach finds in truth commissions the most compelling device for advancing a rights-based democracy and satisfying both the promotion of accountability and awareness of political contingencies. [55] This stance seems to be proved by the fact that since the 1980s[56] truth commissions have become «a staple of postconflict peacebuilding efforts»[57] and evolved within the transitional justice discourse and practice.

Standing at the crossroad between claims for liability and pragmatic challenges, truth commissions are generally understood to be bodies whose aim is to execute official investigations into grave violations committed in a particular country, which can encompass atrocities led by the military or other governmental agents or by armed

[53] Supra note 48, p. 210
[54] Ibid., p. 227
[55] Supra note 1, p. 987
[56] The first popular truth commission was set up in 1983 in Argentina: the CONADEP, National Commission on the disappeared; the term "truth commission" first emerged with the Chilean Truth Commission
[57] Brahm, Eric. 2007. "Uncovering the Truth: Examining Truth Commission Success and Impact." *International Studies Perspectives* 8 (1), p. 16

opposition forces.[58] Following Hayner, a relevant expert who has provided a classical definition for this mechanism of transitional justice, a truth commission must present certain characteristics:

> «A truth commission (1) is focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorised or empowered by the state under review.»[59]

It must be noted that this operational definition only includes state-sponsored initiatives, while non-governmental initiatives have also been a popular option in countries where the newfound government could not provide satisfying accounts.[60] Nevertheless, an official mandate, usually sponsored by the executive branch, is instrumental for acquiring more information, ensuring protection to handle sensitive issues and impacting the social strata more with the final report;[61] in addition, the setup of an official body largely influences its legitimacy and perception nationally and internationally.[62]

In times of transition, truth commissions are useful because they underscore a break with the previous oppressive regime in various ways. The key term that genuinely depicts this transitional justice measure is in fact "truth", which might be interpreted as a fundamental right within the «right to seek, receive and impart information» of the Universal Declaration of Human Rights.[63] The chief standard to evaluate a truth commission's work is its ability not only to establish the truth about the violated rights and forge a detailed account, but to recognise overall patterns of abuse and embrace a meaningful acknowledgement. Indeed, commissions can investigate and examine with ample breadth wider contexts where violence occurred, normally entrenched in the institutional fabric of government and security forces or within society at large.[64] Therefore, it is worthwhile

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[58] Hayner, Priscilla B. 1994. "Fifteen Truth Commissions--1974 to 1994: A Comparative Study." *Human Rights Quarterly* 16 (4), p. 600

[59] Hayner, Priscilla B. 2002. *Unspeakable Truth : Confronting State Terror and Atrocities*. New York: Routledge, pp. 11-12

[60] One prominent example is the *Brasil: Nunca Mais* report supported by the archbishop of Sao Paulo and the world Council of Churches that analysed the military regime's torture practices; on unofficial inquiries see: supra note 59, pp.18-17

[61] Supra note 58, p. 604

[62] Supra note 7, p. 141

[63] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), art. 19

[64] Supra note 7, p. 141

underlining that the value added of these official inquiries is in their ability to acknowledge the truth.[65]

This acknowledgement reflects that the main recipients of truth commissions are the victims of these horrific affairs. The investigations usually allow for a «cathartic public airing of the evil and pain that has been inflicted»,[66] ensuring a public platform for survivors and relatives to tell their personal stories and honour their feelings.[67] When the testimony becomes part of an official record, society publicly addresses the repressive dynamics and creates the official history of a troubled nation.[68] As a consequence, scholars argue that truth commissions are essential to foster national consensus and closure alongside the achievement of long-term results in terms of human rights practices, reforms and development;[69] since truth commissions' mandate is temporary, final recommendations to governments are made vis-à-vis lasting societal, corporate and institutional reconstruction.

Also, recommendations advanced by a truth commission are meaningful to help counter impunity and advance criminal accountability. These moderate justice mechanisms support the strengthening of a legal culture within the transitional country because their prompt employment leads to the precious collection of documentation and evidence in a relative short period of time, carrying the potential to be used in subsequent proceedings;[70] in this way, truth is sought in a conciliatory way without having to deny retributive instances.[71] This element is further attested by the conception that a commission's recommendation can bring about transformation within the judiciary and therefore strengthen the respective instruments for criminal accountability while energising deterrence from future abuses.[72] Lastly, truth commissions, coupled with other transitional justice measures, not only establish the underpinnings for informed prosecutions and institutional reform but may contribute in promoting the cause for

[65] Crocker, David. 2000. "TRUTH COMMISSIONS, TRANSITIONAL JUSTICE, AND CIVIL SOCIETY." Princeton University Press, p. 4; cfr. Supra note 59, p. 13
[66] Supra note 7, p. 141
[67] Shriver, Donald W. 2001. "Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?" *Journal of Law and Religion* 16 (1), p. 15
[68] Supra note 6, p. 88
[69] Supra note 65, pp. 12-13; cfr. supra note 58, p. 608; cfr. supra note 67, pp. 19-20
[70] Supra note 7, p. 141
[71] Supra note 67, pp. 17-18
[72] Supra note 57, p. 27; cfr. Supra note 65, p. 10

compensations to victims. Hearings, reports and recommendations are all factors potentially instrumental to the address of reparations.[73]

Nevertheless, these desirable features do not always correspond to the reality of certain contexts and truth commissions might not have the decisive impact on society that truth commissions' proponents covet. These mechanisms show various drawbacks that can be caused by several factors, involving both their design and ramifications. First of all, these inquiries are obliged to fulfil their mandate: this means that truth commissions might be limited in the typology of crimes covered and the time frame at their disposal;[74] plus, a mandate can sometimes lack a realistic timing for the commission's adequate performance.[75]Secondly, the commission must have proper funding in order to afford more staff and deal with a greater amount of cases, although this might be impeded by concurring necessities in the subsequent moments of transition.[76] Connected to the number of staff members, it is important to recall that the identity of commissioners is crucial for the legitimacy of the inquiry; usually, truth commissions are comprised of «eminent citizens».[77] In fact, this measure can positively influence accountability depending on the set up and the composition.

Another important dimension for accountability regards who endorses the commission. Since the truth must be accessible to the public,[78] public involvement in the reconstruction of history is deemed crucial for an enduring impact; hence, the process must be as open as possible to instil trust about the government within society.[79] Arguably, truth commissions also vary in how they approach individual and communitarian spheres, with some of them naming names of individual perpetrators and risking to destabilise the social order. Finally, some of them might recur to amnesties bartering immunity for information, which might be frowned upon.[80]

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[73] Waldorf, Lars. 2012. "Anticipating the Past: Transitional Justice and Socio-Economic Wrongs." *Social & Legal Studies* 21 (2), p. 24; cfr. Kritz (Supra note 7, p. 14) states that a truth commission "in some cases, establishes a formal basis for subsequent compensation of victims and/or punishment of perpetrators"
[74] Supra note 57, p. 30
[75] Supra note 7, p. 142
[76] Supra note 57, p. 30; cfr. Supra note 6, p. 89
[77] Supra note 7, p.141
[78] Supra note 6, p. 89 Landsman calls for an "unimpeded access to [the commission's record]"
[79] Supra note 57, p. 31
[80] Supra note 57, pp. 31-32; cfr. Supra note 6, p. 88

With regards to its more practical implications, one of the most agreed upon disadvantages is that truth commissions do not possess any prosecutorial power, which implies their limited capacity in bringing cases to trial[81] and cross-examining witnesses and evidence; additionally, their effects are not legally binding. [82] Apart from the shortcoming of not being able to deliver policy goals related to punishment, some critical voices claim also that truth commissions do not automatically encourage reconciliation because establishing an official narrative about prior atrocious crimes committed by certain segments of society could instil a climate of resentment among agents of abuse and victims; an already fragmented society, it is argued, could exacerbate its own divisions in light of "inconvenient" truths.[83] Likewise, truth commission may also supply to perpetrators «public relations smoke screens» to divert public attention from ongoing injustices.[84]

In conclusion, truth commissions highlight a largely victim-centred approach whereby society as a whole is called to contribute in the collection of information and enjoy the subsequent dissemination of truth about past human rights violations. Indeed, they are argued to be one of the most effective measures to obtain reconciliation to the extent that they can give recommendations to newly established democracies for future reforms. However, opening up the archives of the past and inspect deeply into the violations do not acquire significance nor foster rights-abiding attitudes if the commission is not considered legitimate by the citizenry or if it escapes certain complexities for political convenience.

1.4 Reparations: a socioeconomic justice

The debates regarding transitional justice theories and mechanisms have frequently emphasised that both field and practice must start to account for economic and social rights along with political and civil rights in order to propel an effective reconstruction of society and empower citizens.[85] Accordingly, a socioeconomic focus would point out not

[81] Supra note 58, p. 610
[82] Supra note 65, p. 5
[83] Snyder, Jack, and Leslie Vinjamuri. 2004. "Trials and Errors: Principle and Pragmatism in Strategies of International Justice." *International Security* 28 (3), p. 20
[84] Ibid.
[85] Mutua, Makau. 2015. "What Is the Future of Transitional Justice?" *International Journal of Transitional Justice* 9 (1), p. 7

only the root causes of conflict but would also add to the conception of justice through the listening of victims' demands;[86]for this reason, while other transitional justice mechanisms have addressed socioeconomic wrongs,[87] reparations represent the most victim-centred approach with the greatest potential to bring about a socioeconomic awareness into the transitional justice agenda.

Reparations can be achieved either through judicial or administrative processes.[88] Traditionally, the principal method to obtain reparations for the damages incurred is judicial adjudication, which envisages an individual victim bringing the case to trial. In this scenario, the court's role is to assess whether a crime occurred by gathering evidence, locating the plaintiff and identifying the respective responsibilities; after these procedures are completed, the judicial investigation should calculate the extent of the specific material and non-material harm so as to finally establish a proportionate and sufficient reparation for the victim. The ultimate aim is to compensate the losses sustained for the commitment of the crime.[89]

Similarly, advocates for reparations in transitional contexts claim that material, psychological and social damages committed by violators must be addressed. However, propelled by this underlying assumption and the sheer number of victims, most countries have decided to resort to administrative solutions in the form of programmes engaging with the potential claimants of reparations;[90] indeed, reparations are usually intended as «civil remedies (as opposed to criminal remedies) that are designed to redress harm resulting from an unlawful act that violates the rights of a person»[91] and this definition can encompass the majority of those who have actually suffered from state-sponsored violence. Therefore, reparations have started to gain prominence as a transitional justice

[86] Gready, P., and S. Robins. 2014. "From Transitional to Transformative Justice: A New Agenda for Practice." *International Journal of Transitional Justice* 8 (3), p. 346
[87] For instance, truth commissions through final recommendations highlighting structural difficulties
[88] Supra note 35, p. 32
[89] Correa, Cristi*án. 2011. "Reparation Programs for Mass Violations of Human Rights: Lessons from Experiences in Argentina, Chile and Peru". In Transitional Justice: Handbook for Latin America*. Brasília ; New York: Brazilian Amnesty Commission, Ministry Of Justice, pp. 410-411
[90] Supra note 35, p. 33
[91] Laplante, Lisa J. "The plural justice aims of reparations". 2015. In *Transitional Justice Theories*. London ; New York: Routledge, p. 66

mechanism because they can potentially answer in a direct and unequivocal way to the many victims' priorities and requests.[92]

Before analysing benefits and shortcomings of this fourth mechanism, it is necessary to distinguish reparations into two main categories within administrative programmes: namely, reparations operate along a spectrum from symbolic to material actions. Material reparations refer to any type of reparation relating to credit, funding projects, welfare services, cash transfers and so on to undo or alleviate an offence;[93] symbolic reparations are associated to official apologies, memorials, naming a street after a victim and the measures alike to restore the innocent's dignity.[94] The fundamental belief behind these categories of reparation is that they are not mutually exclusive, and so their concurrent implementation is encouraged.[95]

Thus, in whichever form they might emerge, reparations are compelling instruments due to their prevalent attention on those who had to endure harms and grievances by recognising victims as bearers of rights; in fact, offering them something in the form of reparations acknowledges not only a certain regard towards the wronged parties, but it also contributes in identifying past abuses and state's involvement.[96] This consideration of victims as individuals and members of a community led by a prior oppressive government contributes in fostering socioeconomic values, because their consistent engagement with the successor regime can influence the post-conflict agenda and bring about change in a more meaningful way.[97] Yet, reparations' positive impact on justice has long been overlooked, delayed or avoided by affected countries.[98]

However, reparations are being progressively entrenched within international standards inasmuch as they fall under the scope of state's responsibilities. Thus, the recognition of a right to reparations has consolidated with the turn of the millennium, as remarkably demonstrated by an indicative development in international law: the UN General Assembly's approval of the 'Basic Principles and Guidelines on the Right to a Remedy

[92] Supra note 73, p. 177
[93] Supra note 35, p. 33
[94] Magarell, Lisa. 2007. "Reparations in Theory and Practice." *Reparative Justice Series. International Center for Transitional Justice*, p. 4
[95] Ibid., p. 5
[96] Ibid., p. 2
[97] Ibid.
[98] Supra note 73, p. 177

and Reparation for Survivors of Violations of International Human Rights and Humanitarian Law', which assert that

> «Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law (…)».[99]

The Guidelines provide many measures to secure remedy and reparation and are the embodiment of the expanding reach of reparations vis-à-vis transitional justice mechanisms[100]. However, this instrument presents some drawbacks, especially due to the fact that they attempt to challenge structural socioeconomic inequalities which are pervasive and difficult to eradicate. In fact, estimates about who had received reparations and by how much could create a tension among the collectivity and dictate further divisions in terms of economic policies.[101] Concerning governments, there must be precaution in separating development goals from state-owed reparations; accordingly, «governments in developing countries facing demands for reparations are strongly inclined to argue that development is reparation»,[102] whereas they should not overlap because their purposes are different and reparations are also intended to reckon with the past.

Finally, there are also problems relative to reparations' practical implementation, mainly involving the lack of sufficient funding which is, in fact, one of the first issues discussed when considering reparations as a viable option; much of the reparations' feasibility depends on the constraints that result from competing demands coupled with scarce funds.[103] Moreover, defining the typology of reparation to be applied and gauging the

[99] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, art.9
[100] Ibid., art. 19-23 identified five formal categories of reparations: restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition.
[101] Supra note 73, p. 25
[102] Ibid.
[103] Supra note 73, p. 27; cfr. Supra note 94, p. 13

eligibility criteria of beneficiaries for the sake of fairness and viability are essential elements to present a comprehensive programme the provides tangible results;[104] in fact, it is crucial not to let victims' expectations fall apart, a component that embodies and aim and a pitfall at the same time.[105]Lastly, on a general note, these disadvantages may all be rearranged through the perspective that transitional justice mechanisms usually have an expiry, whereas reparations serves for a long-term political scheme fostering human rights and development.[106]

1.5 A combination of efforts?

Considering transitional justice mechanisms analysed so far, proponents of the discipline have long concentrated on the descriptive merits and pitfalls of these measures. However, the chief question that serves the ultimate purpose of assessing the consolidation of democracy and the improvement of human rights policies is whether or not these instruments actually work in practice at the state level.[107] Sceptical positions have argued that transitional justice policies present inherent structural problems that are not addressed enough;[108] more moderate scholarship has conducted various empirical researches on the functionality of the set of transitional procedures, often with contrasting results about their validity.

In the aftermath of transitions, trials have usually been avoided in order to implement amnesties or truth recovery measures or both. However, this perception has changed due to the increasing pressure exercised by the international community, especially for blanket amnesties, due to the success of universally recognised rights of accountability and justice.[109] Nevertheless, Sikkink & Walling's medium-sample study focusing on 17 Latin American countries in the period from 1979 to 2004 have led to the conclusion that trials do not extend conflicts or ongoing human rights violations nor have detrimental effects on the consolidation of the rule of law, but have been implemented usually after

[104] Supra note 94, p. 7
[105] Supra note 73, p. 27
[106] Ibid.
[107] Thoms, O. N. T., J. Ron, and R. Paris. 2010. "State-Level Effects of Transitional Justice: What Do We Know?" *International Journal of Transitional Justice* 4 (3), p. 330
[108] Call, Charles T. 2004. "Is Transitional Justice Really Just?" *The Brown Journal of World Affairs* 11 (1), p. 102
[109] Supra note 35, p. 31

few years have passed from the transition.[110] In an attempt to deepen the outreach of these results, Kim & Sikkink have also analysed circa 100 transitional countries from 1980 to 2004 and have found that prosecutions deter repressive inclinations in future generations of elites such as military officers or political leaders.[111]

However, it must be underlined that transitional justice mechanisms are usually analysed in combination with other instruments because they do not exist in a vacuum and a transitional context demands a combination of significant efforts. For instance, economic and social wrongs are usually best captured by merging reparations and truth commissions;[112] moreover, in their analysis of post-conflict countries, Lie et al. observe that reparations to victims and truth commissions are positively associated with peace stability through time while amnesties lead to a failure in this matter.[113] Then again, the expanding application of prosecutions has been unexpectedly associated with the enactment of amnesties, with scholars arguing for a compatibility under specific conditions for amnesties;[114] in a similar fashion, amnesties and truth commissions have been positively associated in the development of a rights-abiding regime.[115] This proves that the interaction of mechanisms might tell more about the effectiveness of their employment.

A recent study on multiple transitional justice mechanisms has been carried out by Tricia Olsen, Leigh Payne and Andrew Reiter, which consisted of an examination through the Transitional Justice Data Base to assess the mechanisms more likely to bring about positive results in fledgling democracies. After scanning various combinations of procedures, the results have been theoretically relevant: first of all, truth commissions on their own have a statistically negative effect on human rights conditions; on the contrary, when combined with other mechanisms, they offer overall positive effects on the advancement of democratic pillars.[116] Secondly, there are only two combinations that

[110] Sikkink, Kathryn, and Carrie Booth Walling. 2007. "The Impact of Human Rights Trials in Latin America." *Journal of Peace Research* 44 (4), p. 440-442
[111] Kim, Hunjoon, and Kathryn Sikkink. 2010. "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries1." *International Studies Quarterly* 54 (4), p. 957-958
[112] Supra note 73, p. 23
[113] Lie, Tove, Helga Binningsbø, and Scott Gates. 2007. "Post-Conflict Justice and Sustainable Peace." The World Bank, pp. 16-17
[114] Supra note 83, pp. 43-44
[115] Supra note 48, p. 224
[116] Supra note 1, p. 996

seems to achieve the purposes of transitional justice: namely, trials and amnesties, or trials and amnesties coupled with truth commissions. Thus, the scholars' conclusion is that both trials and amnesties are essential to improve a state's human rights account, yet only if they work together because they respectively reflect accountability and stability. [117]

Thus, this fleeting breakdown of the empirical effects of transitional justice mechanisms has been instrumental to highlight that the single employment of one measure cannot bring to significant results for democracy nor human rights. However, the different way in which prosecutions, truth commissions, amnesties and reparations are conceived within these researches generates an ample diversity of findings; thus, assessing effects can be inconclusive or confusing at best. What is important to gather from these attempts at quantifying benefits and harms is that transitional justice instruments are not a panacea and there is no winning formula for transitions. Regarding this last point, transitions are directly connected not only to the international mechanisms of transitional justice, but to the manner in which these are implemented in the domestic domain. Thus, the next section will analyse a fundamental principle for righteous disposition of these instruments within a polity: constitutionalism.

2. Constitutionalism in transition

The toolbox of practices and measures that transitional justice comprises is fundamental to deal with gross violations of human rights perpetrated by the prior regime and simultaneously stress the radical shift from the previous repressive government to a fledgling and promising democratic order. Thus, the main preoccupations of the new leadership can be broken down into four tasks in light of the mechanisms so far analysed: a state must initiate the investigation and prosecution of those responsible for the atrocities; the newfound regime must also disclose the truth to those affected and society at large through an official account becoming part of the nation's history; victims are also entitled to reparations, either monetary or symbolic, for their suffering; finally, nation in the process of building their authority must also ensure institutional reforms so as to dismantle previous arrangements perpetrating the abuse.[118]

[117] Supra note 1, p. 996
[118] Mendez, Juan E. 1997. "Accountability for Past Abuses." *Human Rights Quarterly* 19 (2), p. 261

As already stated, the implementation of transitional justice instruments depends on the evolution of international treaties to trace a state's accountability, while also having to consider the specific context. Recalling the 2004 Report of UN-Secretary General, which provides an all-encompassing definition of transitional justice, the domestic dimension is consistently underscored in the sense that the transitional process «is best served by the definition of a national process, guided by a national justice plan and shepherded by specially appointed independent national institutions, such as judicial or law commissions».[119] Thus, in order to function correctly, transitional justice mechanisms must be initiated and validated by the state. This has important implications in the sense that the two distinct normative frameworks interact and influence each other up to the point that the desirable and international basket of transitional justice measures has to be legally authorized by the interpretation of constitutional tenets.[120]

To the extent that international law has recognised certain core crimes to which all states must compulsorily respond through transitional justice mechanisms and most of the constitutions confer to treaties a certain significance, said measures can be deemed as constitutionally mandated.[121] Since transitional justice commitments have to come to terms with constitutional norms, a brief examination of the main controversies that could emerge is mandatory so as to gather a better understanding of how constitutions and constitution-making have been affected by transitional dynamics. Prosecutions, amnesties, truth commissions and reparations all interrelate with constitutions in a twofold manner: the new constitution-making process might explicitly impose the adoption of distinct instruments and dictate the way in which they will be implemented.[122]

Arguably, one of the key contrasts between constitutionality and transitional justice emerges when prosecutions are carried out. In the eventuality that suspected offenders are part of the military, they will exercise their right to fair trial by appealing to their specialist court; so, through the principle of 'natural judge' which envisages a prosecution

[119] UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General*, 23 August 2004, S/2004/616, par. 37
[120] Méndez, Juan E. 2012. "Constitutionalism and Transitional Justice." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michael Rosenfeld and András Sajó. Oxford University Press, p. 1273
[121] Ibid., p. 1273
[122] The most quoted example is the South African 1993 interim constitution, which set up the Promotion of National Unity and Reconciliation Act and the subsequent Truth and Reconciliation Commission.

carried out by a pre-established and competent tribunal,[123] military defendants have attempted to escape ordinary criminal prosecutions.[124] Moreover, prosecutions also had to deal with the constitutional right to a speedy trial,[125] which clashed with the fragile post-conflict judiciary that could not always satisfy this expectation and subsequently breached the defendant's constitutional rights. Among other challenging issues, amnesties also formed several constitutional obstacles: in particular, amnesic amnesties were impediments for the rightful prosecution of whole categories of offenders; this element seemed to aggravate when amnesties were democratically approved by the population, because they were formally untouchable.[126] Lastly, where amnesties were repealed, recipients could still enjoy their legal protection due to the 'rule of lenity' principle that exercised the law most in favour to the respondent.[127]

Constitutional conundrums vis-à-vis the application of transitional justice mechanisms become apparent in the establishment of a truth commission. The most consistent problem, which was only briefly mentioned, is the question as to whether truth commissions should name specific individuals in their final account; although a truth commission does not possess the prosecutorial functions of trials, its work is highly held into account and 'naming names' could wrongly suggest a condemnation. Therefore, truth commissions have been careful in this exercise and granted the named persons a change to respond accordingly in the full respect of due process. Other concerns might also arise for the conferral of powers to this mechanism; truth commissions that also allow for reparations must act only upon the respective constitutional authority.[128] Finally, reparations per se imply ideally a clear distinction of compensatory typologies and entitled beneficiaries which automatically leads to the identification of culprits; this could eventually lead to constitutional inquiries about due process and fair trial.[129]

[123] International Commission of jurists, p. 7
[124] In Argentina offenders belonging to the military had to be tried by civilian courts because the Supreme Council of the Armed Forces refused to judge their own (see: Elster, Coming to terms with the past, p. 25)
[125] Draft Universal Declaration on the Independence of Justice: final report/by the Special Rapporteur, L.M. Singhvi, art.5(c) "everyone shall have the right to be tried with all due expedition and without undue delay by the ordinary courts or judicial tribunals under law subject to review by the courts"
[126] Full stop law in Argentina and Law on the Expiration of the Punitive Claims of the State in Uruguay are exemplary instances
[127] Supra note 120, p. 1278
[128] Ibid., p. 1274-1275
[129] Ibid., p. 1281

This short analysis of some issues that the implementation of transitional justice mechanisms might cause within the constitutional order, a strictly domestic enterprise, represents another testimony of the constant tension between the national and international spheres of competence. Indeed, these areas are becoming intrinsically connected due to the rise of an international legal order that globally collects consensus and enters the state's realm in such a way as to affect domestic law in its clearest form: the constitution. Thus, it is necessary to examine how constitutionalism has evolved through the lens of the transitions paradigm in order to explain how constitutional agendas within transitional justice have influenced nation-building purposes by filling the legal and political vacuum.

2.1 Revised constitutionalism

First of all, the idea of constitutionalism does have a well-identified description or formulation. Without entering too much into historical and philosophical debates,[130] one satisfactory definition has been provided by Louis Henkin, who claims that modern constitutionalism is something prescriptive pertaining to the sovereign population. Tracing ultimate authority and legitimacy to "the people" leads to certain conditions: the most self-evident is a commitment to the establishment of a government following the law and democratic principles; in this sense, the representative government is limited by those who confer it authority, along with a precise set of checks and balances including an independent judicial order and civilian control of the security apparatus. The governmental structure is additionally scrutinized through the work of institutions that ensure the respect of this blueprint. Lastly, constitutionalism must also guarantee the protection of individual rights and minorities in the interest of "self-determination".[131]

Thus, constitutionalism is a legal doctrine according to which the authority and legitimacy of governments derives from a body of law whose ultimate source is the population itself; the limited power is set by legal norms which shape the internal structure of the state. In

[130] Holmes, Stephen. 2012. "Constitutions and Constitutionalism." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michael Rosenfeld and András Sajó. Oxford University Press, p 214 Holmes analyses constitutional theory and concludes that «constitutions emerge and survive because (…) they serve the perceived interests of the best organized and therefore most powerful social forces»

[131] Henkin, Louis. 1992. "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects." *Cardozo Law Review* 14 (3–4), p. 535-536

a kelsenian hierarchical structure, a constitution is the foundation of any ordered government, the basic norm to which governments must conform, since:

> «Its presupposition is the condition under which every coercive order established by acts of human beings and by and large effective, may be interpreted as a system of objectively valid norms».[132]

Under this notion, a constitution authorises the established government to issue general norms – or statutes – which, in turn, confer to courts and other bodies to emit singular norms expressed in the form of judicial rulings and administrative regulations.[133]

Thus, the international domain starts to peer into this scheme when the constitutional order locates treaty provisions of this kind in the special position above statutes and decrees. In fact, according to recent observers, constitutionalism is moving beyond its conventional borders and defying its entrenched standards in such a way as to distance itself from a purely monistic approach.[134] Indeed, constitutionalism must be analysed in light of political transitions, which bring about paradoxical conditions questioning and broadening the canon; the "foundational" character of the legal doctrine related to constitutions relies on a set of agreed upon procedures for constitutional change, whereas change occurring in transitional contexts has to deal more with the political sphere in unpredictable ways.[135] According to Teitel, the very setting of a political transformation poses a difficult problem to jurisprudence; in other words,

> «Law is caught between the past and the future, between backward-looking and forward looking, between retrospective and prospective. In dynamic periods of political flux, legal responses generate a sui generis paradigm of transformative law».[136]

Hence, it is argued that constitutionalism has been deeply influenced by democratic transitions undertaken across the globe, which led to results such as amendments to present constitutions, the creation of new constitutions, a revised role for judges and other

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[132] Kelsen, Hans. 1960. "What Is the Pure Theory of Law." *Turlane Law Review* 34 (2), p. 276
[133] Ibid., p. 269
[134] Ackerman, Bruce. 1997. "The Rise of World Constitutionalism." *Virginia Law Review* 83 (4), p. 755 et seq. he argues that there is a passage from constitution to treaty and vice versa
[135] Teitel, Ruti. 2000. "The Constitutional Canon: The Challenge Posed by a Transnational Constitutionalism." *Constitutional Commentary* 17 (2), p. 238
[136] Teitel, Ruti. 1997. "Transitional Jurisprudence: The Role of Law in Political Transformation." *The Yale Law Journal* 106 (7): 2009

similar measures.[137] It seems evident that unorthodox constitutional practices indicate that transitional constitutionalism formed following the intent of fledgling democracies in response to the abhorrent actions of prior regimes to not repeat past abuses and move onwards.[138] The legacy of injustice informed how governments had to come to terms with the past, and this also encompassed a revision of traditional constitutionalism.

While traditional constitutionalism was based on the notion of limited power, its conventional role was now adjusted to form what Teitel, as already stated, defines as «*sui generis* paradigm of transformative law». Specifically, constitutionalism referred to the governmental design for a neat delineation of state's prerogatives and limitations with a consideration for the future; conversely, a dual directionality in terms of time frame dominated constitutionalism in transition because legal practices now had to combine its long-established progressive attitude with an awareness towards the past:[139] this Janus-faced feature is ultimately attributed to the developments in transitional justice and unfolding contextual contingencies thereof.

Since the concept of justice had to be re-described in view of specific circumstances associated with periods of political upheaval, transformative notion and purpose were introduced in order to manage transitions with better chances at obtaining the consolidation of democracy. With the aim of implanting into the political and social fabric the seeds of stability, transitional constitutionalism is charged with the daunting task of providing a sound mechanism to transform the political order previously liable of violence – for instance, either through a new constitution or with the return of a pre-predecessor one – into an accountable one, with special attention towards rebuilding social values and gathering political consensus.[140] Some might even argue that this might not be a problem at all, owing to the notion that constitutions are organic and their texts enjoy longevity through adaptability;[141] yet, the distinguishing character of transitional

[137] Yeh, Jiunn-Rong, and Wen-Chen Chang. 2009. "The Changing Landscapes of Modern Constitutionalism: Transnational Perspective." *National Taiwan University Law Review* 4 (1), p. 147-148
[138] Supra note 136, p. 2080
[139] Supra note 136, p. 2057
[140] Supra note 137, p. 149 cfr. Supra note 136, p. 2057-2058
[141] Khatiwada, Apurba. 2007. "Constitutionalism of Transition." *Kathmandu Law Review* 1 (1), p. 42

constitutionalism lies in its dual features, conventional and transformative, that explicate a constructivist paradigm.[142]

Political fluxes induce a constructivist turn insofar as the vast array of functions and meanings attributed to constitutionalism are «constituted by, and constitutive of, the transition».[143] Indeed, the constitutional agenda adopts features that can lay the basis for an inventive relation between law and politics and so cause a shift in the perception of political change; thus, the evolution in the conception of constitutionalism is directly connected not only to the judiciary work in the application of constitutional provisions, but also in the way the local community absorbs these norms.[144] Some scholars have argued that a pre-existent constitutional culture should preferably be in place to secure that a successful democratic transition ;[145] more interestingly, the relation between constitutional law intended as pure jurisprudence and constitutional culture intended as the widespread acceptance of certain values by non-judicial agents is set to have a consistent exchange.[146] Thus, a political change implies a change in the constitutional culture which, ultimately, informs constitutional settlements and influences civil society.[147]

Therefore, transitional constitutionalism embodies the distinguishing interrelation between a state and its citizenry, which creates specific ideas and outcomes corresponding exclusively to a particular legal culture.[148] Different normative standards are dictated by the context under examination but, in general, there are common repercussions pertaining to the role of the state and fragmented societies, respectively. A prime example of the persisting presence of international obligations that filter into constitutional norms and processes through the transitions' lens is embodied by the shift in the conception of the

[142] Supra note 136, p. 2014
[143] Ibid., p. 2014
[144] Teitel, Ruti. 2011. "Transitional Justice and the Transformation of Constitutionalism." In *Comparative Constitutional Law*, edited by Tom Ginsburg and Rosalind Dixon. Cheltenham: Edward Elgar Publishing, p. 59
[145] Halmai, Gábor. 2018. "Transitional Justice, Transitional Constitutionalism and Constitutional Culture." In *Comparative Constitutional Theory*, edited by Gary Jacobsohn and Miguel Schor. Edward Elgar Publishing, p. 375
[146] Ibid.
[147] Teitel (supra note 136, p. 2052), defines the interrelation in this way:" each change in the constitutional order changes the perspective of the participants, in turn changing their sense of what is politically possible and hence, the potential for constitutional consensus"
[148] Klare, Karl E. 1998. "Legal Culture and Transformative Constitutionalism." *South African Journal on Human Rights* 14 (1), p. 151

state per se; while principles such as separation of powers are pillars of traditional constitutionalism, the growing concern towards accountability fostered criticisms in the face of state inaction at the turn of the millennium.[149] Sometimes even defined as a *de facto* amnesty,[150] the lack of an affirmative stance by the state is deemed a grave shortcoming in the construction of a constitutional doctrine that is sensitive to the actors within a certain political background.[151]

Indeed, transitional constitutionalism requires a high level of civil society involvement because it is society itself which transmits the chief necessities in the aftermath of grave crimes. However, communities are usually fragmented and the nexus between the population and the existing political and judicial systems might be severed due to the tarnished use of institutional apparatus; hence, constitutional reforms might provide impetus within various social groups to work towards the construction of new values and norms aimed at constructing a collective "us" in political terms, which benefits also the state.[152] Moreover, this could also lead to a meaningful discussion regarding root causes of conflict and support parameters that could also include hitherto marginalised groups.

The interchange among the normative commitment states owe their citizens and the participation of society to the nation-building efforts may take several forms within transitional constitutionalism. For instance, the establishment of a new constitution can stop the conflicting situation as a short-term effect, while destabilising the previous regime and triggering political change towards a robust democratic system in the long-term.[153] Moreover, there is a shift also in the method in which judges and courts operate in transitional settings that receives direct influence by the political realm. The growing «judicialization of pure politics»[154] is mirrored in the reliance on the judicial apparatus in crucial matters that infect entire communities: these issues might span from fundamental dilemmas about how reconciliation should be achieved to the conferral of judicial legitimacy to post-authoritarian regime; most importantly, defining the nation via courts,

[149] Supra note 144, p. 57
[150] Supra note 83, p. 7
[151] Supra note 144, p.57
[152] Supra note 137, p. 165
[153] Supra note 136, p. 2059
[154] Hirschl, Ran. 2006. "The New Constitutonalism and the Judicialization of Pure Politics Worldwide." *Fordham Law Review* 75 (4): 721–54

intended as the formation of a national identity and arrangements, represents a constitutional struggle.[155]

In conclusion, constitutionalism has also been affected by the rise of transitional justice and the implications in its application have been manifold. Arguably, constitutionalism had to be reconceptualised in light of politics; through this process, the functions have broadened so as to include the facilitation of the transition from a regime to another, with subsequent agenda reforms in order to (re)construct the polity and provide a source of legitimacy to the fledgling government depending on the typology of transition occurred. Indeed, transitional constitutionalism is not only delineated by its prerogative of limiting and organising an internal order, but by its transformative of taking the past and build upon it the new state's political identity. This process bestows the constitutionalist doctrine with more responsibilities, in a dynamic process where the political dimension, the international scenario and constitutionalism complement each other.

2.2 Narrowing the focus: constitutionalism in Latin America

Before turning to the main conclusions concerning transitional justice mechanisms for gross violations of human rights, the research project will now briefly adopt a regional viewpoint to uncover constitutionalism in Latin America and discover some of the issues plaguing policy and law makers, as some of them will be present and further examined in the case studies of Chile and Uruguay. Following the normative development in Latin America means to harmonise the international and national dimensions inasmuch as treaties and conventions for the protection of human rights have become an essential part of the constitutional order, with subsequent constitutional reforms occurring. Specifically, transitional constitutionalism has adjusted the organisation of the state in terms of power relations by developing a robust system of checks and balances and resizing the executive power.[156]

According to Nolte, the international understanding of good governance has been a catalyst of constitutional change in Latin America throughout four constitutional reform cycles beginning in the 1980s. The first one involved the decentralization of political

[155] Ibid., p. 727
[156] Supra note 35, p. 10

administrative structures, with institutional prerogatives being more distributed; the second processes of reform referred to judicial bodies and the development of systems for enhancing horizontal accountability; thirdly, participatory mechanisms like referendums were devised in order to promote population's contribution to the political system; finally, constitutional changes were introduced in conjunction with neoliberalism.[157] Nevertheless, these efforts still underline some major problems within the region, while highlighting a common framework where Latin American countries could operate with respect to their national differences.

Among the trends that underline the entire region lies constitutionalism in transition with its transformative, egalitarian and participatory features. Consequently, there is the expectation that transitional countries in South America would be characterised by a certain openness of their national legal system to international human rights norms;[158] thus, revised constitutionalism as a forward-looking doctrine in the aftermath of severe violations of inalienable rights has provided the region with a new outlook to deal with their contingent difficulties and transform the legal culture. Nevertheless, Latin America is not exempt from critical issues inherently connected to the territory and often its dilemmas touch upon multifaceted themes.

Arguably, one of the most controversial aspects that characterises the whole region is the prominence of executive powers over legislative ones. The Latin American presidential form of government presents some distinguishing features that lead to important conundrums vis-à-vis constitutionalism as regards the allocation of powers. First of all, presidentialism has been and currently is the dominating form of government in South America: this monotypic context is instrumental to assess the dimensions of presidential power and comparing different countries' experiences. Usually, the pillars of executive powers in the region have focused not only on conventional prerogatives connected to law enforcement, but also on items usually associated to the legislature.

[157] Nolte, Detlef. 2008. "Constitutional Change in Latin America: Power Politics or Symbolic Politics?" GIGA German Institute of Global and Area Studies, p. 17
[158] Uprimny, Rodrigo. 2011. "The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges", p. 1592

A comparative analysis of constitutional systems reveals that Latin American constitutions confer to the executive the power to:«issue executive decrees; assume emergency powers; propose constitutional amendments; propose the budget law; initiate regular legislation; veto legislation; issue pardons; appoint and dismiss the cabinet; and dissolve the legislature».[159] Among these, the most significant observation consist of the fact that presidents have gained and maintained law-making powers, in the sense that the executive has the capacity to initiate both ordinary legislation and constitutional amendments, while also issuing emergency decrees.[160]

Emergency power can assume legislative qualities because they envisage the introduction of legislative bills by the executive, thus allowing for a temporary delegation of powers from the legislature to the presidents and leaving room for a deliberate advancement of the executive's sphere of influence in legislature's matters; virtually every presidential constitution presents emergency provisions.[161] Moreover, one peculiar nuance is embodied by the interruption or limitation of rights during emergencies, further adding to the power of the executive; one might also question whether emergencies have to be sparked by grave external causes or if urgency situations can be evaluated even for internal issues, hence strengthening executive powers.[162]

Other concerning elements entail the so-called "agenda-setting powers" of the president, which express the freedom of the executive to dictate about the potential policies to be discussed and the respective timetable, especially in strategic areas such as budgetary matters and constitutional amendments.[163] Therefore, it is argued that the executive's influence in the policy-making process and so in the other branches of government represents the chief feature of presidentialism in the region, which some argue might reflect a new generation of *caudillismo*.[164] Yet,

[159] Cheibub, José Antonio, Zachary Elkins, and Tom Ginsburg. 2012. "Still the Land of Presidentialism? Executives and the Latin American Constitution." In *New Constitutionalism in Latin America: Promises and Practices*, edited by Detlef Nolte. Ashgate Publishing Ltd, p. 79
[160] Ibid., pp. 85
[161] Ibid., pp. 86-88
[162] Ibid., p.88
[163] International Institute for Democracy and Electoral Assistance, and Gabriel Negretto. 2018. "Constitution-Building Processes in Latin America", p. 26
[164] Fix-Fierro, Héctor and Pedro Salazar-Ugarte. 2012. "Presidentialism". In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michael Rosenfeld and András Sajó. Oxford University Press, p. 636

> «Even in the most extreme case, such as the power to issue decrees of legislative content in emergency situations, presidents generally need the support of Congress to convert these decrees into permanent laws. This means that the real impact of president's formal legislative powers crucially depends on the interaction of these powers with partisan support in Congress (…) ».[165]

Indeed, formal powers are not always symptomatic indicators of the president's capacity to actually influence the conventional separation of powers. In fact, the role of the president is the epitome of a convergence among various roles: the president is head of state, head of government and leaders of the government party. Therefore, it is crucial to assess the *de jure* and *de facto* powers that a president possess in different areas of the state and their repercussions in terms of political stability and democracy;[166] research shows that the establishment of new constitutions or revision of old ones have brought to the fore new institutions in order to maintain a system of check and balances and control the power of the executive in important fields such as the judiciary.

The tendency to curb at least certain presidential powers has been one of the main goals of the bundle of reforms that came about in order to strengthen the judiciary.[167] The assumption underlying these efforts is that an independent and strong judicial branch works efficiently at safeguarding the citizens and ensuring the respect of their rights;[168] recent reforms in Latin America have started to build this framework for the consolidation of the judiciary and its courts – especially high national courts – through different institutional arrangements, leading to varied consequences and effects across the region. Accordingly, the expansion or revision of constitutional measures are all centred towards the primary goals of granting more independence and power to constitutional judges.

Following the analysis of constitutional institutions by R*í*os-Figueroa, independence of the judiciary can be broken down into five main aspects. Since judges must not receive unwarranted political pressure, their appointing procedures must be regulated by either a council of judges themselves or at least two state or non-state bodies so as to offer new

[165] Supra note 163, p. 27
[166] Ibid., pp. 22-23
[167] Supra note 158, p. 1597
[168] Larkins, Christopher M. 1996. "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis." *The American Journal of Comparative Law* 44 (4), p. 606; ibid., p 609 he also defines judicial independence as "adjudication by a "neutral third", along with the characteristic of "political insularity"

justices a modicum of autonomy with respect to their appointers; regarding their terms, also the length of the judges' tenure is crucial and should ideally last longer than the organs that appoint them. Furthermore, the removal of members of the constitutional courts might influence the judiciary's independence depending on who is in charge of this procedure: the effects will be different if only the president can start the process or if the removal requires a simple majority or a supermajority of one chamber of the legislative. Finally, an explicit provision within the constitution indicating the number of constitutional judges guarantees a higher degree of difficulty for political agents to amend the constitution by undoing the court.[169]

These formal indicators are also associated to the functions that constitutional courts perform so as to transmit a real break with the past. Constitutional judges are charged with the authority of declaring null any law or act of government in breach with the constitution; in Latin America, the capacity of constitutional courts to protect the provisions and responsibilities within the constitution is carried out by special judicial measures; these mechanisms vary cross-nationally in the level of participation granted to the judges within law-making and policymaking, in the type of constitutional adjudication, in the effects of the decisions, in the openness vis-à-vis access to the appointment procedure and in the level of decentralisation of the jurisdiction.[170]

One of the typical mechanisms for constitutional adjudication has been the writ of *amparo* which provides a specific procedural instrument for the protection of the individual's human rights granted by the constitution in an effective and inexpensive way;[171] in its more general conception, the *amparo* suit provides a safeguard for citizens' rights, but the expansion of this legal instrument in South America has produced different applications. On one hand, the majority of Latin American judiciaries utilises the writ of *amparo* as a mechanism that complements *habeas corpus*, which secures the right of freedom of the person but not the other fundamental rights present in the national constitution.[172] On the other hand, *amparo* might also be employed as a judicial action to

[169] Ríos-Figueroa, Julio. 2011. "Institutions for Constitutional Justice in Latin America." Courts in Latin America, pp. 28-30
[170] Ibid., pp. 40-41
[171] Zamudio, Hector Fix. 1982. "The Writ of Amparo in Latin America." *University of Miami Inter-American Law Review* 13 (3), p. 365
[172] Azcuna, Adolfo. 1993. "The Writ of Amparo: A Remedy to Enforce Fundamental Rights." *Ateneo Law Journal* 37 (2), p. 14

protect the supremacy of the constitution, adding to the recourse of unconstitutionality and supplying a system of judicial review.[173] These aspects deserve a more introspective analysis.

The writ of *amparo* serves multiple functions depending on the state enacting it. The first function is connected to the very essence of this measure and provides for the protection of individual rights against a public authority, which can come from any branch of government. Yet, the *recurso* can also be employed to challenge unconstitutional statutes in original or appellate jurisdiction; additionally, it also entails the overturn of a court's decision when a constitutional provision has been enforced in an unconstitutional manner. Finally, *amparo* can lead to the review of government decrees or administrative acts in order to assess their compliance with basic rights.[174] In sum, the *amparo* suit can take different forms depending on each country's development of this mechanism; Azcuna assess that there are three main categories of *amparo* depending on the extent of this instrument vis-à-vis its procedure and protection:[175] there are countries where this legal mechanism is regarded as a synonym for *habeas corpus* in response to unlawful state acts or omissions that are usually linked to personal liberty;[176] conversely, other nations identify the two notions as distinct yet complementary;[177] lastly, *amparo* might also be conceived as a petition for judicial review to challenge the unconstitutionality of legislation.

Nevertheless, these formal indicators are increasingly challenged by the political scenario or, more precisely, by the political interests that play a fundamental rule in the calculations of the executive. Recalling the prerogative of the president to declare states of emergencies, there are direct effects on constitutional provisions regarding the

[173] Supra note 163, pp.32-33
[174] Tschentscher, Axel, and Caroline Lehner. 2013. "The Latin American Model of Constitutional Jurisdiction: Amparo and Judicial Review." *Available at SSRN 2296004*, pp. 4-5
[175] Supra note 172, pp.15-16
[176] The Chilean 1980 Constitution contains a *recurso de amparo* corresponding to *habeas corpus*, whereas the art. 20 *recurso de proteccion* (resource protection) shares the legal nature of *amparo*.
[177] Venezuelan Constitution 1961 art. 49: "The courts shall protect (*ampararan*) all inhabitants in the Republic in the exercise of the rights and guarantees established by the Constitution, in accordance with law (…)"; Argentine Constitution 1994, art. 43: "Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission is based on an unconstitutional rule (…)"

protection of individuals and, therefore, on *amparo* proceedings. Indeed, both *habeas corpus* and *recurso de amparo* are at stake when a state of emergency is declared, owing to the fact that there are no explicit references within the constitutions about judicial review over governmental acts declaring emergency states that might hinder the citizenry and restrict the safeguarding instruments.[178]

Therefore, courts exist within a political system and their prerogatives might be restricted depending on the relation to other branches. However, the consideration of human rights protection does not stem exclusively from national legislation, but it is entrenched within international treaties and conventions. The Universal Declaration of Human Rights clearly states that:

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by the law.[179]

Moreover, international benchmarks for the respect of human rights have been increasingly acknowledged and integrated in the domestic legal system of Latin American countries through mechanisms of express constitutional provisions or constitutional adjudication, such as the "bloc of constitutionaliy" (*bloque de constitucionalidad*)[180]; these methods are even more advanced and reverberated through the regional system of the American Convention on Human Rights and the interaction with the American Court of Human Rights.[181]

Therefore, due to the growing ratification of human rights treaties, the development of legal interpretations more in line with the political context of each country, and the

[178] Supra note 171, p. 385
[179] Supra note 63, art.8
[180] Supra note 158, p. 1592; cfr. Mera, Manuel E. Góngora. 2014. "La Difusión Del Bloque de Constitucionalidad En La Jurisprudencia Latinoamericana y Su Potencial En La Construcción Del Ius Constitutionale Commune Latinoamericano." *AA. VV., Ius Costitutionale* Commune, pp. 301-302 argues that the inclusion of international norms into the *bloque de constitucionalidad* has "three transcendent juridical effects: 1) human rights treaties take precedence over internal legislation; 2) human rights treaties can be deemed as parameters for the constitutionality concurrent with nacional constitutional norms, so that a conflict between a human rights treaty and a domestic law will result in a declaration of inconstitutionality, and 3) internationally protected human rights by means of human rights treaties can be invoked through the national actions aimed at safeguarding constitutional rights" (own translation). The bloc is a method used in Colombia and is now spreading to other Latin American countries.
[181] The conventionality control principle places the Convention and its respective Court at the top of the legal order vis-à-vis national legal order, see: Dulitzky, Ariel. 2015 (infra note 284). "An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights." *Texas International Law Journal* 50 (1)

establishment of new mechanisms to ensure the protection of human rights and the correct implementation of the constitution, observers have recognized the transformative character of constitutionalism in the region and discourses about a *Ius Constitutionale Commune* in Latin America have started to emerge, based on the interaction between the domestic sphere with the regional and international scenarios. Indeed, constitutionalism in transition is translated in the capacity of law to lay the groundwork for future promotion of human rights with a progressive attention to social and economic rights.[182]

3. Beyond national efforts: the regional system of human rights protection in Latin America

Remaining in the same geographical sphere, another important player that has yet to be analysed is the Inter-American system of human rights protection, a regional device which has significantly enshrined fundamental principles concerning transitional justice and progressed the respect of human rights in the region. Regional systems for the protection of human rights are nowadays present in Europe, Africa and America, representing a fundamental component for furthering substantive rights. The inter-American system stems from the necessity to regulate the peculiar circumstances afflicting Latin America; after a brief analysis of the two chief bodies, namely the Commission and the Court, important case law of the Court is illustrated in order to assess the contributions of its advisory and contentious functions with respect to the developments of rights protected by the American Convention on Human Rights.

3.1 Structure of the Inter-American Human Rights System

The system of the Inter-American protection of human rights originated after a long process involving the development of the Organization of American States (OAS) with the purpose of achieving peace and justice in the American Continent. Specifically, this process took form at the Ninth International Conference of American States in 1948, when both the OAS Charter and the American Declaration of the Rights and Duties of

[182] Bogdandy, Armin von. 2015. "Ius Constitutionale Commune En América Latina: Observations on Transformative Constitutionalism." *AJIL Unbound*, p. 109-110

the Man were produced.[183] The Charter provided for human rights provisions,[184] although it did not explicitly list the specific rights covered nor the eventual mechanisms/procedures to guarantee their execution, whereas the American Declaration proclaimed that «the international protection of the rights of man should be the principal guide of an evolving American law».[185] This very first phase reveals that human rights were already present in the agenda of nations comprising the OAS, since the American Declaration was proclaimed at the same time of the constitutive charter of the organisation. However, the human rights instrument did not have obligatory capacity[186] and only successive efforts would install a proper institutional framework: this led to the creation of an Inter-American Commission on Human Rights (IACHR) in 1959, the first regional organ.[187]

As an autonomous entity of the OAS, the Commission had to promote the respect of human rights in the region and could make recommendations to each member state for this purpose; additionally, it could solicit the governments to supply information regarding the type of measures adopted in the single countries in accordance with human rights. In 1965, the Commission expanded its prerogatives insofar as it investigated the compliance of member states to the human rights referred in the American Declaration; the commissioners were also allowed to examine communications from individual complaints for the infringement of the aforementioned rights.[188] This has indeed been an useful instrument in order to record the heinous violence in the region. However, the Inter-American Human Rights System existing nowadays was properly set up some years later with the entry into force of the American Convention on Human Rights in 1969 at the Inter-American Specialised Conference on Human Rights in San José, Costa Rica.[189]

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[183] Buergenthal, Thomas. 1975. "The Revised OAS Charter and the Protection of Human Rights." *The American Journal of International Law* 69 (4), pp. 828-829

[184] Organization of the American States (OAS), *Charter of the Organisation of American* States, 30 April 1948, art. 5 (j) "The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex"

[185] Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948. It was the first international document in the Continent regarding human rights, preceding also the Universal Declaration of Human Rights adopted in the same year by the United Nations.

[186] The Declaration was drafted as an official declaration, rather than as a treaty. Thus, becoming a party to the Declaration did not automatically impose contractual obligations to member states.

[187] Supra note 183, p. 829

[188] Supra note 183, pp. 830-831

[189] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San José", Costa Rica*, 22 November 1969

The American Convention on Human Rights is the treaty that properly codified the system for the protection and promotion of human rights in the Americas, a region undergoing unique circumstances such as severe misdeeds. Accordingly, the Convention enshrines the «right to respect rights» and protects fundamental entitlements which comprise *inter alia* the right to life, to humane treatment, to personal liberty and due process;[190] among other important prerogatives, the treaty also encompasses a certain consideration for economic, social and cultural rights under the perspective of progressive development.[191] The scope of the duty of member states vis-à-vis the implementation of these rights differs significantly from the Declaration to the extent that the Convention has binding effects on the states that ratified it.[192] This mandatory aspect is possible because the protection and enforcement of substantial rights are ensured by two main bodies: the Inter-American Commission on Human Rights (IACHR) and the newly introduced Inter-American Court of Human Rights (IACtHR).[193] Having entered into force officially in 1978, these organs had to deal with the complexities given by the era of authoritarian regimes and grave violations and so their rationale involved democracy-building.[194]

Thus, the Commission and the Court are two compliance instruments which constitute, through their complementary functions, the system for the protection of human rights at a regional level. In order to accomplish this purpose, the Convention envisages a two-tiered system in the sense that complaints must pass through the Commission before referring to the Court. In fact, the Commission acts as a gatekeeper to the Court and possesses, as already mentioned, monitoring and advisory powers; one of the main characteristics of the Inter-American system is the access procedure to the relevant bodies which is set forth by article 44 of the American Convention on Human Rights:

[190] Ibid., art. 1 (Obligation to respect rights), art.5 (Right to humane treatment), art. 7 (Right to personal liberty) and art. 8 (Right to a fair trial)
[191] Ibid., art. 26
[192] To date, the nations that have ratified the Convention include: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. Neither Canada nor the United States have ratified this legal instrument.
[193] Supra note 189, art. 33
[194] Bailliet, Cecilia M. 2013. "Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America." *Nordic Journal of Human Rights* 31 (4), p. 478

> «Any person or group of persons, or any non-governmental entity legally recognised in one or more member states of the Organisation [of American States], may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.»

This human rights system proves to be effective insofar that state parties agree to the right of individual petition for remedy. Another evidence of the Convention's concern with respect to injured parties is demonstrated by allowing unrelated groups such as non-governmental entities to file a complaint for human rights transgressions on behalf of the victims, thus avoiding problems of access or intimidation and establishing the *actio popularis*.[195] The plethora of different actors that engage in access procedures goes beyond the scope of directly involved individuals, namely victims or their relatives, in order to provide for a wider reach of the regional system. Apart from the access of private actors, member states expressly declare that they allow for complaints deposited by other state parties upon the ratification of the Convention, adding the dimension of interstate complaints.[196]

Thus, the Commission recognises various channels to receive complaints about violations of the rights covered by the Convention; yet, these petitions must satisfy certain formal criteria in order to be accepted and processed through the Inter-American mechanism: first of all, the remedies under domestic law should have been exhausted; secondly, the temporal scope for the lodging of the petition should not go beyond six months after the final domestic ruling; finally, the considered violations should not be investigated elsewhere.[197] If the Commission deems that the statutory requirements of admissibility are not complete, it may ask the petitioner for additional observations;[198] conversely, if the necessary criteria are met, then the Commission informs the government involved in the complaint and requests to the state party for more information on the matter admitting written or oral statements.[199] Should said government not provide responsive information,

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[195] Pasqualucci, Jo M. 1994. "The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law." *The University of Miami Inter-American Law Review* 26 (2), p. 314

[196] Supra note 189, art. 45. Since the Commission is an autonomous organ whose members are elected by the OAS General Assembly, those members that are not parties to the Convention are still subjected to the Commission's examination of relevant petitions and could be addressed for pertinent information; the Commission can also make recommendations when appropriate to bring about more compliance with fundamental human rights. See: Padilla (infra note 202), p. 99

[197] Supra note 189, art. 46

[198] Rules of Procedure of the Inter-American Commission on Human Rights, art. 29(b)

[199] Supra note 189, art. 48(e)

the Commission shall presume the accusations in the petition to be true.[200] From this starting point, the Commission's actions can generate three main outcomes: elaboration of recommendations, friendly settlement or resort to the Court.

Since its inception, the IACHR has the prerogative of elaborating country reports vis-à-vis the respect of human rights within the member states of the OAS. Further developments had also conferred to this organ the function of making recommendations to the involved nations.[201] This final result of the Commission's investigation is accomplished not only through the hearings of statements from both injured parties and allegedly responsible governments, but also through on-site visits which are essential to grasp the dynamics behind contentions and gain a deeper knowledge of facts: on this subject, the investigatory techniques of the Commission improved with time due to the strengthening of relations with the principal human rights agents in each different state.[202] The result of these investigations into grave violations of human rights is reflected in the preparation of country-specific reports with the attribution of state responsibility and issuance of recommendations and opinions, outlining the soft law capacity of the Commission. [203]

This monitoring body can also «place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect of human rights recognised in [the] Convention», under article 40 of its Rules of Procedure. After the democratisation wave, more amicable resolutions have started to occur owing to the fact that *in situ* investigations could be more easily carried out, such as the friendly settlement for cases in Argentina concerning illegal detentions whereby the Argentine government issued a legislation for financial reparations after negotiation between the Commission and the pertinent government.[204] The positive outcome should then be communicated to the petitioner and the state parties through a report.[205] However, when

[200] Supra note 198, art. 39
[201] González-Salzberg, Damián A. 2010. "The Effectiveness of the Inter-American Human Rights System: A Study of the American States's Compliance with the Judgements of the Inter-American Court of Human Rights." *International Law* 16, p. 120
[202] Padilla, David J. 1993. "The Inter-American Commission on Human Rights of the Organization of American States: A Case Study." *American University Journal of International Law and Policy* 9 (1), pp. 103-104
[203] Supra note 189, art. 41
[204] Supra note 202, p. 107
[205] Supra note 189, art. 49

a friendly settlement is not reached, even in this case the Commission shall outline report case with detailed description of the situations and make recommendations and proposals as it sees fit.[206] Thus, the advisory capacity of the Commission is always guaranteed notwithstanding whether the outcome is favourable or not.

However, according to its Rules of Procedure, the Commission can require a state to adopt precautionary measures «in serious and urgent cases (…) to prevent irreparable harm to persons»;[207] in response to petitions of such nature, the Commission had either requested a prompt response from the state[208] or forwarded the petition directly to the Court in order to issue provisional protection measures. Regarding this latter intervention, the Convention states that in cases of extreme gravity the Court may adopt provisional measures at the Commission's request even if the case has not been submitted yet.[209] Thus, the two-tier system characterising the Inter-American human rights protection requires the Commission to submit a case to the Inter-American Court when its recommendations are not followed by the states, when friendly settlement is not reached or when there are cases of extreme gravity. Since the Court is the only judicial organ set up by the Convention and constitutes the principal monitoring instrument for compliance within the system due to its jurisdiction and functions, the next section explores in greater detail its scope of action.

3.2 The functions of the Inter-American Court of Human Rights

As already anticipated, individuals do not have direct access to the Court but must first petition the Commission; indeed, the Commission has a broader scope than the Court and it is the responsible entity for the ultimate involvement of the judicial organ. Following this logic, the Court cannot consider a case on its own initiative and so it can be deemed as a last resort mechanism. The seven judges composing the Court, who are "jurists of the highest moral authority and of recognised competence in the field of human rights",[210] fulfil two main functions in order to safeguard and promote the Inter-American system of human rights: they can issue advisory opinions or solve contentious disputes. Depending

[206] Ibid., art. 50
[207] Supra note 198, art. 25
[208] Ibid., art. 30(4)
[209] Supra note 189, art. 63(2)
[210] Ibid., art. 52(1)

on the task that it has to complete, the Court will exercise a different jurisdiction in terms of objects, initiatives, procedures, participants and effects.

3.2.1 The advisory jurisdiction

During its first period of activities, the Court used its advisory jurisdiction to the fullest to interpret the Convention and other human rights treaties. Its opinions were pivotal for the subsequent developments in the content and scope of human rights provisions.[211] Accordingly, the terms providing for the Court's issuance of opinions are enshrined in article 64 of the American Convention, which states that:

> 1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.
>
> 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

This provision reveals many aspects with respect to the advisory function of the Court. First of all, the Court has addressed the framework and authority to advise on both the Convention and other treaties for human rights protection precisely through advisory opinions. In its first one, the Court laid the foundation as to how «other treaties concerning the protection of human rights in the American states» should be interpreted;[212] namely, the Court recognised that its consultative function could be interpreted either in a broad or narrow manner: in accordance to the latter typology, the Court could only interpret and give its opinion about the different treaties concerning human rights «adopted within the framework or under the auspices of the inter-American system»; conversely, the broadest interpretation would include «any treaty concerning the protection of human rights in which one or more American states are parties».[213] Thus, the Court opted for the broad scope of interpretation, signalling that its advisory function

[211] Quiroga, Cecilia Medina. 2015. "The Inter-American Court of Human Rights 35 Years." *Netherlands Quarterly of Human Rights* 33 (2), p. 118
[212] Inter-American Court of Human Rights, Advisory Opinion OC-1/82, "Other treaties" subject to the consultative jurisdiction of the court (Art. 64 American Convention on Human Rights), 24 September 1982
[213] Ibid., par. 32

could encompass any human rights treaty ratified by at least one American state. In the same opinion, the Court also decided what nations the expression "American states" actually implied: even in this case, the judicial body opted for the broadest interpretation which encompassed all the OAS member states, notwithstanding their position vis-à-vis the American Convention on Human Rights in terms of ratification, because they «may ratify or adhere to the Convention» eventually.[214] Hence, the Court defined the scope of its opinions in such a way as to encompass and involve the highest amount of legal instruments and subjects.

The expansion of the Court's prerogatives associated to other treaties is further attested by the fact that the Court exercised its consultative jurisdiction regarding the American Declaration of the Rights and Duties of Man, which was not a treaty per se. In an advisory opinion, the tribunal held that, albeit not mandatory, the Declaration had become an authoritative interpretation of human rights obligations protected by the OAS Charter and the American Convention.[215] As a result, the Declaration supplies international requirements within the competence of the Commission towards states that have not ratified the American Convention, conferring a binding nature to the Declaration. Among other treaties, the broad and universal stance of the Court is underlined by the stress put on the recourse to nonregional treaties such as the Vienna Convention and the International Covenant on Civil and Political Rights.[216]

Regarding the second subsection of the article, the Court also commented on the compatibility of member states' domestic legislation with the international instruments of the first subparagraph. The inter-American organ established that "domestic laws" were to be considered as all national legislation and legal norms of whatever form, as well as the Constitution.[217] Accordingly, the Court held that it could emit opinions about

[214] Ibid., par. 35

[215] Inter-American Court of Human Rights, Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, 14 July 1989, par. 44

[216] Pasqualucci, Jo M. 2002. "Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law." *Stanford Journal of International Law* 38 (2), p.269 "In response to Mexico's request for an advisory opinion in *The Right to Information on Consular Assistance*, the Court held that an individual's right to information conferred by the Vienna Convention gives practical effect in concrete cases to the right of due process recognized by the International Covenant on Civil and Political Rights"

[217] Inter-American Court of Human Rights, Advisory Opinion OC-4/84, Proposed amendments to the naturalization provision of the Constitution of Costa Rica, 19 January 1984, par. 14

internal regulations not in force, such as those in bills or constitutional reform projects;[218] this prerogative has problematic turns because national political debates could take advantage of the Court's consultation in order to influence the legislative process. Therefore, the Court decided to exercise caution so that its advisory jurisdiction would not affect the outcome of domestic legislative process:[219] in this way, the tribunal avoided altogether the removal of its capacity to express its opinion regarding constitutional amendments.[220] In addition, the competence of the Court in domestic law matters is as extensive as may be requested to safeguard human rights, as provided by the American Convention; in this way, the Court would have given effect to individual rights and freedoms.[221]

Having clarified the competence of the Court in its consultative function, it is noteworthy to reassess again that the tribunal cannot render an opinion *propio motu* but there are specific actors that have legal standing under the aforesaid provision. Firstly, all states making up the OAS can obtain an interpretation about human rights treaties and the Convention but also about their domestic legislation; the last point is undeniably the distinguishing element of OAS member states before the Court: within this jurisdiction, states express their willingness to guarantee human rights to their subjects. Nevertheless, a state cannot recur to this mechanism with the aim to prompt an opinion on another state's domestic legal order, even if the legislation has effect on the petitioning state.[222] Secondly, also organs included in Chapter X of the OAS[223] can request advisory opinions on the interpretation of human rights treaties and the Convention although their standing is limited to their "spheres of competence", as the provision explicitly states. The inter-American Court has interpreted this limitation in the sense that these organs must

[218] Roa Roa, Jorge Ernesto. 2017. "La funzione consultiva della Corte interamericana sui diritti umani". In: Laura Cappuccio and Palmina Tanzarella (eds.). Commentario alla prima parte della Convenzione americana dei diritti dell'uomo. Editoriale Scientifica, Napoli, p. 839
[219] Supra note 217, par. 30
[220] Supra note 218, p. 840
[221] Supra note 217, par. 25
[222] Supra note 216, p. 253
[223] These organs are now listed in Chapter VIII of the OAS Charter (amended 1985) and they are: the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the Inter-American Commission on Human Rights, the General Secretariat, the Specialized Conferences, and the Specialized Organizations.

demonstrate a legitimate institutional interest.[224] While each organ determines if the request falls within its sphere of competence, it is the Court that ultimately decides on the matter, based on the OAS Charter and the constitutive instrument and legal practice of the petitioning OAS organ.[225]

Among the OAS organs that can elicit an opinion, the Commission definitely enjoys a broader reach than its counterparts and so it covers a special position. Within the "sphere of competence" approach, the Court has specified that "unlike some other OAS organs, the Commission enjoys, as a practical matter, an absolute right to request advisory opinions" for what regards article 64 of the American Convention.[226] The Commission does not meet any obstacle for requesting an advisory opinion because its legitimate institutional interest lies on the promotion and observance of human rights. However, this privilege is valid only for the interpretation of the Convention, since the request of an advisory opinion for other treaties must be submitted by any OAS organ with an explicit reference to the sphere of competence.[227]

The very same actors that have the standing to ask an advisory opinion to the inter-American Court can also actively participate in consultative procedures because any interested party can submit a written opinion on the issues comprising the request.[228] It is important to notice that there is a lack of regulation regarding the procedure and this is manifest insofar as the rules of procedure pertaining to the advisory task envisage a normative integration with the contentious procedure as long as these are compatible: the so-called application by analogy instructs the Court towards this path.[229] Within this backdrop, the consultative opinions are strengthened by the participation of many actors. First of all, OAS member states can partake into the consultative procedure whether or not they had ratified the American Convention or accepted the jurisdiction of the Court,

[224] Inter-American Court of Human Rights, Advisory Opinion OC-2/82, The Effect of Reservations of the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), 24 September 1982, par. 14
[225] Ibid.
[226] Ibid., par. 16; cfr. Rules of Procedure of the Inter-American Court of Human Rights (infra note 227), art. 59 "If the advisory opinion is sought by an OAS organ other than the Commission, the request shall also specify, further to the information listed in the preceding paragraph, how it relates to the sphere of competence of the organ in question."
[227] Rules of Procedure of the Inter-American Court of Human Rights, art. 60
[228] Ibid., art. 73
[229] Ibid., art. 74

which invests further legitimacy to the Court and creates a pluralistic component;[230] yet, the OAS members cannot intervene in cases whereby the Court has to dictate on the compatibility of a state's domestic laws with the American Convention or other treaties, therefore their involvement is only limited to the interpretation of the Convention or other legal instruments for the protection of human rights.[231] The states can inform the Court either through written statements or discretionary hearings on the allowed issues.[232]

The organs of the OAS can also participate to the consultative procedure through the presentation of written and oral observations. This time, their intervention is not limited to the legitimate institutional interest: thus, organs can have a say even on topics that are not directly linked to their functions or field of competence. However, just like member states, these bodies cannot send their viewpoints about the compatibility of a member's domestic law with the Convention. Nonetheless, regarding the issue of domestic legislation, the ambit of action for OAS organs could be interpreted in a more inclusive way if prior authorisation has been given by the engaged state as stated in article 73(3) of the Court's Rules of Procedure:

> «The Presidency may invite or authorize any interested party to submit a written opinion on the issues covered by the request. If the request is governed by Article 64(2) of the Convention, the Presidency may do so after prior consultation with the Agent.»

The Court has also facilitated participation by groups and individuals in the capacity of *amicus curiae*, an enriching factor during the consultations. Non-governmental organizations, universities, law firms, newspapers, human rights advocates, researchers and so on send observations which significantly contribute to the development of human rights law; indeed, an *amicus curiae* is «a person or institution who is unrelated to the case and to the proceeding» that «submits to the Court reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding»,[233] thus contributing to the liberalization of procedures applicable to the advisory function of the Court. Finally, the Court can either accept or reject *amici* briefs,

[230] Supra note 218, p. 845
[231] Supra note 217, par. 17
[232] Inter-American Court of Human Rights, Advisory Opinion OC-3/83, Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), 8 September 1983, par. 6
[233] Supra note 227, art. 2(3)

even if there is no formal procedure for the dismissal of the contributions; on this matter, one parameter is the extent to which the contributions actually help the Court for the discussed legal issues.[234]

Thus, having considered the competences of the Court in its advisory capacity, the agents that can petition an opinion and the actors involved in the procedure, it is worthwhile to underline that the Court's consultative practice does not have binding effects. In fact, the advisory function offers an alternative judicial method that is devised to support states and organs in their compliance with and application of human rights treaties and to avoid formalism and sanctions associated to the contentious judicial process.[235] Therefore, although they are not biding in their nature, procedure and statements of the Court have undeniable legal effects on national and international law. Nevertheless, this multilateral mechanism implies certain inherent limitations to the advisory opinion of the IACtHR: since there are no opposing parties, the Court cannot assess a state's responsibility for the misapplication of its domestic norms; secondly, the advisory function cannot be exercised for cases that are actually contentious in their nature; as already specified, opinions cannot influence the domestic political debate of a member states; finally, the Court does not have the faculty to issue an advisory opinion about the internal procedures for the approval of laws because the competent organs are those of the national institutional order.[236]

3.2.2 The contentious jurisdiction

As with all human rights treaties, the Convention is formulated in terms of norms and obligations for states parties which can be held accountable on an international level for the violation of citizenry's rights; yet, the presence of the San José Court has contributed vastly for the advancement of these principles, since it is the most suitable body in order to protect the human rights enshrined in the American Convention and prevent future violations through the performance of its contentious jurisdiction. With respect to its role as an advisor, the Court does not have the same broad prerogatives because its jurisdiction is limited *ratione personae* and *ratione materiae*; however, due to the complex national situations within the region, the Court has always attempted to contribute in significant

[234] Supra note 216, pp. 280-281
[235] Supra note 232 par. 43
[236] Supra note 218, p. 840

ways, especially in accordance to the assertion of state responsibility and the interpretation of procedural regulations for admissibility and merits of the single cases.

First off, the agents having access to the contentious function of the Court and submitting cases are either state parties to the American Convention or the Commission.[237] This restriction vis-à-vis the Commission's prerogatives and the Court's advisory function means that the judicial body is authorised to rule on cases only if member states of the American Convention have acknowledged and accepted its jurisdiction.[238] In this sense, the competence of the Court for cases forwarded by the Commission and for inter-state cases is consensual because state parties must accept the Court's jurisdiction through an explicit declaration, which can be either conditional, on condition of reciprocity or for a specified period or for specific cases in an *ad hoc* fashion.[239] Accordingly, states undergoing this process prompt a legal obligation to follow the Court's rulings in light of the separate statement made.

It must be also noted that, contrary to the Commission's features, the American Convention does not provide a legal standing before the IACtHR to individuals: as already outlined, only member states to the case and the Commission possess this right. Since individuals are not allowed to initiate proceedings before the Court, their only way of seeking remedy is to pass through the Commission; this implies that an individual petitioner who might not agree with the Commission's resolution or is damaged by their government's failure to act in accordance to the resolution, does not have another possibility of recourse.[240] This situations has been slightly modified when the new Rules of Procedure of the Inter-American Commission on Human Rights of the OAS and the Court entered into force in 2001; indeed, now the Court provides the victims, their next of kin or their duly accredited representatives an autonomy from the Commission in the proceedings before the Court.[241] Moreover, the Commission has also allowed for the participation of the petitioner because, in the phase prior to the referral of the case to the

[237] Supra note 189, art. 61
[238] The states over which the Court has currently jurisdiction include: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela (Venezuela had withdrew but was recently reintroduced with Guaidò)
[239] Supra note 189, art. 62(1) and (2)
[240] Supra note 195, pp. 316-317
[241] Supra note 227, art. 23

Court, the Commission shall notify the claimant that a report on the merits has been adopted and transmitted to the inter-American judicial body: had the state admitted the jurisdiction of the Court, the Commission provides the petitioner with the option to assert whether the case should be submitted to the inter-American judicial body.[242] Although the ultimate decision to submit a case to the Court remains a prerogative of the Commission or the involved state, the petitioner still does not have "direct access" but once the case is presented *locus standi* enters into force and the petitioner can introduce their positions before the Court.[243]

As previously stated, the Court does not only have restrictions *ratione personae* but also *ratione materiae*. Specifically, the extent to which the IACtHR can rule over the cases of violations of human rights is unambiguously connected to the American Convention on Human Rights: the jurisdiction of the Court only covers the cases in which it can interpret and apply the provisions of the Convention, provided that the interested states have recognised this authority.[244] This means that many categories of human rights violations that are examined by the Commission cannot considered by the Court, thus running the risk of bypassing significant adjudication. Nonetheless, the Court's competence may be broadened directly or indirectly in order to encompass as many human rights treaties as possible. Firstly, a direct method to expand the list of rights and freedoms protected by the Convention applicable to the member states is the submission and incorporation of protocols, as provided in article 77 of the Convention.[245] For instance, the Additional Protocol in the Area of Economic, Social and Cultural Rights, also known as Protocol of San Salvador, provides states with more obligations – and their citizenry with more protection – concerning a vast array of rights; of course, alleged violations of the aforementioned rights can only be heard only if the state party has ratified the protocol, alas the Court has seen its subject-matter widened. Secondly, the Court has built up the capacity to encompass more rights than those envisaged by the Convention owing to the fact that other OAS human rights treaties either openly or by interpretation have bestowed

[242] Supra note 198, art. 43 (3)
[243] Cerna, Christina m. 2010. "Introductory Note to the Inter-American Commission on Human Rights: Rules of Procedure." *International Legal Materials* 49 (2), pp. 749-750
[244] Supra note 189, art. 62(3)
[245] Ibid., art. 77 "In accordance with article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties and the General Assembly with a view to gradually including other rights and freedoms within its system of protection"

the two-tier inter-American organs with the jurisdiction to consider alleged violations: this has been the case for important legal instruments such as the Inter-American Convention on Forced Disappearance.[246] Additionally, although the Court does not have the authority to apply certain international human rights treaties, it can still interpret rights under the Convention in light of international human rights treaties and soft law standards whenever this interpretation might be relevant.[247]

This brief analysis of the Court's jurisdiction and applicable law, which point at important concerns for the protection of human rights, is relevant also in the procedural regulations of the judicial organ. Provided that deliberations shall reach a quorum of five judges out of seven,[248] mandatory clauses in the third section of Chapter VIII of the Convention impose that: reasons shall be given for the final judgment; there may be dissenting or separate opinions attached to the sentence; the ruling shall be final and not subject to appeal; subsequently, members states must comply to the Court's decision; when there are mandated reparations, the state shall implement them in line with the domestic procedures regulating this eventuality; the parties of the case and the states parties to the Convention will be notified of the result.[249] Apart from these expressly stated provisions, the procedure enjoys a high level of flexibility from the very first phase of admission of recourse and merit. Indeed, the Court must be convinced that the petitioner has exhausted all the available domestic remedies:[250] since the region has been affected by authoritarian regimes and new democracies were on their way towards stabilization, judges have tried to interpret the exhaustion of remedies with a more open approach to guarantee individuals effective remedies following article 46 of the Convention, which envisages some exception to the general rules of admissibility. Indeed, an exhaustion of state

[246] Organization of American States (OAS), *Inter-American Convention on Forced Disappearance of* Persons, 9 June 1994, article XIII clearly states: "For the purposes of this Convention, the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights and to the Statue and Regulations of the Inter-American Commission on Human Rights and to the Statute and Rules of Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures."
[247] Inter-American Court of Human Rights, *Case of Las Palmeras v. Colombia*, Preliminary Objections, Judgement 4 February 2000.
[248] Supra note 189, art. 56
[249] Ibid., arts. 66-68
[250] Ibid., art. 46 providing for the exhaustion of domestic remedies for the acceptance of the case by the Commission and art. 61(2) expressing the compliance of Commission required for referral of a case to the Court.

remedies doctrine cannot be applied when national legislation of the state concerned does not ensure due process or the victim is denied access to the domestic remedies or there has been an unjustified delay in delivering a final judgement. This mechanism is ensured because formal guarantees do not automatically imply the effective implementation of rights such as fair trial (article 8) and judicial protection (article 25).[251]

Once admissibility is cleared and the case is not dismissed, the Court will consider the merits of the case. During this phase, the inter-America body engages in fact-finding and evaluates evidence provided by the concerned parties in order to assess the responsibility of the state in the suspected human rights violations. On this matter, judges go through the evidence provided by the parties but they also demonstrate flexibility when determining who can offer evidence during the proceeding: the Court accepts the contributions of non-parties like witnesses, *amici curiae*, and other persons upon the request of one of the parties.[252] In doing so, the Court exercises its right to obtain «on its own motion, any evidence it considers helpful and necessary».[253] Accordingly, commentators such as Paul have lamented the fact an excessive flexibility could be detrimental to the workings of the Court and more stringent and objective rules would let parties to better understand the trial an plan their actions.[254] Nevertheless, the extensive inclusion of evidence that might even cause confusion reveals that the intent of this tribunal has been to favour the appellants vis-à-vis the state because they are going to have less advantages and could be easily intimidated. Especially in cases regarding gross violations of human rights, the Court held that "the the defense of the State cannot lie on the inability of the complainant to submit evidence which, in many cases, cannot be obtained without the cooperation of the State".[255] In this sense, the most significant instances are the cases of enforced disappearance whereby the collection of evidence is difficult owing to the fact that states attempt to escape international accountability. For

[251] Tanzarella, Palmina. 2010. "Il Sistema Interamericano Di Protezione Dei Diritti Umani Nella Prassi Della Corte Di San Josè." *I DIRITTI DELL' UOMO* 1, p. 15
[252] Paúl, Álvaro. 2017. "Admissibility of Evidence before the Inter-American Court of Human Rights." *Revista Direito GV* 13 (2), p. 654
[253] Supra note 227, art. 58
[254] Supra note 252, pp. 673-674; cfr. Pasqualucci (supra note 195, p. 301) states that "the Court's balancing of victims' rights with procedural regularity and the liberalization of evidentiary rules in cases before the Court helps to prevent the intentional obstruction of justice".
[255] Inter-American Court of Human Rights, *Case of Cantoral-Benavides v. Peru*, Merits, Judgement 18 August 2000, par. 189

example, the *Velásquez Rodríguez v. Honduras* case, the first judgement on forced disappearance of the IACtHR, has led to a similar conclusion, namely that:

> «In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation».[256]

This case has been pivotal because the Inter-American Court was the first international court to deal with this specific human rights crime and to provide both a definition and standards to assess the violation.[257] Most importantly, the case also established the doctrine of the state's duty to punish human rights perpetrators.[258] In fact, the Court asserted that:

> «The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention».[259]

This final holding was indeed directly connected to the state obligations provided in the American Convention, according to which states must respect the rights and liberties present in the Convention and must also ensure the "free and full exercise of those rights."[260] Since states had these obligations, then the Inter-American Court ruled that it was within the competences and duties of states to prevent, investigate and punish any violation of the rights that were covered by the Convention.[261] This very first ruling of the IACtHR outlines the stance of judges according to which the respect for essential

[256] Inter-American Court of Human Rights, *Case of Velásquez Rodríguez v. Honduras*, Merits, Judgement 29 July 1998, par. 135
[257] Supra note 195, p. 323 Pasqualucci summarises the Court's definition by stating: "Forced disappearance takes place when government agents or those working for the government kidnap and hold a person incommunicado in a clandestine prison. The kidnappers then subject the prisoner to torture and other cruel and inhuman punishment, secretly execute him or her without trial, and then destroy or conceal the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible".
[258] Basch, Fernando Felipe. 2007. "The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers." *American University International Law Review* 23 (1), p. 199
[259] Supra note 256, par. 176
[260] Supra note 189, art. 1
[261] Supra note 256, par. 166

rights does not only entail their mere acknowledgment but it requires states to take all the possible measures in order to punish the responsible parties and avoid future recurrences.[262] Indeed, a state might be deemed accountable also in light of its failure to act and comply with the American Convention.

This proactive approach of the Court with respect to its addressees leads to the conclusion that the inter-American body, in the exercise of its contentious capacity, has furthered human rights within its geographical reach and emphasised the *sui generis* character of human rights treaties. Concrete individual cases brought before the Court seeking a remedy had been occasions not only to evaluate damages done to the victim but also to assess the overall behaviour of a state with respect to its institutional structure. In evaluating the compliance by states with human rights commitments, the Court has taken in consideration the political, economic, social and judicial aspects of each nation's internal order since violations have been frequently originated by the infringement of the separation of powers principle, the lack of independence for the judiciary, the superiority of the executive over the legislative branch and so on. This has undoubtedly steered the Courts towards the elaboration of concrete answers by means of *effet utile*.[263] In fact, the Court has acknowledged that state parties to the Convention must assure the compliance with its provisions and its effects within their own domestic laws;[264] as explored through this section, this doctrine has applied to both the substantive provisions of human rights instruments and also to the procedural provisions.

In light of this arrangement, states are expected to ensure that relevant branches and bodies of the government implement the judgements of the Court, in conformance with the principle of *pacta sunt servanda* explicated directly in the Convention as well as the doctrine of effectiveness of human rights obligations (*effet utile*).[265] Nevertheless, neither the American Convention nor the OAS Charter specify exactly how the Court's judgements should be enforced. In the absence of an explicit provision, the only clauses that envisage a sort of mechanism within the Convention instructs the Commission[266] and

[262] Supra note 251, p. 13
[263] Ibid., p. 11
[264] Inter-American Court of Human Rights, *Case of the Constitutional Court v. Peru*, Competence, Judgement 24 September 1999, par. 36
[265] Supra note 194, p. 479
[266] Supra note 189, art. 41(g)

the Court[267] to submit annuals reports to the General Assembly of the OAS. In fact, this is the ultimate resource of the Court to denounce non-compliance, although the judicial body has also assumed responsibility for monitoring the domestic enforcement of its decisions about reparations:[268] the Convention has granted to the Court a broad remedial authority, which include monetary compensation and also the guarantee that «the injured party be ensured the enjoyment of his right or freedom that was violated [and] that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied.»[269] Thus, the Court had provided for a plethora of reparation measures , both symbolic and material. Reparations have been successful in the history of the Court, owing to the fact that most of the times it was not possible to restore the *status quo ante* for the injured parties.

This phenomenon is justified by the fact that the Court meets higher rates of compliance when it offers redress for victims by means of reparations for the verified human rights violations than when it acts as a criminal tribunal and order that states carry out investigations, prosecution and punishment of perpetrators in particular in relation to the military.[270] Indeed, based on what was examined until now, it must be reminded that the court cannot be considered a criminal tribunal because it does not have the authority to adjudicate on specific individuals or state agents but only on states.[271] The Court has in fact declared that:

> «The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible».[272]

[267] Ibid., art. 65
[268] Shaver, Lea. 2010. "The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection." *Washington University Global Studies Law Review* 9 (4)., pp. 663-664
[269] Supra note 189, art. 63(1)
[270] Supra note 194, pp. 481-483
[271] Cardona Llorens, Jorge. 2003. "La Función Contenciosa de La Corte Interamericana de Derechos Humanos. Consideraciones Sobre La Naturaleza Jurídica de La Función Contenciosa de La Corte a La Luz de Su Jurisprudencia." In *"Memoria Del Seminario El Sistema Interamericano de Protección de Los Derechos Humanos En El Umbral Del Siglo XXI (23-24 Nov. 1999: San José, Costa Rica)*., p. 336
[272] Supra note 256, par. 134

From this, the Court has developed the capacity to determine state responsibility for human rights violations committed or tolerated within its borders and to generate a doctrine in constant expansion so as to ensure that the language of the Convention has far-reaching effects. Nonetheless, the inter-American organs can also encounter a state not willing to comply and renounce to its sovereignty; a case in point is the resistance showed vis-à-vis the prosecution of persons responsible for the violations. On this level, the Court has developed method to deepen the engagement between the inter-American system for the protection of human rights and domestic legislation, as the next section explores.

3.3 Effectiveness and developments of the inter-American system

The Americas have seen spectacular developments since the authoritarian regimes have collapsed. The two-tier inter-American system has contributed to the strengthening of human rights by means of advisory opinions or adjudications; in particular, the Court has focused on the chief regional themes that tainted the respect of inalienable rights: forced disappearances, impunity and military influence. Therefore, it is safe to assess that the regional Court has largely contributed to transitional justice by framing the rights-based practice within the concerned countries and developing doctrine on some of the most difficult issues about truth, justice, reparations and so on. In other words, the inter-American order creates a space through which individual rights are safeguarded and awareness of victims' struggles is acknowledged. This appears evident through the contributions of case law.

In its early years, the Court has focused on forced disappearance cases such as the already analysed *Velásquez Rodríguez v. Honduras* which articulated the obligation to investigate and provide reparations, delivering significant contributions to international law. In a subsequent ruling, the Court also interpreted the crime of forced disappearance as prohibited by *jus cogens*, thus allowing for investigation and punishment.[273] The Court's concern for impunity intended as amnesties or statutes of limitations in cases of grave violations amounting to crimes against humanity emerged from the treatment of

[273] Inter-American Court of Human Rights, *Case of Goiburú et al. v. Paraguay*, Merits, Reparations and Costs, Judgement 22 September 2006, par. 84

disappearances.[274] Significantly, the Court developed a solid jurisprudence vis-à-vis amnesties once the political climate in the affected countries became more responsive to the judicial body's views;[275] in *Barrios Altos v. Peru* the Court declared that amnesty laws were not admissible and incompatible with the Convention:

> «This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law».[276]

Accordingly, the Court stated that amnesties obstructed the right of accessing to justice and the proper investigation of the heinous offence, thus constituting a serious contravention of the American Convention.[277] Since amnesty was not compatible with the fundamental inter-American treaty, the Court declared it void of any legal effect and the amnesty could not continue to impede the duty to prosecute the responsible parties.[278] This case lied the ground for absolute rejection of amnesty laws and impunity in the region.

Another thorny question that the Court had to confront in the region has been how to deal with cases whereby military courts exercised their jurisdiction not only on their own but also on civilians. In *Castillo Petruzzi et al.*, the Court flatly recognised that placing civilians under military jurisdiction, something that was very common in the region during the repressive regimes, was in open contravention of the American Court since

> «Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously

[274] Supra note 211, p. 119
[275] Binder, Christina. 2011. "The Prohibition of Amnesties by the Inter-American Court of Human Rights." *German Law Journal* 12 (5), p. 1208
[276] Inter-American Court of Human Rights, *Case of Barrios Altos v. Peru*, Merits, Judgement 14 March 2001, par. 41
[277] Ibid., par. 43 "States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention".
[278] Ibid., par. 44

> established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.»[279]

The Court held a similar position also in *Palamara-Iribarne v. Chile* for cases regarding the competence of military criminal justice for offences committed by civilian in times of peace. The Court recognised the need of a state to maintain military courts, yet it instructed the accountable state to set proper limits to the subject-matter and personal jurisdiction of these special courts because in these circumstances they could lead to grave breached of the Convention such as the judicial guarantees set forth in article 8 ensuring the right to a fair trial.[280] Therefore, the IACtHR has attempted through time and case law to solve some of the most grievous problems affecting the region but also to expand its influence.

Among its case law, the Court has found a way to develop its authority vis-à-vis member states in order to bring about more compliance to its judgements. In 2006, the San José Court codified and articulated a new doctrine that has been increasingly applied in the context of calls for transnational judicial dialogue among states and the inter-American body.[281] The case in which the so-called "conventionality control" has been explicitly formulated was in *Almonacid Arellano v. Chile*, whereby the Court argued that:

> « (…) the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention».[282]

[279] Inter-American Court of Human Rights, *Case of Castillo Petruzzi et al.*, Judgement 30 May 1990, par. 128
[280] Inter-American Court of Human Rights, *Case of Palamara-Iribarne v. Chile*, Merits, Reparations and Costs, Judgement 22 November 2005, par. 256
[281] Contesse, Jorge. 2017. "The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights." *International Journal of Constitutional Law* 15 (2), p. 415
[282] Inter-American Court of Human Rights, *Case of Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgement 26 September 2006, par. 124

Starting with this case, the Court developed the idea that member states which are parties to a treaty such as the American Convention are obliged to ensure that the effects of the rights enshrined within this legal instrument for the protection of human rights are not jeopardised by the implementation of domestic legislation or the performance of state action contrary to the Convention's goals.[283] While the need to assess compatibility between the domestic realm with the Convention is something that the inter-American system already provides, in the *Almonacid* case the Court introduced for the first time the obligation for national judges to perform this type of control between the domestic norms and the Convention.[284] A subsequent series of rulings has outlined with more precision the Court's intent behind the conventionality control doctrine.

In *Cabrera Garcia v. Mexico*, the Court clarified that this exercise on the judiciary's part encompassed domestic legal provisions «at all levels», thus giving leeway for further expansion of the doctrine.[285] However, the tribunal widened significantly the Court's scope of the control in *Gelman v. Uruguay* where it declared that conventionality should be checked by all state authorities; hence, it was not only a matter of the judiciary branch, but all public authorities, governmental bodies, and also member states of the Convention were included in the process.[286] Therefore, the conventionality control doctrine can be defined as the principle under which judges and other national authorities are required to assess the compatibility of domestic *corpus iuris* with the American Convention on Human Rights. In turn, this suggests that the Convention itself becomes an integral part of the domestic legal system, suggesting that judges are also able to disregard pieces of legislation in direct opposition to the Convention.

The latter interpretation points at an evolution in the Court's perception of its role and scope vis-à-vis the Convention within the inter-American system and with respect to the states that have accepted its jurisdiction. Observers such as Dulitzky argue that the conventionality control doctrine highlights a transformation of the international human

[283] Supra note 211, p. 120
[284] Dulitzky, Ariel E. 2015. "An Inter-American Constitutional Court-The Invention of the Conventionality Control by the Inter-American Court of Human Rights." *Texas International Law Journal* 50 (1), p. 50
[285] Inter-American Court of Human Rights, *Case of Cabrera Garcia v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgement 26 November 2010, par. 225
[286] Inter-American Court of Human Rights, *Case of Gelman v. Uruguay*, Monitoring Compliance with Judgement, Order of the Court, 20 March 2013, par. 66-69

rights treaty from a subsidiary instrument to a domestic norm that occupies the highest position in the hierarchy of a national legal systems, including the constitution. While subsidiarity instructs states to incorporate international treaties but leaves them free to choose the manner and level at which this process is carried out, conventionality control as intended by the IACtHR seems to require the incorporation of the human rights instrument as domestic law and also to confer to it a higher rank than any other norm. Hence, this recently formulated doctrine poses the American Court as the final interpreter on how human rights covered in the American Convention will be applied and followed by domestic law.[287]

This trend implies that local judges must disregard laws in contradiction to the American Convention; in this sense, the relation between the Court and the states as framed by the conventionality control seeks to give all judges the status of "inter-American judges" as if they were members of the IACtHR in order to challenge legislation which does not respect the rights in the Convention nor the Court's interpretation of those vary same provisions.[288] However, it could be argued that the Court is not taking into account that the Convention itself requires the protection and assurance of human rights by state parties "in accordance with their constitutional processes"[289] because the IACtHR is requesting to domestic courts not to apply rules contrary to the Convention even if the local judges might not be empowered with the prerogatives of overriding legal norms – including the Constitution. As a consequence, the inter-American Court underestimated the heterogeneity of the region in terms of diffuse, concentrated or mixed models of constitutional review.[290]

Undeniably, there is a connection between conventionality control and constitutionality control because the Court has acted in such a way as to empower judges to regulate the compliance of domestic law vis-à-vis the Convention in a similar approach that justices already possessed for the compliance of domestic law vis-à-vis the Constitution. One

[287] Supra note 284, pp. 57-60
[288] Supra note 281, p. 415
[289] Supra note 189, art. 2
[290] Supra note 281, pp. 419-420. Contesse explains that constitutional review in the region might be: concentrated when there is only a specialised court fulfilling this task; diffuse when the power is held by all judges; mixed when the Constitutional Court strikes down unconstitutional legislation but only with certain mechanism that require the presence of district judges.

instance in which this dynamic is evident is represented by the already mentioned case of *Barrios Altos*: in its final judgement, the Court asserts the incompatibility of the amnesty law and, most importantly, declares it void of any legal effect. Therefore, it seems that the Court is expanding its sphere of action in order to attain features attributable more to an inter-American Constitutional Court, instead of a court of last resort for victims of human rights violations. By the same token, Latin American judges become inter-American judges and contribute to the regional judicial system as guarantors of the Convention, thus delineating an alternative order characterized by the execution of the human rights treaty through national and inter-American efforts.[291]

The conventionality control could be leading towards a judicialization of the inter-American system, intended as the strengthening of the individual mechanisms of appeal in order to obtain a final judgement from the Court in order to protect and promote human rights in the region.[292] In conceiving itself as an Inter-American Constitutional Court, the IACtHR has actually led several authors to convene that the conventionality control helps in the elaboration, consolidation and harmonisation of a *Ius Commune*.[293] This new development of the Court corroborates that the inter-American judicial body considerably interprets the rights enshrined in the Convention and finds innovative ways to widen the scope of protection and enforcement: indeed, the conventionality control might be classified as one of the many methods to guarantee that there would not be recurrences of the gross human rights violations that have afflicted the region.

In fact, the main advantage of a regional perspective on human rights rests on the fact that it is more in touch with the juridical, political and social conditions that have distinguished Latin American states; the awareness of the cultural context has ultimately led the IACtHR to adopt a more comprehensive approach in reaction to violations and consider also the internal nuances that have characterised concerned states. In turn, as already acknowledged, this pioneer type of work has contributed to the development of normative

[291] Supra note 284, p. 64; cfr. Inter-American Court of Human Rights, *Case of Santo Domingo Massacre v. Colombia*, Preliminary objections, Merits and Reparations, Judgement of the Court, 30 November 2012, par. 142-143

[292] Supra note 284, p. 65

[293] Supra note 182; cfr. Sagüés, Néstor Pedro. 2010. "OBLIGACIONES INTERNACIONALES Y CONTROL DE CONVENCIONALIDAD." *Estudios Constitucionales* 8 (1), *p. 119 argues that the conventionality control is one of the most practical tools to obtain this type of ius in the region, "particularly as a homogeneous view of fundamental human rights".*

standards for transitional justice mechanisms and processes due to the constant dialogue of the regional system with internal orders that allows for a wide array of actors participating in the discovery and enforcement of truth and justice.

The impact of the Inter-American system for the protection of human rights is evident also in the two case studies and shows mixed results. Anticipating some instances amply discussed further in the dissertation, Chile has not complied with the 2006 verdict in *Almonacid Arellano* according to which the amnesty had no legal effects and the Chilean state was called to rectify the situation.[294] The status of the Chilean amnesty law with respect to the rights enshrined in the American Convention came before the Court again in 2013 with the denunciation of a grave case of torture during the authoritarian regime: the *García Lucero* case enabled the court to noticed Chile's failure to act in accordance with the prior sentence to annul the amnesty.[295] Yet, the IACtHR also observed that the creative interpretations of the Chilean courts concerning ensured that amnesty was not applied in the investigation of torture; thus, in spite of Chile's non-compliance, the Court asserted that it "does not find it appropriate to rule on the State's international responsibility as a result of the existence" of the amnesty law.[296] Thus, the Court found that Chile had violated the American Convention but its sentences might not have the desired reached that human rights advocates would prefer. Nevertheless, it is noteworthy to underline that the Inter-American system always upkeeps its monitoring functions, as attested by the preliminary *in loco* visit of the IACHR's Executive Secretariat in the country for assessing the situation of human rights in the context of the ongoing protests of late 2019.[297]

Conversely, Uruguay does not possess an extended case law with regards to the inter-American system. Indeed, the case of *Gelman v. Uruguay* represents the only instance of human rights case relating to the gross violations during the authoritarian government and

[294] Supra note 282, par. 121
[295] Inter-American Court of Human Rights, *Case of Garcia Lucero et al. v. Chile*, Preliminary Objections, Merits and Reparations, Judgement 28 August 2013, par. 150
[296] Ibid., par. 154
[297] OAS Press Release. 29 November 2019. IACHR Completes Preliminary Visit to Chile. Available at: https://www.oas.org/en/iachr/media_center/PReleases/2019/312.asp

represents a turning point in the history of Uruguayan accountability since it contributed to the eventual abrogation of the blanket amnesty law that affected the development of proper judicial accounts. Therefore, as the research project is going to attest, it is safe to argue that the inter-American system has brough about a positive impulse for the progress of a human rights regime; plus, Uruguay has also proved to abide by the American Convention insofar as it successfully complied with a friendly settlement for the *Rabinovich* case concerning freedom of expression and information in 2019: in fact, the Commission pleasantly welcomed the signature of a memorandum of understanding that would propel full compliance with the agreement.[298]

As further analysis will illustrate, the ratification of inter-American instruments for the protection of human rights by Chile and Uruguay provided these two countries with an additional device in order to come to terms with past abuses and equipped injured parties with a mechanism of last resort to seek remedy whenever these states, especially right after the democratic transition, attempted to block the pursuit of truth and justice. Apart from its adjudicatory instances, the authoritativeness of the regional system chiefly translates into a constant monitoring of the exercise of human rights the two Southern Cone countries, thus increasing the chances at domestic accountability.

4. Tug-of-war: balancing political constraints and the role of the judiciary

The analysis of transitional justice instruments' major advantages and drawbacks has already underlined how political contexts greatly influence the choices of fledgling democracies which come to deal with the severe human rights breaches committed by the previous oppressive regime. Thus, transitional justice occurs in situations where the nation-state selects the most appropriate remedies taking mostly into consideration the "transition" phenomenon. Therefore, the new leadership that was represented by the executive branch would decide whether to put alleged perpetrators on trial, emit amnesty laws, set up a truth commission or provide for reparations to the victims, depending on the political context because the transitional process was largely deemed a strictly political – and therefore national – issue.

[298] OAS Press Release. 12 June 2019. IACHR welcomes progress made by Uruguay to comply with Frindly Settlment concerning petition 1227-07, David Rabinovich. Available at: https://www.oas.org/en/iachr/media_center/PReleases/2019/148.asp

Within this discourse, the judiciary have been restrained in terms of independent status and power that could exert over the other branches of government to ensure accountability and constitutionality in the name of pragmatism. Whereas judges might have been scarcely influential during the authoritarian rule or even sympathizers, their independence have been restricted after the wave of democratisation; in fact, the transitional period gave a consistent leeway to judicial adjudication in the sense that exogenous elements and considerations had the potential to impact on judge's rulings and impact their fairness, political insularity and scope of action.[299]

In spite of the contingent background, all transitional justice mechanisms operated in order to solve the most urgent matters while granting stability and consolidation of a rights-abiding regime on the long-term. Within the "steady-state" era, the domestic sphere has increasingly started to become part of a more inclusive narrative; in other words,

> «"Globalised law" (…) indicate[s] the existence of normative and institutional complexes that are not necessarily uniform worldwide, but which are constituted before the horizon of the world society – that is to say, they react to the possibility and the reality of social interaction across any political border».[300]

The evolution of an international human rights law discourse has certainly brough about an impetus within the structures and institutions that should guarantee the protection of the citizenry. As a result, constitutionalism in transition also externalised an increasing autonomy in matters that were seen once only as pertaining to the executive branch; the "judicialization" of politics also expresses the widespread trend of justices to seek an efficient way to actually confront past wrongdoers also through customary legal mechanisms like writs of *habeas corpus* or *recursos de amparo*.[301]

However, even if the truth versus justice dilemma has been arguably surpassed, transitional countries still face persistent problems in the relation between political necessities and justice demands. Sometimes the paradoxical setting according which «prosecutors in criminal trials must struggle to observe restrictions such as *nullum crimen sine lege*, which protects against ex post facto justice and punishment for acts not

[299] Supra note 168, pp. 613-614
[300] Fix-Fierro, Héctor, and Sergio Lopez-Ayllon. 1996. "He Impact of Globalization on the Reform of the State and the Law in Latin America." *Houston Journal of International Law* 19, p.789
[301] Skaar, Elin. 2014. "'Post-Transitional Trials in Argentina, Chile, and Uruguay.", p.5

criminalized at the time of commission»[302] can still impede the proper enforcement of constitutional laws and the action of judges. Therefore, some questions as to whether revision or amendment of the constitution would be the best choice must be asked; this is intrinsically connected also to the issue about who should lead the constitution-making process or start amendment procedures in transitional societies. Moreover, the position of the judiciary in delimiting the powers of the president not only formally but in practice needs further discussions.

Although there is not an indicative interpretation, the role of transitional justice mechanisms within the domestic legal order should be explored under the lens of transitional constitutionalism to assess the effects of constitutional reforms in strengthening the role of judges and curbing executive powers. In this regard, the role of a national legal culture should be explored vis-à-vis the attitudes of judicial institutions and civil society responses. Finally, both the presence of local impulses and regional institutions underscores ulterior motives of research in the national-international dichotomy. Thus, the next chapter will attempt to analyse two emblematic cases of constitutional justice in the Southern Cone of Latin America in order to answer some of these open questions and reflect upon the lasting legacy of human rights abuses in contemporary national realities.

[302] Supra note 50, p. 941 cfr. Kritz, Neil J, and United States Institute Of Peace. 1995. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: General Considerations, Volume I*. Washington, Dc: United States Institute Of Peace, p. xxii

CHAPTER III

Pacted transitions and delayed justice in Chile and Uruguay

This chapter analyses the processes of democratisation in Chile and Uruguay respectively. The analysis starts by framing the international context which would deeply influence the political, juridical and social settings of the two countries vis-à-vis the military class; specifically, this chapter provides a brief explanation of the national security doctrine and then turn to the domestic sphere. The delineation of chief obstacles obstructing the transition to democracy leads to an analysis of current developments and a final comparison between the two countries sheds light on the main differences and similarities on how Southern Cone nations have dealt with gross violations of human rights. Finally, current developments will reveal whether transitions are really over or if accountability still requires further steps.

1. The National Security Doctrine in Latin America

The coup d'états occurring in Chile and Uruguay during the 1970s which officially established authoritarian forms of government with a military leadership did not exist in a vacuum. Before analysing the most challenging hurdles for democratic transitions in both countries, it is worthwhile to briefly summarise the ideology behind the repressive leadership that dominated the two nations. Indeed, the national security doctrine arising in the international context of the Cold War legitimised the military elites and ideologically indulged the subsequent violations of human rights with which nowadays Chile and Uruguay are still grappling.

Stemming from the end of World War II, the national security doctrine can be considered a body of uncodified precepts and practices that are united by a single common thread: namely, the nation's interests for stability. More specifically, within a bipolar world order whose main protagonists were the Soviet Union and the United States, the latter's foreign policy elite influenced the "free world" in the fight against Soviet communism expansion; thus, the perceived threat of Marxist ideas called for effective state responses which found their maximal instance in important institutional changes in the national fabric.[1] Latin

[1] Dash, Robert. 1989. "U.S. Foreign Policy, National Security Doctrine, and Central America.", pp. 68-69

America represents one of the most striking examples of national security doctrine implementation in that it attests the willingness of the US to protect the region from Soviet reach.[2]

At the height of the Cold War, influential players were pushing their national agenda and struggling to assert themselves in the international scenario. In fact, the Cuban Revolution in 1959 represented a model to its neighbours, which were subjugated by poverty, corruption and plutocratic exploitation; so, Marxist ideas spread all over the region. Consequently, US national security strategists began worrying over the rising communist influence, fearing that the Cuban phenomenon could spread in their backyard and threaten their sphere of influence; moreover, another worrying element was the presence of left-wing militant groups which put right-wing governments on alert.[3] Within this backdrop, the national security doctrine took shape through both ideological and military training, first of all in Brazil at the "War School" (*Escuela de Guerra*) after toppling the populist regime of João Goulart in 1964.[4]

The ideological basis of the doctrine rests on five essential elements: national security, the state, war, national goals, and national power. First, national security per se is associated to the ability of nations to ensure their existence through political, economic, social, military and diplomatic actions against international disruptions; second, the state is the organic component charged with the task of maintaining order and harmony within its borders to secure survival; third, war was revised and associated also to internal security, a concept that will be explored below; fourth, national goals are the end result of a calculation between accessible resources and obstacles to the realisation of the state's interests; fifth, the national power is the composition of factors such as form of government, national character of the population, culture, territory and so on, all aspects which attune the citizenry in the internal and external areas.[5]

[2] Ibid., p. 70
[3] Skaar, Elin. 1994. "Human Rights Violations and the Paradox of Democratic Transition. A Study of Chile and Argentina." Chr. Michelsen Institute, p. 33
[4] Supra note 3, p. 34
[5] Calvo, Roberto. 1979. "The Church and the Doctrine of National Security." *Journal of Interamerican Studies and World Affairs* 21 (1), pp. 74-77

Therefore, the doctrine spread and endowed the army with a justification to intervene in the national development;[6] indeed, the central aim of this principle was to stop the spread of communism and the main threat to this purpose was the presence of agents linked to Marxist ideas and the Soviet Union.[7] In response to this danger, the armed forces changed their own self-perception and began to assume the function of guarantors of the nation's interests, values and security: invading the civil realm, the Latin American military perpetuated the idea of being the sole institution capable of defending the state whenever threatened.[8] As a result, both lower-rank and higher-rank officers were trained in the US and at war colleges in Latin America, but against whom?

Along with the shift in the armed forces' self-perception, also the notion of enemy changed and did not focus on external risks anymore: the lynchpin of the national security doctrine was the identification of the enemy with internal actors, such as left-wing guerrilla groups.[9] Accordingly, the internal enemy is defined as «unorthodox forms of internal aggression that threaten national security»;[10] the national security doctrine's approach to the enemy could be broken down into two main dimensions:

> «On the individual level, it propagated the extermination of all opposition and installing fear to prevent the recruitment of new opposition. On the institutional level, it sought to eliminate all those structures of civil society through which oppositional voices could be formulated».[11]

Hence, Cold War national security doctrine combining counterinsurgency concepts with anti-communist feeling provided the militaries with the mission of eliminating subversive enemies[12], namely anyone who stood against right-wing authoritarian regimes. As a result, the doctrine of counterinsurgency took over and legitimised practices such as torture, enforced disappearance and extra-legal execution of political dissidents and civilians as an integral part of the struggle against subversion. This international

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[6] Skaar, Elin, and Camila Gianella Malca. 2014. "Latin American Civil-Military Relations in a Historical Perspective: A Literature Review." *CMI Working Paer*, p.7
[7] Borzutzky, Silvia. 2018. *Human Rights Policies in Chile The Unfinished Struggle for Truth and Justice*. Cham: Springer International Publishing Palgrave Macmillan, p. 12
[8] Supra note 3, p.33
[9] Supra note 7, p. 12
[10] Pion-Berlin, David. 1989. "Latin American National Security Doctrines: Hard and Softline Themes." *Armed Forces & Society* 15 (3), p. 413
[11] Supra note 3, p. 33
[12] McSherry, J. P. (2001). Operation Condor: Deciphering the US Role. *Crimes of War Project (Jul 6, 2001)* available at: http://www.crimesofwar.org/special/condor.html

component will also involve the development of Plan Condor, the intelligence-sharing apparatus across Southern Cone countries that would lead to cross-national atrocities;[13] yet, for what regards the national realm, the conception of internal enemy is pivotal to shed light on some of the major problems that transitional justice had to face in both Chile and Uruguay due to the effects of states of exception.

2. Chile: an unfinished affair

The rise of a military regime in Chile after the golpe in 1973 marked a prolonged period whereby individual liberties were significantly restricted and institutional safeguards removed or modified to accommodate the new government. Within this framework, the leadership managed to impose certain clauses, such as the amnesty law and the constitution, whose removal proved to be difficult with the return of democratic values. Moreover, the nonconfrontational policy adopted by the incoming government did not satisfy the demands for justice and truth; thus, the process to eradicate impunity had been gradual, with major events and alternative transitional justice options contributing to a shift in the legal and political culture. Yet, in light of this analysis, the process does not appear to have come to an end.

2.1 Legacy of the Pinochet era: authoritarian enclaves

On September 11, 1973, the Chilean Armed Forces took over the government of the Popular Unity President Salvador Allende, the first democratically elected openly Marxist head of state, after critical polarisations between the right and the left were exacerbated by economic issues.[14] The military overthrew the socialist government «with the patriotic commitment of restoring the Chilean identity, justice and the fractured institutional framework»[15] that Allende, according to the newly established military junta, had encroached. Conversely, the government of the armed forces pledged to «guarantee the effectiveness of the judiciary and respect the constitution and legislation of the

[13] Supra note 6, p. 16; cfr. Rhymes E. (2017). Operation Condor: US, Latin American Slaughter, Torture Program. Retrieved from https://www.telesurenglish.net/opinion/Operation-Condor-US-Latin-American-Slaughter-Torture-Program-20170615-0028.html, the Brazilian General Breno Borges Fortes suggested
already in 1973 to "extend the exchange of information" between various services to "struggle against sub version."

[14] Snyder, Edward C. 1994. "The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973-1995." *Tulsa Journal of Comparative and International Law* 2 (2), pp. 257-258

[15] Decree Law no. 1, *Diario Oficial*, Sept. 11, 1973 (own translation)

Republic»[16] and assumed the exercise of executive and legislative powers, inaugurating a political chapter of Chilean history characterised by repression through decree laws.[17] Indeed, the next sections will examine the most problematic regulation that impeded the quest for justice and truth during and after the military rule.

2.1.1 States of exception

Within democratic societies, emergency regimes have followed so-called 'models of accommodation' which envisaged that legal and constitutional provisions could become more flexible or even partially suspended in cases of national emergency. In order to support the state in a crucial moment, a compromise must be reached so as to ensure observance of the rule of law and democracy.[18] In Latin America, constitutions usually contain articles regulating different states of exception based on the gravity of the emergency and the powers conferred to the executive accordingly. Various typologies of exigencies will determine the typologies of measures taken by the government to face the situation; depending on this, there will be more or less restrictions of individual rights with a simultaneous increase of the executive's prerogatives.[19]

Naturally, the 1925 Constitution contained provisions that envisioned constitutionally mandated states of exceptions[20] and the military junta took advantage of this right. One of the very first actions of the incumbent Chilean government was to declare a state of siege (*estado de sitio*) throughout the country by issuing Decree Law no. 3. The decree was further complemented by Decree Law no. 5, which interpreted article 418 of the Code of Military Justice, and affirmed that the state of siege was to be considered equivalent to a state or time of war due to the internal commotion.[21] In conjunction to the state of siege, a state of emergency was issued with the purpose of strengthening this exceptional

[16] Ibid.
[17] Figueroa, Dante. 2013. "Constitutional Review in Chile Revisited: A Revolution in the Making." *Duquesne Law Review* 51 p. 397 defines a decree law as "(…) an executive decree that regulates a topic that normally would be regulated by a statute, that is, regular legislation, but without the authorization of Congress"
[18] Gross, Oren. 2011. In *Comparative Constitutional Law*, edited by Tom Ginsburg and Rosalind Dixon. Cheltenham: Edward Elgar Publishing., pp. 336-337
[19] Ibid.
[20] Chilean Constitution 1925, art. 72 par. 17, which was what the junta used in it decree; although the constitution conferred upon the national Congress the power to declare a state of siege which could last for less than six months and they permitted very limited restrictions on public freedoms (art. 44 par. 12)
[21] Decree Law no. 5, *Diario* Oficial, Sept. 12, 1973, art. 1

circumstance.[22] However, within the hierarchical scheme for the states of exception, the state of siege remained the gravest because of the resulting effects.

Indeed, being in a state of war implied a series of important consequences in the civil order. The population was deprived of its institutional safeguards in the sense that the junta dissolved the Congress;[23] because the Constitutional Tribunal was supposed to solve conflicts about the constitutionality of legislation between the executive and the legislative branches,[24] but the Congress had already been dissolved, the Court was deemed "unnecessary" and was dissolved in turn.[25] At this point, the military leadership acquired all the executive, legislative and constituent powers stipulated in the Constitution by a further law decree.[26] Along with this, restrictions of freedoms and rights ensued such as the ban on labour unions, censorship on the media and education sectors, dissolution of all the left-wing political parties, annulment of electoral registration lists and so on.[27]

The only institution left virtually untouched was the Supreme Court because it favoured the new regime and its elites, who recurred to it whenever other judiciary bodies attempted to contest the repressive measures: this is also one of the causes as to why the Constitutional Court was eliminated and the Supreme Court was further entitled.[28] The Supreme Court did not stop the gross human rights violations undertaken by the armed forces, which were in the process of creating systematic repression through bureaucratic organs such as the National Intelligence Directorate DINA (*Dirección Nacional de*

[22] Decree Law no. 4, *Diario Oficial*, Sept. 11, 1973
[23] Decree Law no. 27, *Diario Oficial*, Sept. 24, 1973
[24] Chilean Constitution 1925 amended by Law 17284 "Project of Constitutional Reform"
[25] Decree Law no. 119, *Diario Oficial*, Nov. 10, 1973
[26] Decree Law no, 128, *Diario Oficial*, Nov. 16, 1973 the junta stated that "the assumption of supreme rule ove the nation means exercising all the powers of the persons and bodies that make up legislative and executive powers and consequently, the constituent powers that is theirs", consideration c.
[27] Supra note 3, p. 42
[28] Garoupa, Nuno, and Maria A. Maldonado. 2011. "The Judiciary in Political Transitions: The Critical Role of US Constitutionalism in Latin America." *Cardozo Journal of International and Comparative Law* 19 (3), p. 622

Informaciones)[29], and led to an aggravation of the atrocities by rejecting thousands of *habeas corpus* writs.[30]

According to the Constitution, the guarantee of personal freedom was employed through *recurso de amparo,* which provided that any person could petition to the respective court on behalf of a detained person for the respect of judicial formalities.[31] The maximum period of detention indicated by the Constitution without a person being brought before a judge was 48 hours, that could be extended up to 5 days in a state of emergency.[32] Nevertheless, the military junta managed to amend the relevant articles in order to detain citizens without charging them of a crime for 5 days and to initiate proceedings in Military Tribunals.[33] These were all direct effects of the declared state of siege: since it was equivalent to a state of war, both the right to legal proceedings and *habeas corpus* were suspended, along with the restriction of other civil and political rights.[34]

The rationale behind the takeover of Military Tribunals was that internal commotion equalled a state of internal war and, therefore, these specific courts were allowed to assert jurisdiction also over civilian cases as expressed by the Code of Military Justice.[35] Extremely used to prosecute all the dissidents and "internal enemies" of the state, military tribunals served two main functions depending on their mandate: War Councils (*Consejos de Guerra*) exercised jurisdiction only in times of either external or internal war[36] where the enemy is not only a foreigner threat, but «any type of rebel or seditious force militarily organised».[37] Conversely, peacetime courts were used when the state of siege ceased in order to protect military forces from accusations of human rights abuses; this aim was

[29] Decree Law no. 521, *Diario Oficial*, Jun. 14, 1974.The Directorate was supposed to be controlled by the junta, but in practice it answered mostly to the President of the government junta see: Supra note 3, p. 43. DINA took the initiative to officially launch Operation Condor at the "Working Meeting on National Intelligence" called by Chilean Colonel Contreras, who was at the head of DINA. The meeting envisioned a well-defined organizational structure and a proposal for action against subversive forces.
[30] Skaar, Elin, Jemima García-Godos, and Cath Collins. 2017. Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability. London: Routledge, p.134
[31] Chilean Constitution 1925, art. 16; cfr. Supra note 14r, p. 256
[32] Chilean Constitution 1925, art. 15
[33] Decree Law no. 1009, *Diario Oficial*,May 8, 1975. This situation was further exacerbated when the junta passed Decree Law no. 3168 which permitted the military to keep a person incommunicado for 20 days, worsening the conditions of the disappeared.
[34] Supra note 3, p. 42
[35] Code of Military Justice, art. 81 envisaged that all the crimes tried under military jurisdiction in time of war were to be handled exclusively in war tribunals.
[36] Chilean Code of Military Justice, art. 73 provides for the application of "tribunals in wartime" (own translation)
[37] Ibid. art. 419 (own translation)

achieved by broadening the competences of these courts so as to include any type of action that was taken by the army and civilian courts were unable to pursue justice for the wronged parties.[38]

Nevertheless, military tribunals, much like any kind of court that composes the judiciary, is subject to the hierarchical order that poses the Supreme Court at the top. In fact, the 1925 Constitution provides that «the Supreme Court has the direct, correctional and economic supervision over all the Tribunals of the Nation (…)»;[39] yet, the Court declared that it had no competence over War Councils due to the states of exception and accepted the provision of Code of Military Justice according to which only the commander in chief of the specific war tribunal had control over that court.[40] Thus, the Supreme Court renounced to its supervisory role of military courts.[41] Nevertheless, there have been few instances where the Court granted judicial review to those who appealed for the infringement of their integrity due to the state of siege and state of emergency and demanded the inapplicability of the respective law decrees; the Court adopted the assumption that law decrees issued up until that point never specified whether they modified or annulled particular clauses of the Constitution.[42] This manifestation of juridical independence pushed the junta to adopt Decree Law no. 788, whereby all measures, past or future, adopted by virtue of state of siege assumed the status of «amendatory rules»[43]: in this sense, the junta's decrees assumed constitutional rank and avoided possible accusations on unconstitutionality grounds. As a result, the Supreme Court could not enforce the Constitution since the decree laws could amend the it.[44]

The reinforcement of the powers of the junta, which attempted to mask its violent oppression under a veil of legitimacy through the decrees, was additionally confirmed in 1976 with the issuing of the Constitutional Acts (*Actas Constitucionales*) which were institutional guidelines aimed at giving the military leadership constitutional status.[45] These Acts set a framework where basic concepts such as rule of law, democracy and

[38] Supra note 14, pp. 265-267
[39] Chilean Constitution 1925, art. 86 (own translation)
[40] Code of Military Justice, art. 74
[41] Supra note 14, pp. 267-268
[42] National Commission for Truth and Reconciliation. 1990. United States Institute of Peace, p. 93
[43] Decree Law no. 788, *Diario Oficial*, 11 Sept. 1974
[44] Supra note 17, pp. 397-398
[45] Supra note 3, p. 38

individual rights were affirmed and assured; however, these efforts for providing numerous constitutional guarantees[46] that also included the mechanism of individual protection through *habeas* corpus,[47] were shadowed by Act no. 4 referring to how states of exception could limit those same rights. However, the most ominous restriction came about the next year, which modified Act no. 4 and provided that the right to a writ of *amparo* would be suspended altogether during states of exception.[48]

In conclusion, the states of exception had a major impact with respect to the gross violations of human rights with which the country is still dealing. The only branch of the state that continued to be separated from the junta, namely the judiciary in general and the Supreme Court in particular, failed its role as guardian of civil and constitutional rights due to its refusal and incapacity to wield the power of constitutional review through *amparo*. While the Constitutional Court was completely removed, civilian courts lost their jurisdiction over cases whenever members of the military were involved, which coincided to the cases were atrocities were most likely to occur. Thus, the states of exception constituted concrete obstacles to legal proceedings and paralysed the whole system of accountability, leaving Chile in a complete condition of impunity. In the meantime, the Constitution was emptied of its values through law decrees.

2.1.2 The 1978 Amnesty Law

Another significant hurdle, maybe the most persistent and ever-present that human rights advocates have to face, is constituted by the Amnesty Law Decree issued in 1978 which was incorporated into the Constitution. The junta went through phases of repression and the most brutal corresponded to the state of siege beginning right after the military overthrew Allende's government and ending in 1978,[49] increasingly, the leadership started to diminish its repressive measures due to internal outcry and also international

[46] Constitutional Act no. 3 embodied all the rights protected under the "Constitutional rights and guarantees" headline. It underlined that the rights of the individual took precedence vis-à-vis the rights of the State.
[47] Constitutional Act no. 3, art. 2 and art. 3
[48] Decree Law no. 1684, *Diario Oficial*, Jan. 31, 1977 stated that art. 14 of Constitutional Act no. 4 had to be substituted with the clause "The remedy of protection established in article 2 of the Constitutional Act no. 3 will be inadmissible in states of exigency, notwithstanding if these were contemplated in the Constitutional Act no. 4 of 1976 or in other constitutional or legislative norms" (own translation)
[49] Supra note 14, p. 269

pressures in light of the alleged involvement of DINA[50] in the assassination of former Popular Unity official and Allende's minister Orlando Letelier and his secretary Ronni Moffit in Washington D.C. on 21 September 1976.[51] In order to gain legitimacy and protect their own, the armed forces shifted their governmental policy and introduced Law Decree 2191.

> «Amnesty shall be granted to all individuals who committed criminal acts (*hechos delictuosos*), whether as perpetrators, accomplices or conspirators, during the state of siege in force from September 11, 1973 to March 10, 1978, provided they are not currently subject to legal proceedings or have been already sentenced.»[52]

The very first article of the decree underlines that the typology of amnesty applying to wrongdoers would have been total: Chile had just adopted an amnesiac, or blanket, amnesty. The scope of the amnesty's applicability is wide because it covers and protects from trial all the persons who have not committed any of the crimes listed in the law decree, where offences such as murder, kidnapping, disappearance and other relevant felonies actually undertaken by the military regime did not figure.[53] Thus, the most appalling abuses of human rights were not going to be processed because the chief agents were going to be covered by the amnesty; this judicial constraint has added an ulterior challenge to relatives of victims in the pursuit of justice.

Instead of following the «ethical imperative» of «strengthening the ties that unite the Chilean nation, leaving illogical hatred behind and encouraging all the initiatives that consolidate the reunification of Chilean citizens»[54], the decree law actually managed the opposite and created a complex obstacle for accountability and reconciliation. In fact, attempts to challenge the amnesty during the junta government were difficult affairs because the courts automatically declared themselves incompetent and transferred all their cases associated to disappeared individuals to military tribunals, which promptly shut down investigations invoking the amnesty law. Moreover, the amnesty prevented not

[50] After this episode, DINA was dissolved and replaced by the Central Nacional de Informaciones, CNI (National Information Centre)
[51] Supra note 3, p. 50
[52] Decree Law no. 2191, *Diario Oficial*, Apr. 19, 1978, art. 1 (own translation)
[53] Ibid., art. 3 mentions that certain categories of crimes such as homicides within the family or armed robbery were excluded from the amnesty.
[54] Ibid., consideration 2

only the indictment of offenders, but also the investigation of the misdeeds, owing to the fact that judicial measures covered by the decree were automatically refused.[55]

Therefore, challenges to the amnesty remained sporadic and without desirable results. For example, in 1978 the discovery and identification of 15 bodies in a lime kiln in **Lonquén** led to the opening of an investigation by the Supreme Court, which appointed special investigator from the Santiago Appellate Court Adolfo Bañados Cuadra. After hearing testimonies from families and police and going through medical records, the judge concluded that members of the armed forces had been responsible for the detention and later massacre of the 15 people found; moreover, the magistrate established false testimony for eight functionaries involved in the case. He would deem Captain Lautaro Castro's version as «intrinsically implausible». Despite this ground-breaking affirmations, judge Bañados declared himself as incompetent and the proceeding passed to the military tribunal. From that moment, the Amnesty Law followed, and the defendants were exonerated of all charges and the case was dismissed.[56] Hence, discovering the truth and obtaining prosecutions during the regime era was not something feasible; effective methods to challenge the amnesty will only obtain results after the end of the junta government, although the decree still keeps human rights advocates engaged, as it will be analysed further in the chapter.

2.1.3 The 1980 Constitution

As soon as the military junta assumed power, one of the first preoccupations was to establish an official pro-coup group of jurists to elaborate constitutional reforms and prepare the draft of what will become the 1980 Chilean Constitution.[57] The Commission for the Studies of the New Political Constitution (*La Comisión de Estudios de la Nueva Constitución), also known as the Ortúzar Commission*, was meant to be an advisory organ making proposals while the constituent power remains within the military leadership.[58]

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[55] Roht-Arriaza, Naomi, and Lauren Gibson. 1998. "The Developing Jurisprudence on Amnesty." *Human Rights Quarterly* 20 (4), p. 847

[56] Museo de la Memoria. Hornos de Lonquén: la verdad de los "presuntos desaparecidos". Available at: https://ww3.museodelamemoria.cl/Informate/hornos-de-lonquen-la-verdad-de-los-presuntos-desaparecidos; cfr. Human Rights and the phenomenon of disappearances, p. 111

[57] Couso, Javier. 2010. "Models of Democracy and Models of Constitutionalism: The Case of Chile's Constitutional Court." *Texas Law Review* 89 (7), p. 1531

[58] Heiss, Claudia, and Patricio Navia. 2007. "You Win Some, You Lose Some: Constitutional Reforms in Chile's Transition to Democracy." *Latin American Politics and Society* 49 (03), p. 165-166

After its inception, the Commission worked for the next years to give a specific institutional framework to Chile; this concept was underlined by the 1977 Pinochet speech at Chacarillas, where the President called for important reforms and projected the military government into the future by means of a proper structure and not in an *ad hoc* manner anymore.

During his speech, Pinochet underlined how the country had to turn its attention to «shaping a new democracy that will be authoritarian, protected, integrational, technical and having authentic social participation».[59] Behind these pillars rested the ideology of one of the most influential drafters of the commission, Jaime Guzmán; his model of constitutionalism heavily conditioned the manner in which the military junta gained legitimacy. Indeed, the ideologist instilled the notion of 'protected democracy' (*democracia protegida*) in the work of the commission which started from the chief assumption that the military regime would eventually have to resort to open elections and popular vote in order to grant its survival and continuity;[60] thus, their focal point was a constitutionally mandated consolidation of the military regime rather than the start of a democratic transition. The concept of 'protected democracy' was the pinnacle of a technocratic drive towards a constitutionalism that would prevent majorities from altering the current authoritarian regime and preserve the institutional design as imposed by the junta.[61]

Accordingly, Guzmán recognised that Pinochet's challenge was not to «limit himself in laying the foundations of a stable democracy for Chile (…) but rather to assume realistically and opportunely the responsibility for prompting and guiding the country towards the complete functioning of the new democracy».[62] The final project was presented to the State Council for possible revisions and the junta subsequently formed a committee to deliver the final document, which was officially promulgated on August 8, 1980.[63] The text was then ratified by a national plebiscite, which was done under both

[59] Pinochet, Augusto. 1977. "Discurso en cerro Chacarillas con ocasión del Día de la Juventud, el 9 de julio de 1977." Nueva Institucionalidad en Chile. Discursos de SR el Presidente de la República General de Ejército D. Augusto Pinochet Ugarte, p. 13
[60] Huneeus, Carlos. 2000. "Technocrats and Politicians in an Authoritarian Regime. The 'ODEPLAN Boys' and the 'Gremialists' in Pinochet's Chile." *Journal of Latin American Studies* 32 (2), p. 464 and p. 466
[61] Supra note 57, pp. 1531-1532
[62] Guzmán, Jaime. 1979. "El camino político." *Revista Realidad* 1(7), p. 23 (own translation) available at: https://archivojaimeguzman.cl/index.php/revista-realidad-ano-1-n-7
[63] Supra note 58, p. 166

states of siege and emergency[64] and was highly contested due to its failure of carrying out political will in a democratic fashion.[65] The new 1980 constitution entered partially into force on 11 March 1981: in fact, the junta had prescribed in the Constitution a, eight-year period of transition in order to establish the new framework and then reach another plebiscite; during this timeframe, the Constitution would only implement 29 transitional provisions[66] in order to "normalise" society.[67]

Thus, the foundational document was engineered in such a way as to grant and safeguard the autonomy and influence of the military in case of upcoming elections: indeed, the Constitution mandated a plebiscite in 1988, where the junta had to present a presidential candidate yet, in case the voters rejected the candidate, new open and free elections would occur in 1989 to vote for the next Chilean president.[68] Therefore, the 1980 Constitution provided an effective framework to achieve protected democracy through articles that aimed at either reinforcing the power of the military or limiting the scope of action for the protection of individuals. These can be classified within two different sets of practices and clauses, that will be examined in light of their consolidated entrenchment in the legal order and subsequent difficulty in exacerbating them during the transition to democracy.

First of all, the Constitution drastically expanded the powers of the executive in different ways. According to transitory article 15, the President was now in charge of pronouncing a state of siege or emergency at his discretion without consultation or review,[69] which were envisaged in article 40 of the Constitution;[70] as a result, the President could suspend or restrict personal freedoms and therefore revoke the right to *amparo* appeal.[71] Moreover, the President assumed further command of the constitutional order with the introduction of a new state of exception, defined as «danger or disturbance of internal peace»,[72] whose declaration exclusively rested upon the President; plus, this state of exception could not be subject to any review or recourse «except that for reconsideration

[64] Supra note 14, p. 269
[65] Paixao, Cristiano. 2015. "Past and Future of Authoritarian Regimes: Constitution, Transition to Democracy and Amnesty in Brazil and Chile." *Giornale Di Storia Costituzionale* 30, p. 96
[66] Supra note 3, p. 77
[67] Supra note 7, p. 58
[68] Supra note 58, p. 166
[69] Chilean Constitution 1980 (original text), transitory art. 15, par. A (1)
[70] Chilean Constitution 1980 (original text), art. 40
[71] Chilean Constitution 1980 (original text), art. 41
[72] Supra note 14, p. 269

thereof by the authority having ordered them»,[73] so Pinochet himself. This new state of exception was enforced right away and ended only two months prior to the new plebiscite in 1988.[74]

Indeed, the empowerment of the regime is particularly exemplified by transitory article 24 of the Constitution, which signals the paradox of intents within the document: while individual rights are explicitly catalogued in the body of the Constitution, their implementation is consistently limited due to the prerogatives conferred upon the President in the state of danger or disturbance of internal peace recently enforced. The continuous use of transitory article 24 guaranteed an equal continuous violation of fundamental human rights, because the President could arbitrarily arrest, detain, expel from the country, limit freedom of information and resort to *de facto* unlimited entitlements due to the absence of benchmarks such as due process of law. In turn, the executive formally assumed the role of guardian to grant national security, strictly in line with the national security doctrine that affected Latin America during those decades.[75]

The role of guarantors of the institutional system was conferred to the armed force by article 90, yet its practical expression was to be found in the establishment of a Council for National Security COSENA (*Consejo de Seguridad Nacional*) which was composed by the President of the Republic, the presidents of the Senate and of the Supreme Court, and the commanders in chief of the army, navy, air force and *Carabineros*.[76] The COSENA was invested with the task of representing to any authority established by the Constitution its opinion about anything affecting the institutional order or pertaining to national security; in this regard, it possessed a large scope of application also through the right to ask for information about internal and external security of the nation to any public authority.[77] Lastly, the military regime obtained a special role within society because their appointments, promotions and retirements depended solely on supreme decree[78] thus removing any form of civilian control on the whole category.[79]

[73] Chilean Constitution 1980 (original text), transitory art. 24
[74] Supra note 14, p. 270
[75] Supra note 58, p. 167
[76] Chilean Constitution 1980 (original text), art. 95
[77] Chilean Constitution 1980 (original text), art. 96
[78] Chilean Constitution 1980 (original text), art. 94
[79] Supra note 14, p. 269

While the Constitution seemed to growingly consolidate the military's autonomy, which was considered as a pivotal prerequisite to perform the tutelary role,[80] society had many limitations imposed. One of the clauses that amply restricted the citizenry in their rights was article 8, according to which:

> «Any action by an individual or group intended to propagate doctrines attempting against the family, or which advocates violence or a concept of society, the State or the juridical order, of a totalitarian character or based on class warfare, is illegal and contrary to the institutional code of the Republic. The organizations and political movements or parties which, due to their purposes or the nature of the activities of their members, tend toward such objectives, are unconstitutional».[81]

Following this article, political pluralism was heavily restricted and political dissidents were even more vulnerable because of the inapplicability of amnesty law to terrorist conducts.[82] Through other provisions, restrictions to labour unions, freedom of the press, freedom of expression, freedom of education and so on were implemented. Thus, individuals found themselves deprived of their inalienable rights without support from institutions that could have granted a modicum of protection.

The 1980 Constitution managed to pose in an advantageous position not only the military, but every agency that sympathised for the regime; as a result, even the institutional level was influenced by the goal of protected democracy and constrained popular sovereignty through the restrictive clauses both in the political and juridical sphere. Governmental bodies deriving from popular consensus were abolished: elected local governments were substituted by the capacity of the President to nominate regional intendants, governors and mayors;[83] most importantly, the President acquired the power to dissolve the lower house, the Chamber of Deputies, only once during his tenure.[84] Strong presidentialism became an overriding feature of the governmental framework described by the Constitution.

The goal of undermining the contrary voices of those that opposed to the regime was also fortified by the introduction of a new electoral system, which could second the forces pro-

[80] Supra note 58, p. 167
[81] Chilean Constitution 1980 (original text), art. 8
[82] Chilean Constitution 1980 (original text), art. 9
[83] Chilean Constitution 1980 (original text), art. 32 par. 9
[84] Chilean Constitution 1980 (original text), art. 32 par. 5

junta and maintain the military *status quo*. The traditional proportional representative system was substituted by the so-called majoritarian binomial system (*Sistema binomial mayoritario*): each party can present up to two candidates and each district elects a total of two representatives from which the electorate has to pick one; the winners are determined by the total vote received by each list. The list with the largest number of votes gets one seat while the second seat is chosen from the second list with at least half of the votes. In order to support conservative parties, congressional districts were remodelled in order to assure large representation in the areas that favoured the regime.[85] This system led parties to form two large coalitions, which has dominated Chilean politics even after the collapse of the authoritarian government.

Finally, the judiciary continued to be an accomplice of the executive branch through the assurance of principles of superiority to the military. For instance, the hierarchical judicial order according to which the Supreme Court had direct supervision and control over the other courts was formally disrupted in the Constitution, with the exemption of military tribunals from the norm.[86] Conversely, a significant yardstick for judicial review had been maintained, namely the writ of non-applicability (*inaplicabilidad por inconstitucionalidad*) which allows a party to petition before the Supreme Court to declare that a particular legal precept is not applicable because unconstitutional;[87] in order to affirm the non-applicability of a statute, the case must be heard and ruled by the full court. Had the given law been considered non-applicable, the resolution's effects would only be *inter partes* without changing the effectiveness of the law under examination.[88] Moreover, the Supreme Court could not assess the non-applicability for provisions already ruled by the Constitutional Court.[89]

While the Supreme Court had the task of reviewing the constitutionality of legislation by means of inapplicability the Writ of Inapplicability and the Constitutional Tribunal, which was reinstated with the Constitution, was in charge of reviewing the constitutionality of bills. For clarification, the Constitutional Court could rule about the non-applicability of

[85] Supra note 7, pp. 59-60
[86] Chilean Constitution 1980 (original text), art. 79
[87] Chilean Constitution 1980 (original text), art. 80
[88] Couso, Javier. 2003. "The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990–2002." *Democratization* 10 (4), p.74
[89] Chilean Constitution 1980 (original text), art. 83

a given law, but only if it is required to act by the President or a portion of either house and within a set period of time.[90] Usually, the Constitutional Court performs an *a priori* judicial review, meaning that the Tribunal rules over the constitutionality of pieces of legislation before their promulgation: this abstract review applies to both legislative and executive branches in their capacity of issuing laws and the cases covered have *erga omnes* effects.[91]

With the establishment of the junta-assigned Constitution, the Constitutional Tribunal was charged with a new judicial procedure for the protection of the individual's constitutional rights, defined as the writ of protection (*recurso de protección*). The important distinction that must be made here is that *recurso de amparo* in Chile is identified with *habeas corpus*, referring to personal integrity and freedom, whereas the writ of protection shares the legal nature of *amparo* intended as the enabling instrument to invoke action before a court of appeals when there has been a violation of any right granted either implicitly or explicitly by the Constitution or an act or omission by an institutional body or an individual has jeopardised the constitutional rights;[92] this method have been used abundantly in the period following the transition, although the military regime formulated the Constitutional Court to be a watchdog of the authoritarian constitutional framework;[93] in fact, this judicial body was composed by three justices selected by the Supreme Court, one attorney appointed by the President, two lawyers chosen by the National Security Council and one lawyer elected by the Senate with an absolute majority.[94] Military influence was obvious.

Nevertheless, the Constitutional Court showed a remarkable degree of independence vis-à-vis the military regime. In order to assure its victory at the 1988 plebiscite, Pinochet proposed a bill that would have ensured him eights more years as a President; in an unexpected turn of events, the Constitutional Court ruled that the proposed bill was unconstitutional and that basic standards for free and open elections had to be respected during the plebiscite:[95] fairness at the referendum could only be granted through a

[90] Supra note 88, p. 73; cfr. Chilean Constitution, art. 82 par. 12
[91] Tiede, Lydia B. 2015. "The Political Determinants of Judicial Dissent: Evidence from the Chilean Constitutional Tribunal." *European Political Science Review* 8 (3), p. 383
[92] Supra note 88, p.73
[93] Supra note 57, p. 1533
[94] Chilean Constitution 1980 (original text), art. 81
[95] Supra note 28, p. 623

National Electoral Register, an Electoral Tribunal and all, in case of presidential and parliamentary elections, representatives of political parties.[96] Another proof of the Court's perseverance was the declaration of unconstitutionality for the bill creating the Electoral Tribunal responsible for the supervision of elections: indeed, the bill was supposed to enter into force for the first parliamentary and presidential election, supposedly occurring in December 1989; hence, the Constitutional Court established that this body had to commence its task with the plebiscite of 1988.[97]

In conclusion, Pinochet's constitution was created to achieve a protected democracy which was not, however, democratic owing to the fact that it imposed several restrictions and limitations to society and precluded their active participation in the political discourse. High levels of military autonomy and strict impediments to reform certain clauses of the constitution contributed greatly in the entrenchment of authoritarian enclaves after the transition and obstructed transformational processes of justice. After Pinochet lost the plebiscite with 54.7% of the electorate voting "No" to the military rule,[98] he called for presidential elections in the next year in accordance with the Constitution; this was perceived by the opposing forces as the moment to enter into the Coalition of Parties for Democracy CPD (*Concertación de Partidos por la Democracia*), a centre-left multi-party alliance composed mainly by Christian Democrats but also supported by Socialists and a broad range of smaller parties.[99] Presidential elections were set for 14 December 1989 and the transfer of office was programmed for March 1990: the struggle between authoritarian structures maintaining the influence of the military and the purpose of removing the vestiges of the junta in order to live in a democratic society had just begun.

2.2 Negotiating transition: the difficult return to democracy

Transition to democracy for Chile is classified as a negotiated transition due to the influential power that the outgoing regime managed to preserve and the ensuing negotiation for constitutional reforms in 1989. In fact, this difficult affair required a balance between justice and politics because the electoral system heavily influenced the

[96] Supra note 57, p. 1531
[97] Supra note 17, p. 402
[98] Supra note 14, p. 279
[99] Supra note 3, pp. 83-84

composition of the Senate, which could block aby effort to reform and amend authoritarian-imposed provision. Therefore, the democratic opposition managed to eliminate grievous clauses that undoubtedly undermined a proper democratic order, but the military succeeded in keeping its autonomy and preventing future prosecutions. Once elected, the Concertación was able to guarantee some degree of truth and accountability through alternative transitional justice mechanisms, such as the truth commission. For what regards prosecutions of perpetrators, many plaintiffs' requests were rejected by the Supreme Court, yet the domestic sphere started to change through further judicial reforms and new ways of interpreting persistent obstacles such as the amnesty law; this dynamic reached its peak with the transnational case of Pinochet in the United Kingdom.

2.2.1 Do ut des: leyes de amarre and unfulfilled expectations

While the Concertación was sure about its presidential victory, the period between the plebiscite and the upcoming elections was fermented by a series of negotiations agreed between Minister of Interior Carlos Cáceres with the opposition coalition CPD and the rightist National Renovation RN (*Renovación Nacional*).[100] In fact, the outgoing regime adopted a strategy to still maintain some control over the government by campaigning for a reduction of the powers of the executive, especially the presidential ones, and augmenting those of the legislative where it was more likely that pro-junta exponents would have more impact on the decision-making process. A negotiation was inevitable because, on one hand, popular vote had expressed the desire to set aside the seventeen years of authoritarian practice but, on the other one, the junta had the task of unilaterally proposing the constitutional reforms: this tug-of-war between the two forces resulted in efforts to keep an equilibrium in order not to endanger the fledgling democracy by vexing the armed forces.[101]

This process could not be considered a "negotiation" per se, since the democratic opposition made suggestions on the chief points that needed to be reviewed and the junta worked on the modification in order to accommodate some democratic components within the overarching authoritarian structure; indeed, the package prepared by the military government was planned with the intent of granting a modicum that could satisfy

[100] Supra note 3, p. 85
[101] Supra note 58, p. 168

a sufficient number of parties within the Concertación and lead the whole CPD to accept the reforms. Accordingly, «because the Concertación could only accept or reject but not modify the dictatorship's proposed reforms, the military could maximize the number of protected democracy provisions that remained untouched».[102]

The resulting 54 constitutional changes represented a true compromise. Some protected democracy clauses in the charter were modified or abrogated altogether, yet the military accomplished to cement some prerogatives that turned out to be difficult if not impossible to disentangle during the post-election period; therefore, these were called *leyes de amarre* ("tying-up") or mooring laws[103] and ensured that the incoming government could not change the Constitution nor influence the autonomy of the military. These reforms exchanging democratic provisions for authoritarian items and vice versa affected a range of areas that have already been analysed for what regards the constitutional framework given by the junta.

Among the successes of the opposition party to diminish the influence of the previous regime and favour democratic dispositions, the abrogation of article 8 was one of the most sought after. Since it restricted political pluralism in a significant way, only its removal could actually grant society that all voices could contribute to the country's development.[104] Thus, this provision that limited free speech and deemed communist parties as a threat consistent with the national security doctrine was eliminated and some of its content was transferred to article 19: the original article already envisaged the restriction of parties' participation if they were not transparent about their records and funding, but the reforms added that «the parties, movements or other forms of organization of which the objectives, acts or conduct do not respect the basic principles of the democratic and constitutional regime, advocate the establishment of a totalitarian system, as well as those with violence, or advocate or incite it as a method of political action, are unconstitutional».[105] Appreciably, the article also included an explicit reference to political pluralism.[106]

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[102] Ibid., pp. 169-170
[103] Collins, Cath. 2009. "Human Rights Trials in Chile during and after the 'Pinochet Years.'" *International Journal of Transitional Justice* 4 (1), p. 72
[104] Supra note 58, pp. 172-173
[105] Chilean Constitution 1980 (amended 1990), art. 19 par. 15
[106] Ibid.

Political pluralism was resumed also through the abolition of provisions that restricted freedom trade unions to participate in the political life of the country, although these reforms upheld that labour unions could not have any political affiliation to political parties and vice versa.[107] For what regards civic life, provisions restricting freedom of expression in any form such as television censorship and educational limitations were maintained with minor modifications: for instance, the right to academic freedom had no limitations «but those imposed by morals, good customs, public order, and *national security* (emphasis added)».[108]

On the side of the underlying institutional system, there were important gains for the democratic opposition. First of all, the powers of the President with respect to governmental structures were reduced: constitutional reforms of 1989 fortified political pluralism by removing the power of the President to dissolve the Chamber of Deputies;[109] moreover, he would have not been able to exile persons or prohibit their return to Chile anymore at his discretion under states of exception.[110] Likewise, the President's role was also limited in terms of timeframe because his tenure was reduced from 8 to 4 years.[111] Finally, the prerogative of the Senate to appoint the President in case of vacancy until the end of the tenure was replaced with instant presidential elections; the reasoning behind this latter change was connected to the structure of the Senate within the political system.[112] Originally, apart from the 26 elected members, the Senate also comprised 12 nonelected senators[113] who could exert significant influence corresponding to presidential preferences.[114] Thus, it is not surprising when constitutional reforms also lowered the number of appointed senators from 12 to 9 and increased elected ones from 26 to 38 in

[107] Chilean Constitution 1980 (amended 1990), art. 19 par. 19
[108] Chilean Constitution 1980 (amended 1990), art. 19 par. 11
[109] Supra note 58, p. 174
[110] Ibid., p. 176
[111] Supra note 3, p. 85
[112] Supra note 58, p. 174
[113] The nonelected senators appointed for an eight-year term were: two former Supreme Court judges chosen by the Supreme Court; one former national comptroller appointed by the Supreme Court; one former commander in chief from each military branch appointed by COSENA; one former public university president selected by the president of the republic; one former cabinet minister appointed by the President. Chilean Constitution 1980 (original text), art. 45
[114] Uggla, Fredrik. 2005. "'For a Few Senators More'? Negotiating Constitutional Changes During Chile's Transition To Democracy." *Latin American Politics & Society* 47 (2), p. 52

the hope of marginalising the interests of external actors in the decision-making system.[115]

Reforming the Senate was also pivotal with respect to possible amendments to the Constitution. The prior systems required a majority of three-fifths of the members of both Chamber of Deputies and Senate in two consecutive congresses for the approval of certain constitutional changes;[116] this was replaced by a majority of two-thirds of the legislature to make constitutional reforms.[117] Thus, the legislative branch acquired more power in terms of amending the Constitution and so the Senate had to possess a limited number of designated senators. Indeed, the binomial electoral system was such that nonelected senators could always form an alliance with the elected ones from the overrepresented right-wing and, consequently, block any piece of legislation that had the potential to undermine the military. Indeed, the intent of the outgoing regime was to diminish the power of the executive, like some presidential prerogatives, in favour of the legislature where it was more likely that conservative parties sympathising for the junta would exert more influence as a result of non-appointed senators and the electoral law.[118]

Certainly, the *leyes de amarre* were formulated with the intent of granting a continuity of the earlier elites even during the successor government; this was made possible through the revision of some judicial and political practices. Apart from the electoral system and the structure of the Senate, one of the most concerning legacies for the incoming administration was the maintenance of the amnesty law of 1978 which heavily restricted future prosecutions for gross human rights violations, whose hurdles will be analysed below. Yet, Pinochet was also committed to safeguard the military beyond what the amnesty already provided and secure the armed forces' independence from civilian forms of control.[119] These goals were broken down into a variety of spheres.

Within the judicial realm, during his last months as President, Pinochet passed the "Rosende Law"[120] which granted advantageous retirement incentives to the judges of the

[115] Supra note 3, p. 85
[116] This majority was kept for matters that did not concern e.g. constitutional rights, the Constitutional Tribunal, COSENA, electoral justice and reforms of the Constitution. Chilean Constitution 1980 (amended 1990), art. 127
[117] Supra note 3, p. 85
[118] Supra note 58, p. 164
[119] Supra note 58, p. 171
[120] Decree Law no. 18.805, *Diario Oficial*, Jun. 17, 1989

Supreme Court; through this legal resort, seven out of the seventeen justices retired and the President, with already three members appointed by him, could secure for the imminent future justice ministers on his side.[121] Arguably, this is one of the reasons why the Supreme Court, with its internal legal culture, had been the major barrier in the promotion of human rights during Aylwin's government after the presidential elections.[122] Indeed, all the cases corresponding to the atrocities committed during the authoritarian regime had to be proceeded before the Supreme Court, which performed an *a posteriori* concrete judicial review through writ of protection and non-applicability.

While giving up some provisions of protected democracy, other actions were taken by the authoritarian government to consolidate military autonomy. These were all encompassed in a set of Organic Constitutional Laws (*Leyes Orgánicas Constitucionales*) which were distinct from ordinary legislation due to the fact that they required a higher quorum in order to be modified: although the constitutional reforms decreased slightly the quorum required from three-fifths to four-sevenths, tangible difficulty for their amendment was still present and Pinochet took full advantage of this.[123] The promulgation of organic constitutional law of the armed forces[124] and the carabineros[125] guaranteed that commanders in chief of the armed forces and the police would keep their office (this also included Pinochet himself) and that the president could not influence the appointment, promotion and retirement modalities of the upper echelons.[126] As a result, incoming presidents were not able to remove high-ranking officers belonging to the military regime from the political life of the government. This was also confirmed by the reform of article 94 of the constitution, according to which

> «The appointments, promotions and retirement of the officers of the Armed Forces and Carabineros will be effected by supreme decree in conformity with the applicable constitutional organic law, which will determine the respective basic norms, as well as those basic norms concerning the professional career, enlisting in their ranks,

[121] Supra note 14, p. 283
[122] Supra note 28, p. 624
[123] Supra note 58, p. 178
[124] Organic Law no. 18948, *Diario Oficial*, Feb. 27 1990
[125] Organic Law no. 18961, *Diario Oficial*, Feb. 27 1990
[126] Supra note 3, p. 86

> security, seniority, command, command succession and budget of the Armed Forces and Carabineros.»[127]

Therefore, the President was not able anymore to influence the life of military members, including their benefits, pensions, line of succession etc., thus consecrating their autonomy.[128] This was also achieved through the complete independence of budgetary concerns, by means of the Armed Forces organic law that established a minimum floor for resource allocation to the military; plus, another constitutional organic law defined as the "Copper Law" would have ensured an automatic allocation of 10% of copper revenue to the army's budget.[129]

Finally, the package of reforms also changed the National Security Council: former provisions were formulated in such a way as to grant the military the majority of votes in the council, with four out of seven votes;[130] this influenced the removal of the heads of the armed forces and the police, since approval from COSENA was requested.[131] Therefore, the reforms introduced an eight player: the Comptroller General, in order to obtain an equal balance among civilian and military components.[132] Nevertheless, civil order could not totally impact the Council because the opposition party did not manage to select a member from the lower house in COSENA and, moreover, the consensus of at least one military officer in the Council was requested in order to remove a commander in chief.[133]

Military aspirations dominated the final version of the amended Constitution, yet the most innovative aspect that worked in favour of the installation of a democratic order and assured accountability in the long-term was the formal introduction of a "language" of human rights. Accordingly, the reforms included the respect of human rights and their defence was deemed as a duty of the organs of the state;[134] this also supplied a sound

[127] Chilean Constitution 1980 (amended 1990), art. 94
[128] Supra note 58, p. 190
[129] Ibid., pp. 179-180
[130] Article 95 of the original Chilean Constitution 1980 stated that the COSENA had to be formed by the senate president, the Supreme Court president and the commanders in chief of the army, navy, air force and Carabineros.
[131] Fuentes, Claudio A. 2010. "A Matter of the Few: Dynamics of Constitutional Change in Chile." *Texas Law Review* 89, p. 1753
[132] Ibid., p. 1754
[133] Supra note 58, p. 181
[134] Chilean Constitution 1980 (amended 1990), art. 5

basis for prosecutions associated with the abuse of these essential rights.[135] The entrenchment of human rights was reflected also in the elimination of the envisaged suspension of individual rights during states of exceptions.[136] Equally relevant was the abrogation of the section of article 41 which limited *recurso de amparo* and *recurso de protección* under exigency; notwithstanding the particular state of exception, the people would always have their inalienable rights guaranteed by the Constitution.

A pervasive dualism between democratic values and authoritarian motives was present when presidential elections occurred. The 1989 reforms were accepted by the incumbent leadership[137] as a pragmatic compromise which would assure at least some benchmarks for accountability and diminish the prerogatives of military elites, even if the politics of agreements were such that many expectations remained unfulfilled for the time being. Newly elected President Aylwin soon realised that numerous judicial, political and constitutional constraints would limit governmental actions in the area of human rights. Therefore, these conditions led him to adopt an approach that could equalise between ethical responsibilities and factual restrictions: failure to obtain justice in courts turned into attempts at reconciliation through other transitional justice mechanisms.

2.2.2 Resorting to alternative mechanisms: truth commission and reparations

After the presidential elections on March 1990, President Aylwin attempted to dampen the control that the military had possessed over the transition process. An attempt at legal reform came through the so-called "Cumplido Laws", whose aim was to reduce military jurisdiction over civilians; its focus mainly involved prisoners or former political prisoners still under indictments during the previous regime. The package of laws sought to: eliminate death penalty, remove offences committed by citizens from military jurisdiction and diminish the broad scope that certain decree laws emanated by the military regime under states of exception had.[138] However, these laws were amply attenuated due to the political system that posed the right-wing bloc in the Senate in an

[135] Supra note 58, p. 176
[136] Abrogation of the sentence in Chilean Constitution 1980 (original text), art. 19 par. 26
[137] The package was approved by another plebiscite and approved with 87.7% of popular support
[138] Brown, Cynthia. 1991. "Human Rights and the 'Politics of Agreements'. Chile during Aylwin's First Year." Americas Watch, pp. 18-19

advantageous situation for refusing legislation. The only remarkable achievement was law no. 19.047, which shifted the jurisdiction over civilians from military tribunals to ordinary courts; nevertheless, the package failed to bring about impact over the prosecution of violators who were state agents, since this prerogative still belonged to the military tribunals' sphere of influence.[139]

Thus, the most effective method in terms of political costs and benefits at government's disposal was the establishment of a truth commission. The National Commission for Truth and Reconciliation (*Comisión Nacional de Verdad y Reconciliación*)[140] or Rettig Commission was formed with the intent of clarifying the abhorrent events happened during the junta regime and determining the truth in the national narrative; it comprised eight people nominated by the President who chose both pro- and anti-junta individuals in order to obtain as much consensus as possible. Moreover, according to José Zalaquett, who had been one of the commissioners:

> «(…) the even number of members sent a signal, which did not escape political observers, that no precautions were being taken to secure a majority vote in case of divided opinions, that the exercise was done in good faith, and that the matter was too important to be treated in a partisan manner.»[141]

The mandate of the Commission covered the period between September 1973 and March 1990, and it had to carry out a thorough investigation about the grave events that took place, providing an account that would encompass both background circumstances and present consequences; the evidence gathered regarding victims' whereabouts would serve the ultimate moral objective of bringing about national reconciliation.[142] Indeed, the forward-looking objectives that the government deemed essential in light of its role included recommendations by the Commission for compensation to damaged survivors; additionally, the state recognised that it had to do as much as possible in order to block

[139] Supra note 14, p. 281
[140] Supreme decree no. 355, *Diario Oficial*, Apr. 25, 1990
[141] Zalaquett, Jose. 1992. "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations." *Hastings Law Journal* 43 (6), p. 1433
[142] Supra note 140

any further attempt of human rights abuse: the legal and administrative measures advocated by the Commission served this purpose.[143]

The Rettig Commission spent almost a year examining and investigating circa 3.000 cases of individuals reported dead or "disappeared" to produce a report that could satisfy the stated goals of reparation, prevention and reconciliation.[144] Within this targeted scope, the Commission asserted that 2.025 of the examinations were violations of human rights committed by state agents; 90 were declared fatal victims of groups participating in violent opposition; 164 were casualties of political violence whose perpetrators could not be identified; other 614 cases could not be solved due to lack of evidence.[145] In total, the Commission acknowledged that 88.1% of deaths or disappearances had been caused by public officials or persons acting in their service.[146]

However, the Commission presented some limitations due to its temporary nature and restricted mandate. It must be noted that Aylwin only authorized an analysis of data concerning those crimes that could be traced back to a state agent or a person connected to the government because, in the examined instances, the Chilean case had a moral responsibility vis-à-vis the wronged parties.[147] Therefore, many categories such as survivors, exiles, those who had their socio-economic rights abolished, people who suffered tortures[148] were excluded from individual claims gathered by the Commission.[149] Regarding the cases actually handled by the commissioners, there were contrasting and often disappointing results because those responsible for the worst crimes refused to collaborate for the location of the disappeared or the full disclosure of victims' fate.[150]

Another significant hurdle for the Retting Commission was whether to "name names" of the offenders or not. While revealing the identity of some of the worst criminals during the regime would have been coherent with the aims of truth recovery, the commissioners decided against it owing to the fact that the Commission was not supposed to have any

[143] Correa, Jorge S. 1992. "Dealing with Past Human Rights Violence: The Chilean Case after Disctatorship." *Notre Dame Law Review* 67 (5), pp. 1457-1458
[144] Supra note 141, pp. 1433-1434
[145] Ibid., p. 1434
[146] Supra note 30, p.128
[147] Supra note 143, p. 1473
[148] The practice of torture was accounted as a phenomenon, but no individual cases were analysed see: Zalaquett (Supra note 141, p. 1434)
[149] Supra note 143, p. 1473
[150] Ibid., p. 1467

judicial function.[151] The rationale behind this limitation was that naming individual culprits would amount to undue process, since the decree did not confer upon the Commission any subpoena power; the Commission was an entity to be distinguished from courts, which were the only ones that could assess individual accountability. Therefore, the Commission only disclosed whether perpetrators belonged to organs of the state or opposition groups while assigning them to their specific branches.[152]

Notwithstanding these limits, the final report was presented on February 1991 to President Aylwin and brought significant clarifications: it pinpointed the criticalities attributable to Allende before the coup d'état in order to explain the chief dynamics that led to the installation of the junta government and then passed on to describe the main methods and policies employed for committing the abuses against dissidents of the regime.[153] The report also included the commissions' evaluation for each individual case and gauged various sectors of society and public institutions. Among these, the starkest critic was reserved to the judicial branch for neglecting its duties during the authoritarian government; holding the Supreme Court particularly accountable because it indulged the elites and allowed for the execution of horrible crimes against the citizenry, especially for what regards the jurisdiction given to military tribunals to process the civilians.[154]

Atonement of the Chilean state towards the victims of human rights abuses ensued not only with the establishment of the National Truth and Reconciliation Commission, but also with an active reaction to the recommendations provided by the latter body. Indeed, the commission's contribution to avoid future human rights passed also through the acknowledgment of the past and, therefore, through the actions taken to remedy human rights abuses. Since judicial problems for the families of those missing were not going to have a proper solution,[155] the government decided to compensate and assist them with different policy measures. On a general level, the Commission encouraged the ratification

[151] Supra note 140, art. 2
[152] Supra note 141, p. 1435
[153] Supra note 14, p. 280
[154] Ibid.; cfr. Supra note 91, p. 381
[155] Supra note 143, p. 1481

of international treaties for human rights and the reinforcement of the internal legal system which would foster a culture of human rights within the country.[156]

Within the country, the areas of social welfare, healthcare and education were central subjects of reforms implemented by Aylwin's and successive governments. Specifically, administrative reparations programmes were successful in securing concrete results for the population; the most complete mechanism in this regard was the pensions' programme developed in the early stages of transition which guaranteed a monthly allowance to families of the victims following a legislation approved in 1992.[157] That same law also led to the creation of the National Corporation for Reparations and Reconciliation (*Corporación Nacional de Reparación y Reconciliación*), which implemented the Commission's recommendations and dealt with unsolved individual cases along with managing the relative reparations;[158] the corporation was indeed instrumental for further contributions to the recognition of victims. Finally, future modifications to the law regulating the reparations programme established the body the widest range in the country: the Programme of Reparations and Comprehensive Health Care (*Programa de Raparación y Atención Integral en Salud*), which provides medical services, including both physical and psychological assistance, available to victims of political repression through the national healthcare system.[159]

Thus, the Commission's work was pivotal in acknowledging the past with an eye to the future; in spite of its self-limitations, the Retting report tackled the underlying historical, political and legal circumstances associated with human rights abuses and tried to lay the groundwork for effective measures for reconciliation. Indeed, the Commission put its main findings at governments' disposal for prosecutions, yet amnesty law was still in force and could not be repealed due to the conservative bloc in the Senate; additionally, when there were attempts to investigate cases with human rights violations, the Supreme Court applied the most permissive interpretation to the amnesty for this typology of cases and actually shielded criminals. The course of justice was still heavily obstructed.

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[156] United States Institute of Peace. 1990. Report of the Chilean National Commission on Truth and Reconciliation, Part IV Chapter 2
[157] Law no. 19.123, *Diario Oficial*, Jan. 31, 1992
[158] Lira, Elizabeth. 2006. "The Reparations Policy for Human Rights Violations in Chile." In *The Handbook of Reparations*, edited by Pablo De Greiff. Oxford University Press, p. 60
[159] Law no. 19.980, *Diario Oficial*, Oct. 29, 2004, art. 7

2.2.3 The turning point: 1998

The transitional setting of judicial accountability in Chile was in dire conditions. The combination of mooring laws provided by the Constitution and the amnesty law decree, both of which could not be repealed nor invalidated due to an opposing Senate and a complicit Supreme Court, rendered the prospective of individual accountability thin. Thus, human rights advocates had to abide by the general stance of the government for a long time, namely focusing on the realm of what was feasible. The Chilean trajectory towards liability started with crimes that were not included in the amnesty, although the Supreme Court held law decree no. 2191 in various occasions.

Among the failed attempts in courts, the *Insunza Bascuñán* case was indicative about the block exerted by the Supreme Court: when attempting to find the truth regarding 70 disappearances, the Court held that the state could legitimately deem an amnesty as a valid implementation of its legislative prerogatives, thus suspending accusations of criminality.[160] From a domestic law point of view, the Supreme Court invoked article 60 of the 1980 Constitution and underscored that amnesty's effects were «neither arbitrary nor contrary to the constitutional order because [they] result from the legitimate exercise of sovereignty (…)»;[161] yet, the message transmitted by the highest judicial authority was clear: amnesty were occupied a superior position vis-à-vis constitutional norms. In fact, as already stated, article 5 of the Constitution clearly declared that state sovereignty was limited by the respect of human rights and so led public bodies to act accordingly;[162] finally, the Court recognized that article 60 superseded the judicial authority that was envisaged to assess criminal liability.[163] From an international law point of view, the petitioners also pointed at common article 3 of the 1949 Geneva Conventions for the protection of those not involved or not active during a non-international armed conflict, but the Court refused compatibility with international laws on the ground that the coup d'état did not start an internal state of war.[164] Therefore, the amnesty was deemed as an

[160] Chilean Supreme Court. *Iván Sergio Insunza Bascuñán*, Case no. 27.640, 24 August 1990, par. 19-20
[161] Ibid., par. 20
[162] Chilean Constitution 1980 (amended 1990), art. 5 par. 2
[163] The court invoked article 73 of Chilean Constitution 1980 (amended 1990)
[164] Supra note 160, par. 26; paradoxically, the Supreme Court contradicted its earlier rulings in, whereby the Court held that the nation was in a state of war thus renouncing to its supervisory powers over wartime military tribunals see: Supra note 14, p. 272 and 278

expression of the junta's legislative power and this notion dominated the very aftermath of Aylwin's government: what could human rights advocates do?

The path to justice was still long and courts decided to prosecute what could be actually processed without the obstruction from the amnesty law. Indeed, crimes not included in the amnesty or committed beyond the temporal limit indicated by the decree were successfully prosecuted (10 March 1978); among these, President Aylwin pressed for the solution of one single event that was putting a strain on the relations between Chile and the US: namely, the *Letelier* case which, as already exposed, covered the assassinations of former Foreign Minister during the Allende administration Orlando Letelier and his aide Ronni Moffit. The crime was committed within the temporal reach of the amnesty, but it was excluded from the text because the responsible parties had already been charged for the car-bomb murder in the US and the amnesty law directly excluded those put on this trial;[165] specifically, the US Congress requested that juridical actions were to be taken also in domestic Chilean courts, associating also the principle *aut dedere aut judicare*.[166] In November 1993, DINA ex-chief General Manuel Contreras and Brigadier Espinoza were convicted in Chile for the crimes, sentenced to seven and six years of prison respectively.[167]

Apart from these exceptional circumstances, lower courts struggled to obtain investigations and subsequent judgments for human rights abuses during the junta regime. The agreements and compromises that were made in order to democratise the country excluded important issues for the sake of pragmatism: constitutional matters, full protection of human rights, the relation between politics and armed forces and the authoritarian legacies that permeated the institutional framework were all arguments which could put at risk the frail stability of new leadership. The embodiment of this trend was the Supreme Court finding the Amnesty law constitutional and always ceasing any type of divergent opinion from other courts. However, a reform of the Supreme Court in

[165] Supra note 52, art. 4 states that the amnesty would have not protected "those persons who are responsible, whether as perpetrators, accomplices, or as contributors, for the actions being investigated in legal proceeding no. 192-78 of the military tribunal of Santiago, Office of the Public Prosecutor Ad Hoc"
[166] Quinn, Robert J. 1994. "Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model." *Fordham Law Review* 62 (4), p. 914
[167] Supra note 3, p.123

1997 coupled with series of cases associated to judicial accountability for past crimes in 1998 started to change the interpretation of amnesty and generate important results.

One of the "tie-up" laws that Pinochet decreed concerned financial benefits for Supreme Court ministers over the age of 75 who retired; the "Rosende Law" led to the appointment of seven out of seventeen justices of the Court by Pinochet. This composition was changed through a constitutional amendment in late 1997 which brought about these main changes: first of all, members of the Court increased from 17 to 21 justices; secondly, the appointment of each judge should be agreed by the Senate; thirdly, a minimum of five members should be non-judicial attorneys lawyers; lastly, justices over 75 years of age could retire more easily. [168] As a result, the Supreme Court came to be comprised also of eleven members outside of the judiciary, marking a significant break with traditional arrangements.[169]

This reform was not only substantial for the formal modifications, but also for the shift in cultural legal culture that new components of the Supreme Court steered towards activism. In this sense, 1998 marked a prosecutorial turn which led judges to abandon a purely formalistic notion of legality in favour of circumventing the amnesty law; in fact, the amnesty was not revoked, but reinterpreted in such a way as to dilute and diminish its effect and scope of implementation in various areas. According to Chile's Criminal Code, cases cannot be opened if maximum fifteen years have passed since the crime has been committed: thus, the statute of limitations had already run out for the crimes committed during the most grievous period of the junta regime;[170] yet, this notion was put to discussion because of the question as to whether the crime of disappearance could have set dates signalling the start and the end of its prescriptive period even if the chief evidence, namely the body of the missing person, was not recovered. These were the promising premises for the *Poblete Córdova* case.

In *Poblete Córdova*, the Supreme Court reversed the ruling of a military tribunal which employed the amnesty decree to dismiss the case of the disappearance of Pedro Poblete

[168] Law no. 19541, *Diario Oficial*, Dec. 22 1997
[169] Requa, M. A. 2012. "A Human Rights Triumph? Dictatorship-Era Crimes and the Chilean Supreme Court." *Human Rights Law Review* 12 (1), pp. 96-97; this reform was part of the "modernisaton of justice" under the Frei government (1994-2000) see: Supra note 103, p. 79
[170] Chilean Criminal Code 1874, *Diario Oficial*, art. 94

Córdova in 1974.[171] This case was significant in the sense that it indicated a change in the judicial logic of domestic courts and established the doctrine of the "ongoing crime" through which successive cases advanced the protection of human rights[172]; accordingly, the Court held, with a five to one decision, that the amnesty decree did not limit a judge's capability to investigate what happened to the victim and assess individual criminal responsibility.[173] Only after proper investigation could the amnesty be applied or not.[174] Yet, in order to investigate without the time restraints of a statute of limitations, the crime of disappearance was reconceptualised as "ongoing" or permanent because the whereabouts of the victim were unknown, and so the offense could not be assessed with absolute certainty: as a consequence, disappearance was to be considered a kidnapping which is still being carried out, until further proof.[175]

By modifying its interpretation to the amnesty, the Supreme Court opened up the possibility for investigation for numerous cases: it must be underlined that the court ruling only applied the doctrine of "ongoing crime" to the impact that the amnesty exerted on the investigation.[176] In any case, this judgment brought about important changes in the judiciary, since:

> «(…) the Court ordered the Special Investigative Judges to reopen cases that had been permanently closed, to investigate the crimes "as much as possible," and to apply the amnesty provision only after the investigation had been concluded. According to the new interpretation, before applying the amnesty provision, Chilean judges had to determine the identity of the criminal and the nature of the crime».[177]

The verdict also upheld that the state of internal war declared by the dictatorship in 1973 was enough to activate the protection granted by Geneva Conventions, which Chile had ratified prior to the authoritarian regime. Invoking common article 3, along with articles 146 and 147, the final sentence manifested the willingness to respect human rights for the protection of those involved during internal conflict with a special concern also towards

[171] Chilean Supreme Court. *Pedro Poblete Córdova*, Case no. 469-98, 9 September 1998
[172] Supra note 169, p. 85
[173] Ibid.
[174] Huneeus, Alexandra. 2010. "Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn." *Law & Social Inquiry* 35 (01), p. 105
[175] Supra note 171, par. 2(d)
[176] Supra note 7, p. 124
[177] Ibid.; cfr. Collins (supra note 103, p. 79-74), the cases which were suspended by military courts were reopened

prisoners.[178] By arguing that the investigative judge must try those in breach with international law, the High Court established the judicial hierarchy in accordance to which international legislation had superiority over the national legal order. Yet, once the investigation was over, amnesty had to be applied; in fact, the Supreme Court never questioned the constitutionality of the amnesty.

Before the ruling over *Córdova*, another unrelated occurrence contributed to the creation of this legal critical juncture for the Chilean judiciary branch. Under the investigative magistrate system, individuals directly involved by the heinous crimes could submit a complaint to one of the specialised human rights cases magistrates[179] and this was the action undertaken by the Communist Party to denounce the disappearance of the party's leaders in 1973: this was the first case were the complaint was directly addressed to General Pinochet; surprisingly, judge Guzm*án accepted the appellant's argument that neither amnesty nor statute of limitations could block the investigation because disappearance was considered an abduction until the whereabouts of the victims were discovered.*[180]

Interestingly enough, all the cases brought before the courts which dealt with gross human rights violations during the authoritarian era showed a propensity of the judicial bodies to resort to domestic law instead of international law in their decisions. However, a substantial event taking place a few months after these two examples of judicial activism compelled the domestic sphere to take into account the international dimension and improve legal actions against high-ranking officials: Pinochet's detention in London. In early 1998, General Pinochet was supposed to retire as army commander-in-chief in accordance with the Constitution; however, always based on constitutional provisions, he would have a lifetime seat in the Senate which entailed a parliamentary immunity further restricting the scope of actions against him.[181] This political affair pushed the Chilean Communist Party to file the complaint against Pinochet himself to protest the new role that the ex-authoritarian leader would have occupied in the life of the country. Nobody

[178] Supra note 171, par. 9-10
[179] Supra note 30, p. 137
[180] Supra note 174, p. 104
[181] Supra note 103, p. 76

expected that the complaint would be accepted, a signal that things were changing, and nobody could have foreseen the consequences of 1998 trials.

Due to medical reasons, newly appointed lifetime senator Pinochet went to London notwithstanding the fact that two years earlier a criminal complaint had been filed against him in a Spanish court for blatant breaches of human rights encompassing genocide, terrorism and torture. Confident about the protection stemming from his position in the Senate, Pinochet flew to London on September 23, 1998.[182] The Spanish investigation began with the filing of a complaint by Spanish organisation Progressive Association of Prosecutors (*Unión Progresista de Fiscales*) against Argentine defendants for both Argentine and Spanish citizens;[183] a second complaint was then field by the Madrid-based Salvador Allende Foundation accusing General Pinochet ad other high military echelons for the death and disappearances of Chileans.[184] Soon, the two cases were consolidated under one single investigation due to the uncovering of Operation Condor, whereby junta regimes in the Southern Cone cooperated to eradicate dissidents across national borders: the judge tasked with conducting this complex inquiry was Judge Baltazar Garzón of the National Audience (*Audiencia Nacional*).[185]

The Spanish National Audience focused on cases which involved more than one province, including international offences. Along with this feature, Spain's court system allows for ordinary citizens to bring a criminal complaint before the competent magistrate, even if they are not directly affected by the offense.[186] For the specific cases investigated by Garzón, the chance at prosecuting non-Spanish perpetrators for crimes committed beyond national borders was authorized by article 23 of the Judicial Law, according to which Spanish jurisdiction could be applied for crimes such as genocide, torture, forced disappearance and other offences under international law that were integrated in the Spain by means of treaty ratification.[187] Therefore, the case was based on universal jurisdiction due to the horrible nature of the crimes covered by the investigation; against this

[182] Roht-Arriaza, Naomi. 2006. *The Pinochet Effect: Transnational Justice in the Age of Human Rights*. Philadelphia: University Of Pennsylvania Press, pp. 1-2
[183] Ibid. pp. 2-3
[184] Brett, Sebastian, and Cath Collins. 2008. "The Pinochet Effect: Ten Years on from London 1998." *SSRN Electronic Journal*. Universidad Diego Portales, p. 9
[185] Roht-Arriaza, Naomi. 2001. "The Pinochet Precedent and Universal Jurisdiction." *New England Law Review* 311, p. 312
[186] Supra note 182, pp. 5
[187] Ley Orgánica del Poder Judicial no.6, *Boletin Oficial del Estado*, Jul. 2, 1985, art. 23 par. 4

backdrop, when Pinochet came to London for a surgery, the judge issued an arrest warrant and a request of extradition.

In October 1998, Senator Pinochet was arrested in London with charges about his participation in Operation Condor resulting in genocide and terrorism and was processed in order to assess the possibility of extradition to Spain. Thus, Pinochet's house arrest was followed by a November 1998 decision of the Judicial Committee of the House of Lords which rejected the *habeas corpus* appeal lodged by Pinochet's lawyers and argued that the army's ex-chief as a former head of state did not enjoy immunity from prosecution;[188] Counsel of Pinochet relied on the UK's 1978 State Immunity Act, but statutory immunity in favour of a former Head of state required, as argued by Lord Steyn, the coincidence of two requirements:

> «(1) that the defendant is a former Head of State (ratione personae) and (2) that he is charged with official acts performed in the exercise of his functions as a Head of State (ratione materiae). In regard to the second requirement it is not sufficient that official acts are involved: the acts must also have been performed by the defendant in the exercise of his functions as Head of State».[189]

Significantly, the decision highlighted that the actions undertaken during and after the coup d'état did not amount to the exercise of the functions attributable to a Head of State under international law provisions. In other words:

> «(…) the development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d'état, and certainly ever since, international law condemned genocide, torture, hostage taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment.»[190]

Indeed, extradition of Pinochet to face trial in Spain was allowed by a 3:2 margin. However, the Law Lords soon had to invalidate their own ruling owing to the fact that one of the judges composing the initial Committee had personal ties to Amnesty International, which was supporting Pinochet's extradition. Thus, since impartiality had

[188] R., ex parte Pinochet v Bartle and Commissioner of Police for the Metropolis, [1998] UKHL 41, [2000] 1 AC 61, [1998] 3 WLR 1456, [1998] 4 AII ER 897, (1998) 37 ILM 1302, (2002) 119 ILR 51, 25th November 1998, United Kingdom; House of Lords [UKHL], referred to as "*Pinochet 1"*
[189] Ibid.
[190] Ibid.

not been granted, dispositions for a new hearing were set.[191] In "*Pinochet 3*", the panel of judges confirmed the first verdict for what regarded Pinochet's entitlement to immunity and possibility of extradition.[192]

However, the second decision diminished the number of charges that could be tried in Spain; this time, the verdict was based more on domestic law rather than international provisions. Accordingly, the extraditable crimes were significantly restricted in terms of acts of torture because a majority in the panel argued that the United Kingdom could only charge Pinochet for torture committed after 1988, the date the country ratified and integrated in its domestic legal order the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by the enactment of the Criminal Justice Act 1988.[193] Although the decision affirmed that former Heads of State did not enjoy immunity for torture and could be prosecuted even in third countries, it also entailed a significant reduction in the number of charges for this crime.[194] Following this logic, «it was the incorporation of the Torture Convention into UK law that gave the court jurisdiction, not the underlying customary law norm.»[195]

The epilogue of *Pinochet* defines that universal jurisdiction has not actually been considered for the extradition of the Senator, since British extradition rules in accordance with the principle of "double criminality" had to be respected.[196] Consequently, charges were limited but the Home Secretary granted authority for the extradition. In light of this conclusion, it must be underlined that in Chile the trial and conviction of Pinochet were considered a challenge to the state's sovereignty to prosecute;[197] therefore, on 14 October

[191] Pinochet,Re, [1999] UKHL 1, [2000] 1 AC 119, [1999] 2 WLR 272, [1999] 1 AII ER 577, 6 BHRC 1, (1999) 149 NLJ 88, (2002) 119 ILR 112,15th January 1999, United Kingdom; House of Lords [UKHL], referred to as "*Pinochet 2*"

[192] R., ex parte Pinochet v Bartle and Commissioner of Police for the Metropolis, Appeal Judgement, [1999] UKHL 17, ILDC 1736 (UK 1999), [2000] 1 AC 147, [1999] 2 WLR 827, [1999] 2 AII ER 97, (1999) 38 ILM 581, (2002) 119 ILR 135, 24th March 1999, United Kingdom; House of Lords [UKHL], referred to as "*Pinochet 3*"

[193] Criminal Justice Act (United Kingdom [gb]) 1988, c.33, Pt.XI Miscellaneous, torture, s. 134 Torture

[194] Supra note 7, p. 110

[195] Supra note 185, p.314

[196] In *Pinochet 3*, the double criminality rule for the specific case was defined as "the most important requirement [according to which] the conduct complained of must constitute a crime under the law both of Spain and of the United Kingdom" (Lord Browne-Wilkinson's opinion)

[197] Garretón, Manuel Antonio. 1999. "Chile 1997–1998: The Revenge of Incomplete Democratization." *International Affairs* 75 (2), p. 261; cfr. Collins (Supra note 103, p. 80): "the executive claimed that he could be tried properly in Chile"

1999, the Chilean government asked Home Secretary Jack Straw to release Pinochet on medical grounds, since he would have not been able to stand trial. After a medical examination at the beginning of 2000, the Home Secretary decided not to extradite the alleged perpetrators, claiming that Pinochet's health condition would have not granted him a fair trial.[198] Pinochet returned to Chile.

Already during the detention and attempted extradition of Pinochet in the UK, the domestic mechanism of judicial accountability in Chile was set in motion in an innovative and active manner. The obstruction to unfold the truth and prosecute those responsible for grave violations of human rights was challenged by the stimulus given from judiciaries abroad, who functioned as catalysts for the consolidation of law and the attention towards international legislation. In fact, the few complaints where Pinochet was explicitly named as an offender in cases of disappearance, murder and torture strongly increased, with more than a hundred cases by the time the General touched Chilean soil and they kept growing.[199] In fact, the "Pinochet Effect" can be deemed as a shift in justice which spread like a wildfire and energised the human rights movement due to the acknowledgment that no one was above the law, not even the high ranks. This was supported by the minor, yet essential, changes that the national dimension in Chile triggered before Pinochet's arrest. The concomitance of different legal circumstances led to a new phase for criminal liability in the country.[200]

Further proof of this change was the increasing voice of public opinion asking for a reformation of the armed forces' role within the political life. Indeed, during the arrest of Pinochet, the reputation of the military started to diminish while a simultaneous support for human rights took a strong hold of society.[201] This new wave of legal proceedings against presumed offenders led also the military to change its stance, from outright denial to reluctant dialogue.[202] The Roundtable Dialogue (*Mesa de Diálogo) was a non-judicial initiative between the Frei – and later on, Lagos – government, human rights advocates and the military for furthering truth recovery and gathering new information about*

[198] Supra note 7, p. 110
[199] Supra note 182, pp. 68-69; this judicial gimmick was used to let lower courts transfer those cases into Guzman's investigation.
[200] Supra note 103, p. 76
[201] Supra note 131, p. 1772
[202] Bakiner, Onur. 2009. "From Denial to Reluctant Dialogue: The Chilean Military's Confrontation with Human Rights (1990-2006)." *International Journal of Transitional Justice* 4 (1), p. 58

disappearances; the most remarkable result of the Mesa was the armed forces' recognition that abuses of inalienable rights have occurred and they were willing to collaborate to uncover the facts.[203] *Yet, the roundtable presented many pitfalls: it always granted judicial protection to informants; it perpetuated the narrative of security forces not being involved in the crimes;*[204] *and the final report managed to provide a list of victims, but it contained many errors.*[205] *In spite of these drawbacks, the Mesa attested that the* Pinochet effect had truly affected everyone and this influence led to new concrete developments at the turn of the millennium.

2.3 A cautionary tale: new developments

The ferment perceived right after the return of Pinochet to Chile contributed greatly to the progress of human rights at the beginning of the 21st century. Transnational efforts boosted prosecutions in domestic courts and revealed a deep gap between the political class, which responded to these challenges with obstinate entrenchment of codified norms, and the public opinion which witnessed the assertion of national sovereignty by the government along with the failure on the part of the latter to advance demands for justice for the majority of Chilean population. The post-Pinochet period has been marked by relevant activism in judicial courts and the political leadership did not remain completely passive: first of all, Pinochet was invited to resign from the Senate and retire from public life, while charges against him rose;[206] secondly, President Lagos announced another non-judicial form of remedy; finally, a new package of constitutional reforms aimed at removing the last authoritarian enclaves within the text of the constitution. Nevertheless, the question remains as to whether transitional process has been completed or not.

2.3.1 Remedies for accountability at the turn of the millennium

Among the initiatives undertaken in the wake of Pinochet's decrease of influence over the political scenario, a third official initiative for investigating the truth was launched by the Lagos government. Pushed by the results of the Roundtable, which witnessed a major

[203] Supra note 202, p. 59
[204] Supra note 30, p. 129
[205] Supra note 202, p.60
[206] Supra note 103, p. 80

involvement of the military and laid the basis for further cooperation, President Lagos launched in 2003 the human rights policy called "No Tomorrow without Yesterday" (*No Hay mañana sin ayer*) whose centerpiece was the National Commission on Political Imprisonment and Torture (*Comision Nacional sobre Prison Politica y Tortura*), also known as the Valech Commission.[207] His view was founded upon the support that these non-judicial means could provide to judicial processes in terms of important information gathered and actors involved.[208] With respect to the 1990 National Commission on Truth and Reconciliation, this truth commission focused on the survivors and investigated mostly the effects that torture had on victims; at last, the crime of torture was examined for individual cases, which had been previously ignored in favour of crimes for murder and disappearances.[209]

The Valech Commission operated between 2003 and 2004 for six months[210] and the eight commissioners had the daunting task of gathering evidence 30 years after the crimes had been committed. The final report gathered a large body of evidence, that reached 27,255 people involved in abuses of civil rights or politically motivated torture by wrongdoers associated to the regime. The legitimate victims presented «hard or corroborative evidence» to demonstrate that they had received grave ill-treatment by the junta regime; the report also presented the major hotspots for detention and torture, which were usually closely associated with structures of armed forces' branches such as naval vessels or military bases.[211] Much like its predecessor, also the Valech Commission made an *excursus* to pinpoint the pieces of legislation which were problematic for achieving accountability and beneficial for masking the repression; indeed, the third chapter underlines the institutional and systematic nature of the junta's oppressive actions: states of siege, the role of wartime military tribunals, the reaction of the judiciary branch and the overall context in which the regime operated and perpetrated torture.[212]

Another similarity that the Valech Commission shared with the Rettig Commission was the lack of "naming names" of perpetrators, only the victims. Within this framework,

[207] Supreme decree no. 1040, *Diario Oficial*, Sept. 23, 2003
[208] Supra note 7, pp. 147-148
[209] Supra note 30, p. 128
[210] Supra note 207, art. 7
[211] Supra note 7, p. 149-150
[212] Informe de la Comision Nacional sobre Prison Politica y Tortura, ch. III available at: https://bibliotecadigital.indh.cl/handle/123456789/455

Valech was capable of revealing only a partial truth, which was nonetheless significant because it had been left behind in the period right after the collapse of the military regime; moreover, not everyone had testified nor every case had been supported by hard facts.[213] Yet, the most influential feature of the Commission must be considered in terms of consequences in court benches: the brutal testimonies and all the supporting information were considered confidential because it could affect the survivors' privacy; therefore, a 50-year embargo was put on the relevant documentation, which also applied to judges, thus preventing the use of victims' statements as judicial evidence.[214]

Nevertheless, the Valech Commission took into account the long-term effects of torture and detention on the victims and this was also reflected in its effects. Having recognized that individuals could suffer immensely for the psychological impact of these crimes, the Commission urged them to speak up about their damages and recommended a reparations programme. In fact, individual reparations were expanded to the almost 30,000 subjects of the report, mostly in the form of monthly pensions considering the average age of the victims, yet they also included educational benefits and healthcare considerations.[215] The recommendations also applied to a subsequent annex which was mandated in 2004 and added 1,204 cases.[216] Neither Valech nor its complementary report were ever questioned by conservative parties or armed forces; in fact, the army commander-in-chief General Cheyre changed significantly the position of the military vis-à-vis human rights violations and from 2004, just a few months before the publication of the report, he issued a series of statements admitting the army's responsibilities. The national security doctrine logic was officially abandoned in order to pursue modern-day demands.[217]

Thus, government's efforts in reaching accountability in this new political climate were perfectly in line with the activities of courts which were experiencing a phase of judicial activity that furthered human rights mostly by circumventing the scope of the amnesty law and accounting for international law in a more consistent manner. Consequently, legislation considered inherently political in nature because of its inception came to be

[213] Supra note 7, p. 153
[214] Supra note 30, p. 130
[215] Law no. 19.992, *Diario Oficial*, Dec. 17, 2004
[216] Supreme decree no. 1086, *Diario Oficial*, Mar. 17, 2005
[217] Bakiner (Supra note 202 p. 63) reports a striking statement by Cheyre: "The Army of Chile took the hard, but irreversible, decision to assume the responsibilities that fall upon as an institution for all the punishable and morally unacceptable events of the past".

increasingly recognised as invalid. One of the main cases that embodied this new phase for Chilean domestic courts was *Sandoval*,[218] which never rejected nor even questioned the amnesty decree but led to significant limitations of its interpretation and applicability.

In January 1975, Miguel Ángel Sandoval was arrested by DINA officers due to its affiliation to the Leftist Revolutionary movement (*Movimiento de Izquierda Revolucionaria*) and detained in Villa Grimaldi, one of the torture centres in Santiago.[219] Twenty-eight years later, the case reached the Supreme Court after responsible parties had been convicted in first instance in 2003 and, especially, in earlier 2004 by the Santiago Appellate Court in accordance with the doctrine that had already been asserted in the historic precedent of *Poblete* concerning the crime of disappearance as ongoing and the superiority of international law. Indeed, the Supreme Court did not overturn the decisions but instead endorsed the convictions in unanimity based on the notion of abduction as a permanent crime, on the pre-eminence of international human rights treaties and on the resulting inapplicability of the amnesty law.

Therefore, building upon cases already adjudicated, the Supreme Court reflected upon the notion that it was not possible to ascertain when the crime of disappearance actually ended and so stated that:

> «it is not possible, in this Court's opinion, to apply [the amnesty] where the minimum requirements have not been crystallized, thus the date of conclusion of the offence examined has not been determined. Accordingly, it does not appear reasonable to invoke the application of "amnesia" or "forgetfulness" when in practice the perpetration of the crimes is not finished».[220]

Moreover, the Court also rejected the defendants' claim that the crime committed against Sandoval could not be described as kidnapping because the prospective of his demise was more probable; conversely, the Court argued that certainty about Sandoval's death had not been established during the time frame considered by the amnesty law. Thus, the only definite matter was that the victim's location or fate were still unknown at the date of the expiration of the time limit envisaged by article 1 of the amnesty: the crime of kidnapping

[218] Chilean Supreme Court. *Miguel Ángel Sandoval,* Case no. 517-04, 14 November 2004 (own translation)
[219] Lafontaine, Fannie. 2005. "No Amnesty or Statute of Limitation for Enforced Disappearances: The Sandoval Case before the Supreme Court of Chile." *Journal of International Criminal Justice* 3 (2), p. 469
[220] Supra note 218, par. 30

was still underway when amnesty's temporal restraint expired.[221] Similarly, the statute of limitations was rejected on the same grounds.[222]

On appeal, the Court also highlighted that the sovereignty of the Chilean state is limited only by the respect and protection of inalienable rights which is also enshrined in international treaties. In this regard, the Court noted that, when Sandoval was illegally detained, conventions such as the Geneva ones were undoubtedly in effect[223] and were not applied during the state of siege declared by the junta in 1973. Thus, the Court identified the internal state of war and recalled the obligations prescribed by common article 3 of the Geneva Conventions. Yet, the reliance on these international treaties on the part of the Court had been unclear, since the Court based its decision on precedent verdicts, thus underscoring that the clauses of international treaties only illustrated what domestic law already entailed.[224] Indeed, the Court's reference to international legal instruments:

> «only highlights the importance of the crime committed and how, through time, efforts have been made to reinforce further the concept that individual freedom is a legal right of the utmost importance, just as is the recognition of the life and dignity of people and of those who hold the just and legitimate right to know the whereabouts of those who have been detained.»[225]

The reliance on internal legislation serves the function of adding one more case against the applicability of amnesty and statute of limitations to international crimes. Indeed, the Supreme Court concluded that forced disappearance was an ongoing crime until new evidence and so the amnesty law did not apply. The recalcitrant offenders saw their appeal proceedings refused, meaning that the sentences already issued by the courts of first and second instance had to be respected. Therefore, the importance of this decision is based on the fact that *Sandoval* allows conviction and sentencing of the perpetrators despite the amnesty law, while *Poblete* had just opened the way for the investigative phase vis-à-vis amnesty.[226] In conclusion, the Supreme Court cemented the continuous crime principle and considered offences constituting war crimes or crimes against humanity as non-

[221] Supra note 218, par. 33; cfr. Supra note 219, p. 412
[222] Ibid., par. 37-39
[223] Ibid., par. 35
[224] Supra note 169, p. 88
[225] Supra note 218, par. 18
[226] Supra note 219, p. 472

amnestiable even if perpetrated before 1978. Of course, the case represented a milestone for the advancement of the Chilean constitutional order in the fight against impunity.

2.3.2 The 2005 reforms

Among the substantial changes occurred during the Lagos administration, the most important accomplishment had undoubtedly been the package of constitutional reforms approved in 2005 after a long period of negotiations between the involved parties.[227] Formulated in order to finally eliminate the persisting authoritarian enclaves of the Constitution, these reforms represented Lagos' commitment to bringing about democratisation within the country's institutional order.[228] However, the introduction of the reform bill took almost five years due to the long discussions between the acting government and right-wing coalition retaining veto power for constitutional amendments; indeed, the executive branch was proactive for the legislative agreement with the opposition, which attempted to narrow the scope of reforms.[229] Nevertheless, conservative parties convened that reforms were necessary in light of the events that characterised accountability in the new millennium through significant efforts to change the status quo: in a forward-looking fashion, the opposition endorsed reforms in critical areas.[230]

Accordingly, the parties composing the right-wing coalition *Alianza* had shifted their perception of the political life vis-à-vis the armed forces due to several factors, such as the armed forces duty to provide more information about the victims' whereabouts as recommended by the roundtable on human rights or the impact of the second truth commission mandated by the government; moreover, the fallout of Pinochet's trial in London led to a financial scandal which significantly diminished the support of the coalition to the General.[231] As a result, the *Alianza* distanced itself from the armed forces and the most significant testimony of this strategy was the support in the elimination of the anti-democratic institution of the "designated senators".

[227] Law no. 20.050, *Diario Oficial*, Aug. 26, 2005
[228] Supra note 7, pp. 156-157
[229] Supra note 131, pp. 1766
[230] Ibid., pp. 1772-1773
[231] Ibid., p. 1773

Article 45 of the 1980 Constitution was modified so as to remove nonelected or appointed senators who had constituted a concrete obstacle to democracy and electoral results via the block of amendment proposals that could threaten the influence and the autonomy of the military and predecessor elites; this would imply a significant change in the legislative process, since conservative opposition could not count anymore on "fixed" senators entering into coalition and rejecting anti-regime pieces of legislation. According to the new formulation, senators would be elected by direct vote in senatorial circumscriptions and stay in office for eight years in accordance with the respective constitutional organic law.[232]

Moreover, military autonomy was consistently restricted; one of Lagos' objectives was to divest the armed forces of their constitutionally mandated role as guarantors of the institutional order, whose exercise was implemented through the COSENA. Therefore, the reforms modified article 90 and eliminated the specific expression stating the tutelary role of the armed forces to protect the nation.[233] Most of the National Security Council's functions were transferred to the legislative branch and its powers were removed insofar as, for instance, it did not possess the prerogative to authorise a state of exception like emergency or siege upon President's proposal; conversely, the Congress had to agree to the declaration of the state of exception;[234] in this regard, the rights and liberties restricted during the states of exception were reduced.[235] Moreover, the package of reforms also allowed the President to appoint and remove the commanders-in-chief of the armed forces, yet the retirement of the subjects should have to be ordered after having informed deputies and senators instead of finding an agreement with the National Security Council.[236]

Thus, the National Security Council changed from being a body controlled by the military, which exercised its independent influence over the other political and civil spheres, to an institution controlled by civilians. The substantial reduction in the power of COSENA also entailed a change within its composition, which now included also the

[232] Chilean Constitution 1980 (amended 2005), art. 45
[233] Supra note 227, art. 1 par. 45
[234] Ibid., art. 1 par. 20
[235] Ibid., art. 1 par. 20 states in art. 45 that the state of siege may only restrict the exercise of the right to assembly.
[236] Ibid., art. 1 par. 46

President of the Chamber of Deputies, and provided only the issuance of regulations and not agreements anymore; the same article also imposed an absolute quorum of its members as a quorum of the meeting.[237] Moreover, the reforms also affected other characteristics, including: the elimination of the "extraordinary" period of sessions in Congress which aimed at restricting the executive branch over the legislative agenda; the establishment of a congressional procedure to summon members of the cabinet; the reduction of the presidential office to four years without the possibility of re-election; increase of Congress' investigative powers through the creation of investigative commissions.[238]

Nevertheless, one of the most significant reforms affected the Constitutional Tribunal which drastically changed the constitutional review process towards a higher level of accountability and democracy. First of all, Chile's Constitutional Court was reformed in terms of its composition in order to meaningfully develop democratic values: indeed, the Supreme Court continued to select three members, yet the judges are expected to be outside of the judiciary definitively eliminating the presence of justices from the Supreme Court in the Tribunal; under the reforms, the President appointed three other judges, while the Senate selects two through a two-thirds majority and, finally, the lower house appoints two members prior approval of the higher house.[239] In total, the number of justices composing the Constitutional Tribunal increased from 7 to 10 members. A notable fact is that the military-ruled National Security Council was excluded from the appointment of justices in favour of a process which would grant 70% of the appointee to be chosen by elected politicians.[240]

Before the 2005 reforms, the Constitutional Tribunal only possessed abstract review powers for proposed laws, while the Supreme Court exercised concrete review. The reforms did not change the general scope of judicial review but rearranged it in such a way as to put all the judicial review functions under one single court, namely the Tribunal. Consequently, the Supreme Court is the court of highest review for lower court rulings and the Constitutional Tribunal presents both concrete and abstract judicial review

[237] Ibid., art. 1 par. 47-48
[238] Ibid., art. 1 par. 13, 18-19, 24
[239] Ibid., art. 1 par. 41
[240] Supra note 91, p.384

prerogatives.[241] Therefore, Chile's Constitutional court could now apply concrete law review for certain types of cases through the writ of inapplicability (*recurso de inaplicabilidad por inconstitutionalidad*): new article 82 of the Constitution establishes that the Tribunal shall: «decide, by the majority of its active members, the inapplicability of a statute whose application in any matter pending before an ordinary or special tribunal is contrary to the Constitution.»[242]

The writ of inapplicability appears more accessible, since it can be filed by any plaintiff or by the judge of the case, as long as it can be considered admissible. Accordingly, for accepting a writ, some standards should be respected: there must be a pending issue before a special or ordinary court; the application of the challenged legal precept must be decisive for the outcome of the particular case; the challenge has to be reasonably founded; and, finally the remaining requirements established by applicable statutes are met.[243] A subtle difference with the prior constitutional arrangement is that after 2005 the inapplicability can be assessed when the effects generated by the implementation of the statute are unconstitutional in that particular case, even though the piece of legislation complies with the Constitution.[244] Having considered the newly-introduced writ of inapplicability for the Constitutional Tribunal, the reforms also provided different provisions concerning abstract review.

Indeed, the abstract review powers of the Constitutional Tribunal underwent changes too in terms of legal effects provided. Specifically, the reforms also allowed for an additional type of abstract review which allowed judges to deem laws already approved by the legislature unconstitutional; this apparently concrete feature is then coupled with the characterising *erga omnes* effects typical of abstract judicial review.[245] The so-called writ of unconstitutionality (*declaración de inconstitucionalidad*) was the chief innovation within the judiciary branch because its universal consequences entailed also the repeal of the statute declared unconstitutional. Firstly, the amendments of 2005 integrated in article 82 the clause whereby the Tribunal: «decides, by a majority of four-fifths of its active

[241] Carroll, Royce, and Lydia Tiede. 2011. "Judicial Behavior on the Chilean Constitutional Tribunal." *Journal of Empirical Legal Studies* 8 (4), p. 860
[242] Chilean Constitution 1980 (amended 2005), art. 82, sect. 6; now the article coincides with article 93 of the updated Constitution
[243] Chilean Constitution 1980 (amended 2005), art. 82, par. 10
[244] Supra note 17, p. 406
[245] Supra note 91, p. 385

members, the unconstitutionality of a legal precept declared inapplicable according to the previous section»;[246] it must be underlined that the unconstitutionality of a statute can actually been confirmed if the following criteria are met: the statute is declared inapplicable before the request of unconstitutionality; the declaration of unconstitutionality can be requested by any individual or be affirmed on the Tribunal's initiative; the challenged legislation must be in clear contradiction with the Constitution.[247] Thus, the statute will be repealed as soon as the Tribunal's decision about the unconstitutionality is edited in the Official Gazette, with no retroactive effects. [248]

Finally, the reforms brought about crucial developments which affected not only the government's branches but also the autonomy of the military class. These legislative actions served the purpose of eliminating the authoritarian enclaves inherited by the Aylwin government's acceptance of the 1989 amendments and ensuring that "protected democracy" instances were modified, such as the National Security Council, or abrogated, like designated senators. Arguably, the transitional trajectory could have been considered complete as vestiges of the past were dismantled; yet, a series of developments and matters after the reforms brings the attention towards the persistent character of the 17-year military regime.

2.3.3 Recent developments and obstacles

First of all, the constitutional amendments negotiated by Lagos' government were mostly successful, but they did not manage to undo some aspects of the authoritarian system; in fact, the reforms did not completely remove all the enclaves from the Constitution. Concerning the military, the reforms did not address properly the armed forces' control during states of exception or elections, nor discussions about the "Copper Law", which guaranteed a set budget per year to the military and permitted its financial independence, occurred. The reform also left the Organic Constitutional Law of the armed forces intact and maintained the supermajority required to amend legislation of this nature, meaning that some level of influence in fields such as education and judicial issues was maintained. Shifting the subject, another important factor that kept influencing the political panorama

[246] Chilean Constitution 1980 (amended 2005), art. 82, sect. 7
[247] Supra note 17, p. 407
[248] Chilean Constitution 1980 (amended 2005), art. 83

was the persistence of the binomial electoral system which continued to foster a distortional representation within the congress and was abrogated only in 2015 through the adoption of a proportional system.[249]

Within this backdrop, the amnesty law is currently in force even if its alternative interpretation has improved accountability. On this matter, the Inter-American Court of Human Rights (IACtHR) issued a landmark judgement in 2006 when appellants complained about the amnesty law for having precluded the investigation and eventual punishment of those responsible for the execution of Almonacid Arellano among others in 1973. In *Almonacid Arellano et al v Chile*, the Chilean state recognised the offences but claimed immunity due to the lack of *ratione temporis* competence of the Court because the crime occurred before Chile accepted the jurisdiction of the IACtHR.[250] The Court rejected this argument and affirmed that self-amnesty laws were not compatible with general duties contained in the American Convention on Human Rights, such as obligation to respect rights (article 1), right to fair trial (article 8) and right to judicial protection (article 25).[251]

Apart from declaring the incompatibility of the amnesty, the Court also established the role that domestic judiciary should play with reference to blanket amnesties. Namely, it stated that when the legislature enacts laws at odds with the Convention, the judiciary should not apply any such laws since the judicial power must respect the rights outlined in the Convention. If there is a breach of such arrangement, then the state becomes internationally liable.[252] Most importantly, the Court acknowledged the duty of the judicial system to respect the rule of law and enforce the provisions set in the legal order,

> «(…) But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic

[249] Supra note 7, pp. 157-158
[250] Inter-American Court of Human Rights, *Case of Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgement 26 September 2006, par. 39(b)
[251] Ibid., par. 83
[252] Ibid., par. 123

> legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention».[253]

Thus, national judges had to exercise a control over the domestic regulations in order to assess the conformity of these clauses with the American Convention or with the Court's interpretation of the Convention: after the *Almonacid* case, the "conventionality control" doctrine would be often reiterated in successive rulings. Along with the recommendation for reparations, this decision was groundbreaking because it explicitly required Chile to ensure that the 1978 amnesty decree would not represent an obstacle to the investigations of the case.[254] Despite its clear instructions, the ruling did not have effects on the state because the government strongly delayed a bill that would interpret the criminal code to bring the amnesty in conformity with international requirements;[255] this project was never fulfilled and so Chile can actually be deemed in contravention of the Inter-American system. Justice still has a long way to go.

Moreover, demands for truth had yet to be fully satisfied and this led to the creation of the Presidential Advisory Commission for the Classification of Detained-Disappeared Persons, Victims of Political Execution and Victims of Political Imprisonment and Torture, more easily called Valech II.[256] This body was not a truth commission, but rather an iteration of both Rettig and Valech I due to the fact that temporal limitations have not allowed for a proper hearing and investigation of all the cases. The commission worked for 18 months and its final report added almost 9800 victims of torture and illegal imprisonment and 30 individuals to the list of disappearances and executions. [257] In spite of this initiative taken under Bechelet's government and terminated under the first right-wing presidency of Piñera in 2011, the rate of acceptance of the cases was rather low and the main results were only lists of names with statistical appendices; in terms of truth recovery, Valech II did not become an authoritative voice. Plus, similarly to Valech I, the

[253] Ibid., par. 124
[254] Ibid., par. 145
[255] Supra note 30, p. 136
[256] Supreme decree no. 43, *Diario Oficial*, Feb. 5, 2010
[257]Supra note 7, pp. 190-191

truth delivered in the report was not insulated from justice, meaning that the secrecy imposed could not serve contemporary demands of justice.[258]

Overall, justice had undertook fundamental changes in order to develop a law-abiding system that could deal with the gross violations of human rights committed by the military regime. Since in the Chilean judicial system higher courts do not establish a binding precedent,[259] the Supreme Court has presented an inconsistent attitude despite the advancements in the interpretation of amnesty and other obstructing legislation. For instance, the Supreme Court adopted a formula defined as "half-prescription", which allows judges to reduce the sentences significantly for cases where the designated statute of limitations period for the crime had passed; this proportionate discount between the crime and the sentence has been applied to convicted regime wrongdoers and led to more lenient sentences in 2008.[260] Again, the Supreme Court also sent opposite signals to the judicial system, since in 2013 it refused to recognise abduction as an ongoing crime,[261] not to mention that the amnesty law decree is still in place.

Insofar as the reforms in 2005 attained important achievements, the chanting for a new constitution did not stop. Student demonstrations in 2011 revealed the fragility of the human rights turnover and pointed at the principal obstacles that were blocking true reform. Apart from the legitimacy problem, protests unveiled the lack of socio-economic awareness in the "law of the laws" due to antidemocratic and neoliberal biases which made it difficult to push forward social change; among these, the legislative supermajority required to amend organic constitutional laws and the preventive review powers of the Constitutional Tribunal that could block bills before their emanation. In 2013, presidential candidates included in their programmes the introduction of a new constitution for Chile;[262] yet, recent protests in 2019 demonstrated how this goal has not been reached. In a historical agreement, President Piñera and the opposition scheduled a referendum on April 26 2020 inquiring Chilean citizens about whether or not they want to begin a constitutional process, which would require further plebiscites to appoint members and

[258] Supra note 30, pp. 130-131
[259] Supra note 241, p. 858
[260] Supra note 103, p. 82
[261] Supra note 30, pp. 135-136
[262] International Institute for Democracy and Electoral Assistance, and Gabriel Negretto. 2018. "Constitution-Building Processes in Latin America, p. 49

to accept or reject the new Constitution.[263] In light of these events, it is worthwhile asking one simple, yet crucial, question to underline the importance of transitional justice instruments: is the transition really over?

3. Uruguay: the sanctuary of impunity

By holding on to the expression of writer Eduardo Galeano with reference to Uruguay,[264] this section analyses the peculiar case of a negotiated transition to democracy apparently successful which, conversely, revealed pervasive and insidious problems for the quest of accountability. Indeed, the armed forces managed to achieve power in a gradual manner and their rule was characterised by overall control over the institutions; yet, the military carried out not only their rise but also their own demise through a ruinous plebiscite. When the democratic forces regained power through popular participation, Uruguay did not have tangible obstacles to prosecution and truth recovery. However, the political goal of maintaining stability led to the formation of further legal impediments, fuelling slow – although emblematic – achievements. Thus, current conditions in the country indicate that the constant back-and-forth behaviour of certain legal and political institutions might be damaging the Uruguayan human rights scenario and jeopardise the hard-earned victories.

3.1 The democratic path towards authoritarianism

Uruguay has embodied a unique example in the Southern Cone for the way in which the armed forces gained legitimacy within the political fabric. This segment illustrates how the frail domestic situation led to a strong polarisation in society at large and influenced the subsequent decisions of the executive; namely, the growing reliance on the armed forces that the government built through time gradually allowed for the takeover of the institutional order. The most distinguishing feature Uruguay's authoritarian regime was the fact that it did not occur through a conventional coup d'état, but rather by means of a process advancing by degrees which soon led to atrocious human rights violations that

[263] Krygier, Rachelle. 2019. Chile to hold referendum on new constitution. The Washington Post. Availab le at: https://www.washingtonpost.com/world/the_americas/chile-to-hold-referendum-on-new-constitution/2019/11/15/ef973a9c-07b8-11ea-ae28-7d1898012861_story.html

[264] Speech delivered by Eduardo Galeano for the burial of Ubagesner Chaves Sosa, the first disappeared found in Uruguay. Abracadabra. Pagina 12, 17 March 2006. Available at: http://www.sinpermiso.info/textos/abracadabra

granted to Uruguay the title of «the torture chamber of Latin America».[265] Oppressive actions were justified under constitutional provisions, thereby signalling a complete control over the traditional safeguards of individuals. Yet, popular discontent led the military regime to concede a transition to democracy on its own terms, which reflected the same gradual method as the takeover.

3.1.1 The armed forces take over politics

The Uruguayan golpe in 1973 is conventionally considered the final stage of a long process, which involved more than one government and covered a deep social and economic crisis. The gradual takeover of multiple prerogatives by the military attests the concomitant acute fragmentation of the party system and the erosion of the rule of law.[266] This phenomenon started at the end of the 1960s, specifically when newly elected Colorado President Jorge Areco Pacheco[267] started to adopt strong political stances bordering towards authoritarianism which propelled social divisions and divided political responses. Indeed, the strong presidentialism showed by Pacheco vis-à-vis the traditional institutional system has been a reaction to the dire economic conditions and its consequences have been contributed to the eventual rise of the armed forces.[268]

For instance, as soon as he assumed his role as President of the Oriental Republic, Pacheco issued a decree which dissolved and banned the Uruguayan Socialist Party along with other left-wing political parties such as the Uruguayan Anarchic Federation, the Oriental Revolutionary Movement and so on;[269] additionally he also closed down

[265] Pearce, Jenny. 1980. *Uruguay: Generals Rule*. London: Latin America Bureau, p.8
[266] Greising, Carolina, Cecilia Pérez, Elina Rostan, Marisa Silva Schultze, and Benjamin Nahum. 2011. *Historia Uruguaya. 11, La Dictadura 1973-1984*. Montevideo, Uruguay: Ediciones De La Banda Oriental, p. 16 (for this publication, the translations are my own)
[267] Caetano, Gerardo, Aldo Marchesi, Vania Markarian, and Jaime Yaffé. 2016. *Uruguay. Tomo III, 1930-2010, En Busca Del Desarollo Entre El Autoritarismo y La Democracia*. Montevideo: Planeta, p. 54 The recently approved Constitution of 1967 strengthened the powers of the executive branch, in particular of the President of the Republic. In this way, the Constitution provided the best institutional framework to promote the return of the Colorado party, which had been dominated by a more presidential approach. (for this publication, the translations are my own)
[268] Caetano, Gerardo, and José Pedro Rilla. 2016. *Historia Contemporánea Del Uruguay: De La Colonia Al Siglo XXI*. Montevideo, Uruguay: Claeh, p. 285 the authors refer to the economic crisis during the 1950s mostly in terms of crisis of the old structural order, which laid the groundwork for proposals for a new national project (for this publication, the translations are my own)
[269] Nahum, Benjamin, Ana Frega, Monica Maronna, and Yvette Trochon. 2011. *Historia Uruguaya. 10, El Fin Del Uruguay Liberal 1959-1973*. Montevideo: Ediciones De La Banda Oriental, p. 54 (for this publication, the translations are my own)

newspapers expressing socialist or other ideologies that were associated to armed groups which arose due to careening inflation and depressed labour market. These were the first steps towards the restriction of civic liberties and the concentration of powers within the executive; another complementary measure which undermined the role of traditional political actors in 1968 had been a change in the composition of the cabinet for positions regarding agriculture, industry, infrastructure and foreign affairs in order to adopt new economic alignments through the substitution of professional politicians and the subsequent employment of technocrats linked to business and management with no political experience.[270]

Nevertheless, the most inhibiting act has been the imposition of "Prompt Security Measures" (*Medidas Prontas de Seguridad*), a constitutional instrument declaring a state of exception and conferring upon the executive more power; in fact, the specific provision refers to the President's duty «to take prompt security measures in grave and unforeseen cases of foreign attack or internal commotion, giving an account within twenty-four hours to a joint session of the General Assembly or, during its recess, to the Permanent Commission, about the action and the motives behind it, the decision of the latter bodies being final».[271] Accordingly, these measures severely restricted individual freedoms,[272] allowing for swift detentions, and they were constantly applied during Pacheco's administration starting from June 1968.[273]

Pacheco sought citizenry's support arguing that Uruguay's survival was at stake and so governmental intervention was pivotal to guarantee the threatened freedoms.[274] Thus, the constant state of emergency not only gave to the President the right to centralise the whole institutional structure, but also to fight against subversives who were principally identified as members of the urban guerrilla group named Tupamaros. Also known as the National Liberation Movement MLN (*Movimiento de Liberación Nacional*), Tupamaros were an insurgent group associated with the eagerness to rupture the crisis-stricken

[270] Ibid., p. 54; cfr. Caetano & Rilla (supra note 268, p. 293) describe this new cabinet as the "the entrepreneurship cabinet."
[271] Uruguayan Constitution 1967, art. 168 par. 17
[272] Uruguayan Constitution 1967, art. 31 «Individual security may not be suspended except with the consent of the General Assembly or, if it has been dissolved or is in recess, the Permanent Commission, (…) and even then such suspension may be used only for the apprehension of the guilty parties, without prejudice to the provisions of Section 17 of Article 168»
[273] Supra note 269, p. 57
[274] Ibid., p. 56

political system in a revolutionary and slightly socialist fashion.[275] This group was the product of a merger between individuals coming from the Union of Artigas Sugar Cane Workers UTAA (*Union de Trabajadores de Azucar de Artigas*) trade union and the leftist militia known as *Coordinador*;[276] at the beginning of the 1960s, both parties decided to carry out in Montevideo acts of political sabotage, which pointed at unveiling oligarchic schemes and corruption. However, Tupamaros' peculiar insurgency soon became characterised by more violent operations and this escalation brought the government to take serious countermeasures.[277]

Indeed, a few months prior to the 1971 elections, the escape from Punta Carretas prison of almost all the detained Tupamaros who also comprised the original leadership led the government to ask the Parliament for the assignment of the fight against subversion to the armed forces. In a matter of days, presidential decree no. 566/71 was issued, and the military was officially charged with the full control of anti-subversion operations:[278] this signalled the very first step towards the entrance of this category into the political sphere of the country. Along with the creation of the Supreme Military Command ESMACO (*Estado Mayor Conjunto*) to devise and administer military strategy,[279] the Board of Commanders-in-Chief (*Junta de Comandantes en Jefe*) from the army, the navy and the air force elaborated a document containing the political functions that the armed forces would have to express: the main objectives included the control and repression of subversive apparatus and provide total security for the national development; following the regional trend, the armed forces conceived preventive measures as essential in order to achieve national security.[280]

[275] Supra note 268, p. 285
[276] Brum, Pablo. 2014. "Revisiting Urban Guerrillas: Armed Propaganda and the Insurgency of Uruguay's MLN-Tupamaros, 1969–70." *Studies in Conflict & Terrorism* 37 (5), p. 391
[277] Ibid., p. 395. Brum argues that Tupamaros have been popular during their armed propaganda phase, which consisted of transmitting political messages via contained violence which was often accompanied by symbolic gestures. Their tactics shift started with the abduction and assassination of USAID Public Safety Program director Dan Mitrione, which broke the balance vis-à-vis the government and led to strong retaliations.
[278] Galain Palermo, Pablo. 2011. "La Justicia de Transición En Uruguay: Un Conflicto Sin Resolución." *Revista de Derecho de La Universidad Católica Del Uruguay* 6, p. 112
[279] Handelman, Howard, and Thomas G Sanders. 1981. *Military Government and the Movement toward Democracy in South America*. Bloomington, Ind, p. 283
[280] Supra note 269, p. 87

Therefore, the fight against internal threats coupled with the suspension of individual liberties via judicial mechanisms were the starting points for the military's imperceptible appropriation of the political and civic spaces. This was the backdrop of the 1971 elections which resulted in the victory of Colorado member Juan María Bordaberry by a very thin margin and manifested a political impasse indicating the strongly fragmented party system;[281] overall, this difficult climate underlined the polarisation between authoritarian and democratic drives. Bordaberry assumed presidency in 1972 and, like his predecessor, resorted to the same means of repression against Tupamaros; after bloody events between the insurgent group and the military in April 1972, the President declared a state of internal war, according to which all individual freedoms would have been suspended or restricted. This temporary state of exception was then extended over the prescribed 30 days, dismissing democratic norms altogether.[282] Consequently, this meant that all offenders would have had to face trial before a military court because the state of internal war imposed military jurisdiction over ordinary courts.[283]

Furthermore, the shift from civilian to military control over society was consolidated by the enactment of the State Security Law (*Ley de Seguridad del Estado y el Orden Interno*) on July 1972.[284] The law transferred certain crimes from the ordinary Criminal Code to the Military Criminal Code,[285] thus ordinary crimes were now considered on par with military offences and the ensuing punishments became more repressive;[286] for instance, crimes related to rebellion envisaging a conviction of two years up to ten years of exile were now punishable with the same amount of time in a penitentiary.[287] More importantly, the law described the shift to military jurisdiction for crimes related to national security, attacks against the Constitution, subversive activities and so on[288] which diminished

[281] Supra note 268, p. 301 the minimal difference between the Colorado party and the National party did not even constitute 1% of total votes
[282] Hudson, Rex A, Sandra W Meditz, Thomas E Weil, and Library Of Congress. Federal Research Division. 1992. *Uruguay: A Country Study*. Washington, D.C.: Federal Research Division, Library Of Congress, p. 42
[283] Uruguayan Constitution 1967, art. 253
[284] Law no. 14.068, *Registro Nacional*, Jul. 10, 1972
[285] Esteva Gallicchio, Eduardo G. (2002). Los estados de excepción en Uruguay: hipótesis, aprobación y controles jurídicos o jurisdiccionales. *Ius et Praxis*, *8*(1), p. 147
[286] Supra note 269, pp. 84-85
[287] Supra note 284, art. 10
[288] Ibid., art. 1

significantly the Supreme Court's scope of action and gave a permanent character to what the state of internal war had already introduced.

Within this framework where no confrontation with the military was possible due to the laws of exception, Bordaberry reinforced the dichotomy of order versus subversion and the armed forces justified their repressive measures in light of the fights against the urban guerrilla. However, the conventionally acknowledged coup happened through two chief stages in 1973: at the beginning of the year, there was an institutional crisis owing to the fact that the army and air force commanders – and later also the navy – rejected the appointment of general Francese as new Ministry of Defence. Although the protest was unconstitutional because the prerogative of nominating ministers rested within the president,[289] Bordaberry tried to mobilise the citizenry and other political forces to support him, but to no avail: his reputation had been discredited.[290] During the crisis, the armed forces released communique 4 and 7 whereby they announced vague plans and objectives concerning political, social and economic areas such as the elimination of insurgents through the establishment of adequate legislation for control and sanctions. [291] Since the military strongly relied on its tutelary role, the crisis was eventually diverted with the signature of the Pact of Boisso Lanza by Bordaberry: the National Security Council COSENA (*Consejo de Seguridad Nacional*)[292] was established as an advisory body to the executive through which commanders of the armed forces participated in policymaking.[293] In the wake of this event:

> «The political and social forces failed to promote a firm and concerted response to the serious situation after this first quasi-coup. It is also true that multiple factors (total discredit on the president, acute social conflict, mutual distrust between opposing parties etc.) did not contribute to concretely shaping a point of convergence for democratic forces».[294]

[289] Uruguayan Constitution 1967, art. 174
[290] Supra note 269, p. 88
[291] Supra note 268, p. 333-334. Communique no. 4, Feb. 9-10, 1973 preliminary remark stated that: «The members of the Armed Forces, at all levels, became fully aware of the problems affecting the country, through their special participation in the national work occurred in the last year and assessed the seriousness of the situation which requires a firm reaction, with the honest participation of all sectors of the Uruguayan people, because failing that will inevitably lead to total chaos».
[292] Decree no. 163/973, *Registro Nacional*, Feb. 23, 1973
[293] Supra note 282, p. 42 COSENA included the commanders of the armed forces, plus an additional senior military officer and the ministers of national defence, interior and foreign affairs.
[294] Supra note 268, p. 308

Finally, the last occurrence which propelled the beginning of the military era was caused by the pervasive tension between Parliament and the executive branch, which reached its apex on June 27, 1973. On this date, the Executive issued the dissolution of the Chamber of Deputies and the Senate through decree no. 464:[295] while article 1 provided for the elimination of the legislative structure of the country, article 2 established the creation of the State Council (*Consejo de Estado*). The latter organ was supposed to substitute the Parliament inasmuch as the organ was charged with three main tasks: it had to perform the functions of the General Assembly; to control the Executive in relation to the respect of individual rights and its compliance to the constitutional and legal norms; to elaborate a draft constitutional reform which would be subjected to a plebiscite.[296] Moreover, a subsequent decree imposed also the dissolution of departmental boards, legislative expression at the local level.[297]

The golpe provided for an increase of armed forces' participation while Bordaberry maintained his presidential prerogatives, meaning that the military takeover had not completely depleted the old government and counted on the support of segments of society, politics and bureaucracy. The main manifestations against this historical turn were promptly shut down and later on banned completely by means of decree [298] or detention.[299] This phase of the military government revolved mostly around the repression of Tupamaros with the ultimate aim of bring about order within national borders: behind the expression "house in order" ("*la casa en orden"*), repression and torture reached unseen levels.[300] In 1974, the State Council even issued an Organic Constitutional Law[301] which summarised the armed forces' objectives and underscored the notion of security; significantly, the law envisaged the military occupation of civil positions, such as justice both in the Supreme Military Tribunal and the Supreme Court.[302] Through this organic law, COSENA, ESMACO and the Board of commanders-in-chief were officially

[295] Decree no. 464/973, *Registro Nacional* Jun. 27, 1973
[296] Supra note 266, p. 21
[297] Decree no. 465/973, *Registro Nacional*, Jun. 27, 1973
[298] Decree no. 622/793 regulated trade unions and illegalised strikes
[299] Supra note 266, p. 18-19. Some opposing parties elaborated a document in order to remedy the actual situation (Bases para la salida de la actual situacion) through new elections, but many of them were detained.
[300] Supra note 268, p. 339-340
[301] Organic Constitutional Law no. 14.157, *Registro Nacional*, Feb. 21, 1974
[302] Ibid., art. 31 (G)

institutionalised in the legal body of Uruguay. In sum, the conventional safeguards for society were under the control of the military, as detentions, torture and forced disappearances kept being carried out in a systematic manner without the chance to escape the arbitrariness of military justice.

Once the Tupamaros were significantly reduced, either because they were detained or preferred to exile, the military assumed forward-looking projects which coincided with the supposedly electoral year. In 1976, differences between Bordaberry and the armed forces regarding the future of the country led to the ultimate dismissal of the president; the main point of contention concerned the survival of traditional political parties: while Bordaberry called for their elimination in order to impose a unipersonal regime, the military did not want to «share the historical responsibility of suppressing traditional political parties».[303] The removal of Bordaberry and the nomination ad interim of State Council president Alberto Demicheli pointed to the inauguration of a new institutional phase,[304] since the last formal representative which preserved to some extent some form of electoral legitimacy was gone.

3.1.2 Emptying the Constitution

The dismissal of Bordaberry and the interim appointment of Demicheli established a new form of institutional order, which found its main expression in the issuance of different norms that deeply affected the structure of the conventional government branches. Accordingly, the Constitution started to be amended by means of Institutional Acts (*Actos Institucionales*), marking a rupture with the previous functioning of the system; from the military perspective, the removal of Bordaberry from office indicated the beginning of a transitional period during which these provisional norms with constitutional status would regulate the country until the completion and approval of a new Constitution.[305] Through Institutional Act no. 1, Demicheli suspended until further pronouncement the elections that were supposed to take place in November and through Institutional Act no. 2 he

[303] Supra note 267, p. 57
[304] Caetano & Rilla (Supra note 268) popularised the division of distinctive phases of the military regime made by political scientist Louis E. Gonzalez: namely, the "dictatorship", "foundational dictatorship" and the "transitional dictatorship"
[305] Demasi, Carlos, and Et Al. 2009. *La Dictadura Cívico Militar: Uruguay 1973-1985*. Montevideo: Ediciones De La Banda Oriental, pp. 48-49 (own translation)

created a new organ: the Council of the Nation (*Consejo de la Nación*). Composed by the members of the State Council and the Board of commanders-in-chief, the Council of the Nation was charged with the right to appoint virtually every position in the government, from the President of the Republic to the members of the State Council and the Court of Justice: essentially, it was a supreme governmental body, covering both legislative and executive prerogatives.[306]

Following these constitutional decrees, Demicheli was succeeded by Aparicio Mendez when he refused to sign in favour of the exclusion of a great majority of political actors; this was eventually achieved through institutional act no. 4 mandated by Mendez. Indeed, this constitutional decree prohibited the exercise of political activities, including the right to vote, for fifteen years to all the candidates to elected office in the lists for the 1966 and 1971 elections of Marxist or pro-Marxist parties, declared illegal by virtue of resolutions in 1967 and 1973;[307] the same provision applied also to the individuals who had been part of either of the legislative chambers.[308] This provision considerably restricted political rights and put a *de facto* halt to pluralism, thus outlining the powers of the Council of the Nation. Overall, the executive power masked its oppressive measures with the emanation of act no. 5, which clearly stated that the State recognised human rights as a natural expression of the man as a matter of principle, notwithstanding any legal situation and above any provision of the written norm.[309]

However, the most relevant manifestation of the authoritarian conception concerning the new order that the military government desired to realise in Uruguay was encapsulated in the provisions associated to the judicial power. Institutional Act no. 3, issued on September 1976, created a Ministry of Justice which would have competence over the relation between the executive and the judicial power and other jurisdictional entities with the exclusion of military bodies.[310] In this way, the principle of separation of powers was removed to assert the supremacy of the executive as the sole coordinating body.[311] Moreover, the judiciary was rendered completely dependent to the Council of the Nation

[306] Supra note 266, p. 33
[307] Gross Espiell, Héctor, and Eduardo G. Esteva Gallicchio. 2008. "La Evolución Político-Constitucional de Uruguay Entre 1975 y 2005." *Estudios Constitucionales* 6 (2), p. 408 (own translation)
[308] Supra note 266, p. 34
[309] Constitutional Act no.5, *Registro Nacional*, Oct. 20, 1976, art. 1
[310] Constitutional Act no. 4, *Registro Nacional*, Sept. 1, 1976, art. 2
[311] Supra note 307, p. 405

through the issuance of decree no.8, which outlined a different regulation of judicial bodies and the courts' competences. Accordingly, Institutional Act no. 8 emphasised the constituent powers possessed by the executive branch in light of the institutionalisation of the revolutionary process; thus, this capacity was reflected in the wide modification of Section XV – the Judicial Power.[312]

First of all, the title of Section XV was changed from "the Judicial Power" (*Del Poder Judicial*) to "the jurisdiction" (*De la jurisdicción*), a subtle way to point out the loss of autonomy as "power" of the state while increasing centralisation of the executive branch; additionally, the act replaced the name of the Supreme Court of Justice with the Court of Justice.[313] These formal modifications correspond also to an essential altering of the scope of the judiciary: although article 1 of the act assesses that the jurisdictional activity attributed to the courts is delineated by independent and sovereign decisions, even when there exists a hierarchical order about administrative matters vis-à-vis the executive branch,[314] the subsequent constitutional provisions shaped a new typology of judiciary. As already mentioned, the appointment of (Supreme) Court of Justice judges became a task pertaining to the Council of the Nation, on the executive's proposal, [315] and members could stay in offices for five years instead of ten as the Constitution prescribed.[316] The appointment of Supreme Court justices have always been a prerogative of the General Assembly: accordingly, the selection would have to be approved by two-thirds majority of the total of its members.[317] This automatically implied that the various and different parties had to come to an agreement about the suitability of candidates, thus granting to the judicial branch not only independence from the executive but also from the legislature.[318]

The new arrangement affected not only the appointment of Supreme Court's members, but also justices of peace courts and courts of first instance of any rank and denomination were now chosen by the executive power on the proposal of the Court of Justice. Thus,

[312] Espiell, Héctor Gros. 1983. "Control Político de La Constitución: El Caso de Uruguay." *Política. Revista de Ciencia Política* 2, p. 24
[313] Supra note 307, p. 405
[314] Constitutional Act no. 8, *Registro Nacional*, Jul. 1, 1977, art. 1
[315] Supra note 312, p. 24
[316] Uruguayan Constitution 1967, art. 237
[317] Uruguayan Constitution 1967, art. 236
[318] Supra note 312, p. 26

the Court loses the power to appoint officials of the judiciary.[319] Moreover, the transitory dispositions also put the magistrates, both in administrative and ordinary justice, on an interim position for four years starting from the date of issuance of the act; the executive could remove them at any time either on its own initiative or upon the suggestion of the Court of Justice or the Tribunal of Administrative Claims until the temporary positions were confirmed.[320] These provisions undoubtedly reduced the independence of courts in seeking justice for the damaged parties and of the Court of Justice in its pivotal role in assessing the constitutionality of laws.

Thus, the Institutional Acts served to legitimate the constant circumvention of the Constitution in a constitutional manner; the military presented its actions as necessary measures in order to defend the democratic tradition of the country and reinforced this rhetoric through the declaration of the guarantee of human rights, thus denying any involvement with abuse and ill-treatment. Finally, the Constitution was made void of any significance with the fatal impairment of the Supreme Court and the court system in general, which became subordinate to the executive and lacked the basis to form a consistent opposition to the military. The armed forces continued this trend and looked for a proper institutionalisation in 1977 by means of a constitutional project which would incorporate the institutional acts; once elaborated, the new Constitution would be subjected to approval with a plebiscite in 1980 and subsequent national elections with a single candidate would be held.[321]

The constitutional project was elaborated by the State Council and approved by the Council of the Nation, meaning that the Constituent Assembly was self-appointed.[322] The draft aimed at preserving the military's tutelary role and embedding in the institutional order the repressive mechanisms already implemented through the Institutional Acts. As Weinstein points out, «(…) the new charter would have ratified all the illegal acts of the regime and established a legal justification for the bans, political dismissals, and abuses (..)»;[323] this purpose would have been accomplished through the permanent integration of COSENA within the powers of the state and the creation of a Tribunal of Political Control

[319] Supra note 307, pp. 405-406
[320] Supra note 312, p. 25
[321] Supra note 266, p. 35
[322] Supra note 307, p. 401
[323] Weinstein, Martin. 1988. *Uruguay: Democracy at the Crossroads*. Boulder: Westview Press, p. 75

to dismiss party authorities: accordingly, the armed forces would have assumed direct competence over matters of national security[324] Moreover, the electoral law was now supposed to confer absolute majority to the leading party and it was not possible for parties to present more than one presidential candidate per list anymore.[325] Significantly, the long-term plans of the armed forces showed with the provision which envisaged only one presidential candidate for the 1981 elections and two for those of 1986.[326]

For what regards human rights, night raids were prohibited while the right to strike was limited prior to its exercise by executive's private initiative, parliamentary approval by a qualified majority and establishment of rules of mediation, conciliation and arbitration.[327] Although the draft document provide virtual veto power on all policies,[328] this timid openings with respect to the repressive stances of the military were produced in order to gain authority before the Uruguayan population. However, on November 1980, the military leadership lost its own referendum with 57.6% of citizens voting against the constitutional project: after the electoral defeat, the return to a democratic order was inevitable. To achieve this goal, internal party elections were held in 1982 as a result of the earlier approval of the political parties' law[329] which controlled the regeneration of the political party system and authorised electoral campaign with the subsequent strengthening of the opposition.[330] Significantly, parties belonging to the left were excluded and did not even participate in the negotiations with the armed forces in order to restore democracy.[331]

3.1.3 The 1984 Naval Club Pact

Political dialogue between the newly qualified parties and the military after the popular rejection of the constitutional reform in 1980 was not linear, since it witnessed many drawbacks and failed attempts at reaching a satisfactory agreement.[332] Yet, in the words

[324] Supra note 268, p. 352
[325] Ibid.
[326] Supra note 266, p. 36
[327] Supra note 268, p. 352
[328] Supra note 282, p. 44
[329] Fundamental Law 2, *Registro Nacional*, Jun. 1982
[330] Supra note 266, pp. 40-41
[331] Supra note 282, p. 46
[332] The first Parque Hotel talks in 1983 came to an impasse between the negotiating parties largely due to the demands of the military regarding jurisdiction over military personnel and offenders accused of

of one of the pivotal figures of the negotiation on the parties' side and future President of the post-transitional government, Julio Maria Sanguinetti:

> «In Uruguay there was a gradual transition through negotiations, which was very important. Why? Because the dialogue between the political and military leaders permitted us to get to know each other. The politicians learned to understand military reasoning, and the military learned to negotiate and compromise. From 1980 to 1984 we talked, argued, left the negotiating table, returned again, and finally agreed to hold elections».[333]

Within this framework, the Naval Club Pact is to be considered as the endpoint of a long-term process towards the beginning of democratic transition. This secret forum was dominated by pragmatic necessities and contradictory pressures whereby military concerns for explicit immunity provisions clashed against civil demands for accountability. Therefore, the results of the negotiations reflected this *esprit de corps*.

Since the talks were conducted in total secrecy, no formal document was signed and promulgated; nevertheless, the main conclusions accorded by the parties were summarised by Institutional Act no. 19 which all the concerned participants subscribed: first of all, it was agreed that national elections would occur in November 1984, thus repealing Institutional Act no. 1.[334] For what regards the specific provisions, the armed forces did not completely hold the control they wished to retain over civilians and, at the same time, the political representatives did not succeed in removing entirely authoritarian bodies and institutions. Namely, the military saw the National Security Council limited in its capacity, since it survived only as an advisory body that would be controlled by the president and the cabinet of ministers.[335] Moreover, army candidates for the rank of commander-in-chief would be appointed by the president among a list of three candidates provided by other generals, which entailed that the civilian leadership restricted the scope of influence of the armed forces but concede the maintenance of their seniority system. Another provision also stated that military courts would continue to adjudicate civilians

subversion; the political parties directly rejected these claims and walked out of the roundtable, leading to further political tensions and public protests. See: Mallinder infra note 336, pp. 16-17

[333] Sanguinetti, Julio María. 1991. "Present at the Transition." *Journal of Democracy* 2 (1), p. 7

[334] Supra note 266, p. 47

[335] Supra note 282, p. 47

whenever the parliament recognised a state of insurrection.[336] Finally, the Supreme Military Court would have had to review circa 400 cases of political prisoners so as to assess their possible release.[337]

Among the main achievements obtained by the negotiating parties, the suspension of *habeas corpus* would only be allowed through the vote of parliament in case of a state of insurrection; relating to this, the establishment of *recurso de amparo* to legally safeguard appeals against governmental decisions or military actions marked a significant shift concerning accountability and delineated a mechanism to make past perpetrators face their misconduct.[338] Overall, this agreement signalled the return of the 1967 Constitution as is was formerly conceived: some of the provisions that the armed forces preserved under act no. 19 would have been only provisional and persist during the first year of the new legislature, indicating a gradual process for the dismantlement of the military apparatus. Nevertheless, some pitfalls of the pact indicated long-lasting consequences for the Uruguayan system: for example, General Hugo Medina, a relevant figure during the negotiations, remained as the army commander-in-chief and became Minister of Defence in 1987;[339] most importantly, there were no explicit references to the protection of human rights and amnesty or accountability were not mentioned.[340]

Accordingly, it was acknowledged that a discourse on human rights would have brought negotiations to a stalemate and many observers today argue that the cost of drastically reducing military demands in exchange of the assurance of political elections and subsequent return to democracy was the implicit acceptance of impunity for the agents of repression and torture.[341] Indeed, Julio Maria Sanguinetti became the first democratically elected president after more than ten years due to the Colorado party's electoral campaign

[336] Mallinder, Louise. 2009. "Uruguay's Evolving Experience of Amnesty and Civil Society's Response." *Transitional Justice Institute Research*, p. 20
[337] Ibid., p. 24
[338] Ibid., p. 20
[339] Ibid., p. 21
[340] Es imposible de olvidar. Breve Historia. Brecha no. 1743, 17 April 2019, p. 2 «Every time Juan Vicente Chiarino (participant of the negotiations and future Minister of Defence for the first government of Julio Maria Sanguinetti) was asked if in the conversations with the armed forces it had been agreed to not judge the military and police members who had violated human rights during the dictatorship, the chief denied that such commitment had been taken, although he admitted that the issue lingered during the conversations.»
[341] Skaar, Elin. 2007. "Legal Development and Human Rights in Uruguay: 1985–2002." *Human Rights Review* 8 (2, p. 54; cfr. Sznajder, Mario, and L. Roniger. 1997. "The Legacy of Human Rights Violations and the Collective Identity of Redemocratized Uruguay." *Human Rights Quarterly* 19 (1), p. 75

centred more on a process of pacification instead of an emphasis on polarising sentiments.[342] Uruguay had been «the closest approximation in South America of the Orwellian totalitarian state»[343] and the incoming government would have had to confront the state's heinous past sooner or later.

3.2 The construction of immunity

The ordered upsurge and retreat of the authoritarianism in Uruguay seemed to favour the vision that perpetrators of serious violations of human rights could finally face trial and victims' demands for truth and justice would be satisfied. Nevertheless, the political aim to guarantee political stability soon surpassed these considerations and the incumbent democratic government tried to adopt alternative transitional justice mechanisms, such as reparations and a sort of truth commission. Significantly, the main obstruction to accountability was not set up during the military regime, but it was established by the incoming executive in accordance with the project of national reconciliation and long-lasting peace. Therefore, offenders obtained a strong protection for their misdeeds which was going to be defended also by the executive, while human rights advocates struggled to advance human rights policies; the first significant changes started only when the executive, specifically the President, permitted more investigations of past cases.

3.2.1 The National Pacification Project

The transition to democracy had been the product of a pact between armed forces and the different political parties; this undoubtedly influenced the successive democratic governments. One of the greatest issues that Sanguinetti had to face during the first democratic term was how to build a credible democracy, which entailed a more pre-eminent role of the judiciary, without renouncing to his change to peace, which entailed an amnesty also for human rights violators. For this reason, the government decided to focus on the present and deal with the most pressing situations, mostly with regards to political prisoners and dismissed public employees for ideological reasons.[344] Thus,

[342] Supra note 268, p. 365
[343] Loveman, Mara. 1998. "High-Risk Collective Action: Defending Human Rights in Chile, Uruguay, and Argentina." *American Journal of Sociology* 104 (2), p. 503
[344] Greising, Carolina, Cecilia Pérez, Elina Rostan, Marisa Silva Schultze, and Benjamin Nahum. 2011. *Historia Uruguaya. 12, La Restauración Democrática 1985-2005*. Montevideo, Uruguay: Ediciones De La Banda Oriental, pp. 12-13 (for this publication, the translations are my own)

Sanguinetti's human rights policy did not focus either on the pursuit of justice or truth, but rather it underlined national pacification.

After tensions between the Colorado party and the opposition regarding the scope of the amnesty, the National Pacification Law was approved on March 1985.[345] This transitional resolution expressed the willingness of Sanguinetti to not commence any official policy to seek justice but also his desire to not prevent anyone from appealing to a court: in other words, this law was an attempt at pacification. However, analysing its main provisions, it is not clear how pacification was intended nor how it should have been implemented vis-à-vis the past. Firstly, one of the most relevant aspects of this law is the ratification of the American Convention on Human Rights of November 1969, known as the Pact of San Jos*é* de Costa Rica, along with the annexation of the First Optional Protocol to the International Covenant on Civil and Political Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The regional and international dimensions were officially incorporated in the legal body of the country.

For what regards the pressing internal problems, one of the merits that the Law of National Pacification brought about is the amnesty granted to non-violent political prisoners, a further testament of Uruguay's human rights policy. Indeed, the law clearly stated that amnesty would be granted to «all the political crimes, common crimes and related military crimes, committed after 1 January 1962».[346] Political crimes were defined as crimes committed for directly or indirectly political motives, while military and common crimes related to political crimes were those committed with the same purposes or perpetrated to ease, accomplish and intensify their effects or prevent punishment.[347] The broad scope of the law is also evident insofar as it allowed for the release of prisoners who had been convicted and those detained without trial. Conversely, prisoners who had committed or were involved in "intentional homicide" would not have been eligible for amnesty, but they would be set free under provisions for sentence reduction;[348] this clause

[345] Law no. 15.737, *Registro Nacional,* Mar. 22, 1985
[346] Supra note 345, art. 1
[347] Supra note 345, art. 2; cfr. Art 4 provides that authors, co-authors or accomplices can be eligible for the amnesty whether or not they have already been convicted or are recidivists.
[348] Supra note 345, art. 1; significantly, the individuals falling in this category would have their sentences reduced through the formula that each day spent in prison during the military government corresponded to three days of their sentence.

distinguished categories of offenders and condemned those who committed "blood crimes" so as to not condone violence as a means of political change.[349]

These provisions would have been carried out by the Supreme Court of Justice: the Supreme Military Tribunal had to pass to the judicial body a list of all the captives covered by the pacification legislation within 48 hours. The Supreme Court was then required to order the release of all detainees, except those charged for "intentional homicide" who would have to wait for the Supreme Military Tribunal to transfer their cases to civilian courts within five days.[350] Significantly, the procedural steps were set by the executive, but the implementation of the amnesty was supervised by the Supreme Court Chief Justice.[351] Finally, the enactment of the pacification law imposed not only swift releases, but it also provided for: the interruption of surveillance of the amnesty beneficiaries; the cessation of warrants or requisitions; rescission of limitations of movement outside the country's borders for the amnestied; and the end of any investigation for crimes falling within the scope of the amnesty.[352]

Other mechanisms enacted through the Sanguinetti administration's law included reparations, in the form of restitution of assets that have been seized or confiscated during the regime to the amnestied people within 120 days; when restitution was not possible, then this would be accomplished through destruction, extinction, transfer or re-registering as states property assets seized or confiscated.[353] Most importantly, the law also reinstated public employees unfairly dismissed during the regime because of their political beliefs;[354] if not possible, then the involved party or their relatives could obtain a pension.[355] The return of government officials signalled the intention of the incoming government to legitimate the state organs whose reputation had been spoiled by the military regime; yet, the extent of the success of these measures had been somehow restricted by the Naval Club Pact because the personnel employed during the repressive rule could not be removed.[356] Finally, the National Pacification Law created the National

[349] Supra note 336, p. 30
[350] Supra note 345, art. 8
[351] Supra note 336, p. 33
[352] Supra note 345, art. 7
[353] Ibid., art. 12
[354] The dismissal had been emanated through Institutional Act no. 7
[355] Supra note 345, art. 25
[356] Supra note 336, p. 37

Commission for Repatriation (*Comisión Nacional de Repatriación*)[357] to facilitate the return of exiles to Uruguay by compiling a register of all the citizens living abroad interested in coming back and executing programmes of assistance in various areas for this purpose.[358]

Since the intent of the legislation was national pacification, there were no explicit provisions about truth recovery and judicial proceeding; for instance, cases that were reviewed for the release of prisoners did not investigate nor question the original sentences but just focused on quickening the process. At the same time, the provision did not acknowledge to what extent political activity had been tarnished during the authoritarian regime, nor declared the innocence of the beneficiaries of the amnesty. Nevertheless, a significant message was conveyed through article 5, stating that:

> «Crimes committed by police officers or members of the military who were perpetrators, co-perpetrators or accomplices to inhumane, cruel or degrading treatment or the detention of individuals who disappeared, or who have covered up any such behaviour, are excluded from amnesty.»[359]

Moreover, the exemption from amnesty also applied to crimes committed for political reasons or when the perpetrators were acting under any form of government capacity and duty. The unequivocal exclusion of military and police officials from the amnesty's remit contributed to delineate different dimensions of accountability and brought to a constant increase of denunciations before courts; in fact, the judiciary formally regained its autonomy and independence through the elimination of the Ministry of Justice and the introduction of new members in the Supreme Court and the Tribunal of Administrative Claims appointed by the legislature.[360] The restitution of full powers to the courts promoted a climate for prosecutions in light of human rights abuses.[361] Nevertheless, this approach was soon contested mainly by the denounced authorities: the principal military leaders, such as General Hugo Medina, began to complain about the protests and refused

[357] Supra note 345, art. 24
[358] Supra note 336, p. 35
[359] Supra note 345, art. 5
[360] Supra note 344, p. 13
[361] Burt, J.-M., G. Fried Amilivia, and F. Lessa. 2013. "Civil Society and the Resurgent Struggle against Impunity in Uruguay (1986-2012)." *International Journal of Transitional Justice* 7 (2), by December 1986, 734 cases were under investigation

to appear in ordinary courts.[362] Instead of standing for the rule of the judiciary in relation to the accusations to the armed forces, the government preferred to avoid a possible institutional crisis and decided to keep stability and "pacification" via a new amnesty.

3.2.2 The 1986 Amnesty Law

While the 1985 National Pacification Law for political prisoners explicitly avoided to apply an amnesty to state agents responsible for human rights violations and let Uruguayan society hope that the door on the past was not going to be closed, the political objective of avoiding the collapse of the recently gained democracy surpassed accountability demands and escaped any engagement with crimes of the past. Since victims and/or relatives of victims started to accuse members of the armed forces and military leaders – especially General Medina – retaliated by stating that no officer would abide by judicial summons, the executive did not want to risk another coup and on December 1986 the parliament enacted a new amnesty law.

The so-called Law on the Expiration of the Punitive Claims of the State (*Ley de Caducidad de la Pretensión Punitiva del Estado*),[363] also referred to as Expiry Law,[364] abolished the state's capacity to prosecute the categories left out by the pacification law since:

> «it is recognised, as a consequence of the logic of the events deriving from the agreement between the political parties and the Armed Forces in August 1984, and in order to complete the transition to full constitutional order, the State renounces to the exercise of punitive claims with respect to crimes committed until March 1, 1985 by military and police officials whether for political reasons or in fulfilment of their official capacity and in obeying orders from superiors during the de facto period».[365]

This first provision completely prevented any future kind of judicial mechanism for human rights violations. Nevertheless, the preclusion of legal action did not exclude the possibility to inspect cases of enforced disappearances: article 4 provided that the judge in charge of the case had to transmit to the Executive the witness' statements presented

[362] Supra note 344, p. 14
[363] Law no. 15.848, *Registro Nacional*, Dec. 28, 1986
[364] Interestingly, the text never refers to an "amnesty" although its legal consequences were *de facto* amnesties benefitting military and police officers.
[365] Supra note 363, art. 1 (own translation)

until the date of enactment of the law relating to proceedings about persons who had been detained in military or police operations, including also children considered abducted in a similar manner. The Executive was compelled to order investigations into these matters immediately and report the findings within 120 days.[366] This seemingly positive outcome implied a political move in order to transfer legal and political prerogatives for the investigations from courts to the executive power, thus diminishing and controlling the autonomy of the judiciary.[367]

This intent is unmistakable in article 3 of the Expiry Law which, as Errandonea argues, «is the true crucial point of the Uruguayan amnesty. Without such provision favouring the control of the judiciary, the Expiry Law could have been contravened following the broad provisions of article 1».[368] Indeed, the third article establishes that the judge in charge of the denunciations would have to demand to the executive power whether the case under investigation is covered or not by the law. Plus, if the executive confirmed that the case was indeed covered by the legislation, then the judge would have to close and archive it; on the contrary, the inquiry could proceed if the executive deemed as outside of the expiry's scope.[369] Thus, a supremacy of political agents over the judicial branch could be exercise simply through the non-action of the presidential office whenever the executive had no interest to investigate cases.[370] In fact, this had been the leading approach of the first post-coup governments.

As soon as the Expiry Law was approved, severe objections raised especially from the opposition and even from sectors of the leading Colorado party that renamed the legislations as the "law of impunity". The synergy among political agents with human rights organizations brought to a sufficient number of signatures in order to request a national plebiscite with the ultimate aim of revoking and repealing the law. However, the efforts of civil society were not repaid because on April 1989 those in favour of the Expiry Law won with almost 57% of votes while those who wanted the law defeated amounted only to around 43%.[371] The plebiscite upheld the amnesty law granting immunity to

[366] Supra note 363, art. 4
[367] Supra note 341, p. 56
[368] Errandonea, Jorge. 2008. "Justicia Transicional En Uruguay." *Revista IIDH* 47, p. 22 (own translation)
[369] Supra note 363, art. 3
[370] Skaar, Elin. 2013. "Wavering Courts: From Impunity to Accountability in Uruguay." *Journal of Latin American Studies* 45 (3), p. 488
[371] Supra note 267, pp. 77-78

perpetrators of gross violations of human rights and this event generated three important effects:

> «First, the military now had a formal guarantee that they would not be prosecuted. Second, civil society was totally disillusioned. Third, the law formally turned military prosecution into a political rather than a legal matter».[372]

Regarding the last point, the judiciary itself was involved in another episode occurred during the process to obtain the referendum that further cemented the amnesty. Indeed, in 1988 the Supreme Court of Justice claimed that the law was constitutional in a minimum majority decision: in this way, the regulation of human rights violations was passed to the executive. Specifically, appeals of the law's unconstitutionality were presented in all cases reported to the judiciary and assessed that constitutional provisions such as separation of powers, right to due process, judiciary's independence and equality before the law had all been breached. However, the Supreme Court dismissed the arguments accusing the first four articles of Law no. 15.848 and concluding that the motivation behind the law and the extraordinary circumstances of the socio-political order which prompted its approval constituted an authentic amnesty.[373]

The Supreme Court ruled that the Expiry Law corresponded to an amnesty as envisaged by the Constitution, which required an absolute majority vote of both Chambers in plenary session to grant amnesties in extraordinary cases.[374] However, one of the most solid criticisms from opposing judges voiced that the law did not respect the separation of powers, an essential feature of the government; thus, the breach of this principle would jeopardise the guarantee of a due process of law and a legal sentence granted by the Constitution.[375] However, the Supreme Court deemed that these provisions would not be affected by the law because the Constitution does not prohibit the intervention of another power of the State in a judicial process insofar as the holders of the state's punitive claims are not the judges but the Public Ministry, an organ of the executive branch. In this sense, the activity of judges was not regulated by the Constitution, but by the law itself which

[372] Supra note 341, p. 57
[373] Marchesi, Aldo. 2013. Ley de Caducidad: Un Tema Inconcluso: Momentos, Actores y Argumentos (1986-2013). Montevideo: Trilce, pp. 158-159 (own translation)
[374] Uruguayan Constitution 1967, art. 85(14)
[375] Uruguayan Constitution 1967, art. 12

expressed the legislature's constitutional prerogative to grant an amnesty.[376] Dissident opinions underscored the fact that the Constitution did not allowed state powers to delegate their original competences, such as jurisdictional functions: by establishing that a judge must obtain the approval of the executive power to inspect case against a military officer accused of politically motivated crimes before March 1985, the legislative was clearly depriving the judiciary of its jurisdictional functions[377] to assign them to the executive in clear contravention of the Constitution.[378]

Thus, the Expiry Law was mainly perceived as a political act curtailing judicial activity, which was however supported by the highest court of the country. Due to the combination of the ruling and the referendum, the *Caducidad* law blocked any type of activity in courts even if some judges attempted to find legal solutions to challenge the law. In the 1997 *Zanahoria* case, regarding the disappearance of 150 people who were believed to have died of excessive torture, first-instance judge Reyes ordered an investigation without prosecutorial intentions on the basis of the recently ratified Inter-American Convention on the Forced Disappearance of Persons; indeed, the aim was only to determine assess the existence of a clandestine cemetery and eventually return the bodies to the families. Nevertheless, the Court of Appeals invalidated Reyes' order of investigation because he had assumed a responsibility belonging to the executive. So, the judge directly forwarded the case to President Sanguinetti, who had to order an investigation for disappearances following article 4 of the Expiry Law. Alas, the case was closed and archived as a result of the government's claim that the disappearances were included in article 1 of the law; moreover, Reyes was removed from his position as criminal judge.[379] Therefore, the executive was ready to shut down any form of legal investigation and individual judicial efforts at that time were not enough to defy this balance.

[376] Supra note 368, p.23 Sentence of the Uruguayan Supreme court, no. 184, May 2, 1988 «If the legislative power could dictate a general amnesty law, because expressly empowered by the Constitution (…), with more reason it could set certain limits or controls (…). Moreover, it is known that the punitive claim of the State falls within the scope of the Public Ministry. The function of the judge is limited or conditioned, in criminal matters, by the activity of said Ministry. This activity is not regulated by the Constitution, but by law (…) »
[377] Uruguayan Constitution 1967, art. 233
[378] Supra note 368, pp. 23-24
[379] Supra note 370, p. 490

The failure of finding remedies at the domestic level, brought a Uruguayan NGO to file eight cases against the Uruguayan state before the Inter-American Commission on Human Rights (IACHR), asserting the Expiry Law violated the American Convention on Human Rights through the prevention of criminal inquiries.[380] Thus, the IACHR issued a report regarding the *Ley de Caducidad* to assess its validity.[381] The Commission found that the amnesty was in breach with the right to a fair trial provided for in article XVIII of the American Declaration of the Rights and Duties of Man and with articles 1, 8 and 25 of the American Convention on Human Rights which focused respectively on the duty to respect of rights, ensure judicial remedy and guarantee judicial protection.[382] The IACHR also recommended just compensation to the victims and urged Uruguay to adopt necessary measures to clarify the cases associated to heinous crimes.[383] In spite of the report, which underlines the country's duties under international human rights instruments, the final decisions did not have political or legal influence over the situation because the IACHR has never even made an *in loco* visit.[384]

3.2.3 A matter of political will: the first pursuits of justice and truth

The impasse which impeded truth recovery and legal prosecutions lasted for a long time and attempts at changing the situation proved faulty or were rejected. Indeed, not only judicial initiatives but also early mechanisms established to clarify the abuses that occurred during the military regime from 1973 to 1985 did not achieve the desired effects. Human rights violations were considered an important objective for opposition parties: Broad Front (*Frente Amplio*) party and National party set up three investigative commissions to clarify some cases of disappearances and political murders in 1985. Among these, the "Investigative Commission on the Situation of 'Disappeared' People and its Causes" reported on 164 disappearances and assessed the participation of the armed forces; evidence was forwarded to the judiciary but neither this commission nor the parallel one covering the assassination of representatives Zelmar Michelini and

[380] Supra note 336, p. 59
[381] Inter-American Commission on Human Rights. *Hugo Leonardo de los Santos Mendoza et al v Uruguay*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report No. 29/92, OEA/Ser./L/V/II.83 (1992)
[382] Ibid., closing remark 1
[383] Ibid., closing remark 2-3
[384] Supra note 336, p. 59

Hector Gutierrez Ruiz were able to depict the complete process about how the crimes came to fruition at the decision-making level from an institutional point of view.[385] Moreover, the commission's report was not widely distributed and failed to generate a national narrative: the government and the military did not even respond to the final reports, thus never officially acknowledging the findings.[386] The third commission was then established by the Senate in 1990 to ascertain the involvement of former Senator Carlos Blanco in the disappearance of teacher Elena Quinteros, yet there were not grounds to initiate a court case.[387]

Thus, in light of the failed attempts explored so far, human rights discourse during the first administrations after the return to democracy was permeated by a profound silence, worsened by the lack of political impulse to discover the whereabouts of the disappeared. Some tentative steps were unexpectedly taken when Colorado Jorge Batlle Ibáñez assumed as President of the Republic and decided to adopt a systematic instrument to rectify this situation. On August 2000 – 15 years after the end of the military regime – he set up the Commission for Peace COMPAZ (*Comisión Para la Paz*), a new attempt at truth recovery this time made official by decree.[388] The aim of this commission was to «receive, analyse, classify and collect information about forced disappearances that occurred during the de facto regime»,[389] thus trying also to bring about national reconciliation and peace among Uruguayans and close some persistent issues. The preamble of the report stated that this was an «ethical obligation for the State and a necessary task in order to preserve the historical memory»,[390] although the obligation stemmed from a legal argument, as the state was required to follow what article 4 of the Expiry Law stated, along with the Constitution and international treaties ratified by Uruguay.[391]

For the elaboration of a comprehensive report, the commission was granted the «broadest powers to receive documents and testimonies» that would be kept under «strict

[385] Hayner, Priscilla B. 2002. *Unspeakable Truth: Confronting State Terror and Atrocities*. New York: Routledge, p. 241-242
[386] Supra note 30, p. 88
[387] Ibid., p. 88. The case of Elena Quinteros will be analysed further in this section.
[388] Presidential resolution no. 858, *Diario Oficial*, Aug. 9, 2000
[389] Ibid., art. 1
[390] Informe Final de la Comisión para la Paz, Apr. 10, 2003, ch. I, A (1)
[391] Supra note 368, pp. 43-43

confidentiality»[392] but the work of the six commissioners could not actually achieve an in-depth analysis of the individual cases.[393] Moreover, the governmental body was supposed to determine only the fate of the disappeared, thus highlighting that there would be no judicial consequences because the commission was not set up to recommend or provide evidence for the prosecution of alleged wrongdoers. Against this background, the commission carried out its investigations and extended its initial 120-days term several times to deliver the final report in 2003: it was endorsed unanimously by all members of the commission, in spite of their different positions and mindset.[394] The review of circa 200 cases of disappearance, which was confirmed when «everyone is sanely and honestly convinced of having arrived at the truth»,[395] brought to the definitive fate of 38 disappearances occurred in Uruguay: 23 Uruguayans had perished due to torture and other 3 died for direct actions intended to kill the persons involved; the remaining 6 cases concerned Argentinians and only 4 of them were confirmed by the commission. The report also included the cases of Uruguayans missing in Argentina, Chile, Paraguay and Bolivia, raising the number covering around other 200 cases.[396]

Despite these findings, the commission faced various obstacles among which figures also the lateness of its creation compared to other commissions charged with similar tasks; this led to many difficulties in reconstructing the events. Moreover, the people involved for the collection of information could decide not to disclose any clue because of the public and official character of the commission: additionally, the military and the police did not collaborate in the exchange of information over which they had jurisdiction. Finally, the dispersed and fragmented nature of information rendered the investigation a daunting task.[397] These elements have to be associated also to the fact that the mandate of the commission ignored illegal detention and torture, in the sense that they were not

[392] Supra note 390, ch. I, D (2)
[393] Supra note 385, p. 250
[394] Allier, Eugenia. 2006. "The Peace Commission: A Consensus on the Recent Past in Uruguay?" *European Review of Latin American and Caribbean Studies | Revista Europea de Estudios Latinoamericanos y Del Caribe* 0 (81), pp. 89-90
[S] Supra note 390, ch. I, F (36)
[396] Ibid., ch. III
[397] Supra note 394, p. 90

included as objects of investigation even if they were Uruguay's most characteristic forms of repression.[398]

Nevertheless, these challenges did not stop the commission from providing some final recommendations to the President: first of all, the commissioners suggested the creation of a follow-up secretariat (*Secretaria de Seguimiento de la Comisión para la Paz*).[399] Secondly, the commission called for the updated the legal status of missing persons by formulating the term "absent due to forced appearance",[400] with the intent of revising the regulations in force and also ratifying international treaties and conventions in order to position Uruguay at the forefront of the individual rights protection.[401] The recommendations also included a plan for reparations for the damages suffered to the victims individuated by the report: this brought to the approval of two different pieces of legislation, respectively granting pension rights to those who were unable to work during the military regime[402] and paying reparation for state crimes.[403]

As already noticed, the recommendations of the Commission for Peace were acknowledged by President Batlle, who decreed the acceptance of the information and deemed them as the official version of the situation on the disappeared.[404] Therefore, even if the commission was far from perfect, its main merit is based upon the fact that this topic gained new political legitimacy and for the first time the state officially recognised the crimes committed during the authoritarian government:[405] after years where human rights had only played a marginal role, the public sphere became more engrossed with past severe violations, thus starting to shift the mentality of main actors. Yet, it must be underline that the Commission for Peace was a product of Batlle's personal initiative to interpret article 4 of the *Ley de Caducidad* in favour of serious investigations to determine

[398] Sharnak, Debbie. 2015. "The Gelman Case and the Legacy of Impunity in Uruguay." In *40 Years Are Nothing: History and Memory of the 1973 Coups d'état in Uruguay and Chile*. Newcastle Upon Tyne: Cambridge Scholars Publishing, p. 41
[399] This body was duly established in 2003, following presidential resolution no. 449 with the administrative task of following the pending cases of COMIPAZ
[400] The 2005 Law on Forced Disappearances no. 17.894 indeed created the legal category of "absent due to forced disappearance"
[401] Supra note 390, ch. IV, C (81d)
[402] Law no. 18.033, *Registro Nacional,* Oct. 2006
[403] Law no. 18.596, *Registro Nacional* ,Oct. 19, 2009
[404] Presidential resolution Apr. 10, 2003, art. 1
[405] Lessa, Francesca. 2014. *¿Justicia o Impunidad?: Cuentas Pendientes En El Uruguay Post-Dictadura*. Montevideo: Debate, p. 100

the whereabouts of missing individuals; Batlle ultimately resorted to this methodical mechanism after some emblematic cases revived desires of accountability within Uruguayan society.

Among the events that led to a reconsideration of the human rights scenario and the ultimate establishment Commission for Peace, the international attention that Argentine poet Juan Gelman attracted during his search for his missing granddaughter in Uruguay was a key factor in the commitment of Batlle to investigate the fate of the disappeared. Since the *Gelman* case will be analysed later in this chapter, the logic of impunity started to change mainly through another pioneering case which witnesses the attempts of human rights lawyers to circumvent the Expiry law: the disappearance of teacher Elena Quinteros Almeida in 1976. Already back to 1987, Tota Quinteros, Elena's mother, tried to appeal to President Sanguinetti for the search of this daughter; in line with the spirit of that time, Sanguinetti and the executive refused to investigate because the case was considered to be included in the Expiry law.[406] In 1999, lawyer Chargoña presented a recurso de amparo on behalf of Tota Quinteros without any punitive purpose but just to access information about the whereabouts of the missing person.[407]

The first instance civil court decided to hear the case and accepted the grounds of the *amparo*, thus beginning inquiry regarding the disappearance. The ruling represented a harsh criticism of the executive, which was accused of illegitimate inaction: accordingly, the government had neglected both national and international law by precluding to the plaintiff the right to obtain information.[408] In accordance with article 7 of the Constitution which grants the protection of essential rights and in line with law no. 16.011,[409] the judge assessed that amparo is a guarantee against any illegitimate act or omission which threatens, alters, restricts or damages the human rights and freedoms. Having recognised the amparo, the court provided that article 4 of the Expiry law compelled the executive to

[406] Supra note 341, p. 60; cfr. the Investigative Commission in relation to the conduct of Juan-Carlos Blanco reported that there was no basis for a trial or to suspend the Senator from his functions
[407] Almeida de Quinteros Maria del Carmen C/Poder Ejecutivo (Ministerio de Defensa Nacional) Amparo,' Ficha 216/99, Sentence No. 28 (10 May 2000)
[408] Ibid., art.1 (e)
[409] Law no. 16.011, *Registro Nacional,* Dec. 19, 1988 is the law that provides for the writ of amparo in Uruguay. There is no specific provision within the Constitution that refers to amparo, although the this piece of legislation enshrining this principle is enabled by article 72 of the Constitution stating that «the enumeration of rights, duties, and guarantees made in this Constitution does not exclude others which are inherent in human beings or which are derived from a republican form of government».

carry out an administrative investigation to clarify the circumstances of the disappearance.[410] When the executive transferred the case to the Appellate Court on May 2000, it did not expect that this court would uphold the first instance ruling with the same reasoning, centred on the Expiry Law and other international human rights obligations.[411] Indeed, the effects of the recently elected President Batlle were already showing.

The mandated inquiry did not produce any significant results and so Chargoña in an unprecedented move, opened again the criminal investigation in order to charge former Minister of Foreign Affairs Juan Carlos Blanco based on the fact that Blanco was a civilian and, therefore, he would not be covered by the Expiry law. In fact, it is necessary to recall that article 1 of the *Ley de Caducidad* provides immunity only to «military and police officials» who committed crimes «by following orders», thus excluding all the high-ranking members of the armed forces or civilians leaders who had been involved in gross violations of human rights.[412] This argument was accepted and in 2002 former minister Blanco was charged for the unlawful kidnapping and disappearance of Elena Quinteros, marking the first instance anyone had been indicted for human rights crimes during the military regime in Uruguay.[413] The *Quinteros* case definitely led to other judgments following the same legal reasoning, although the amnesty per se was not questioned. Therefore, the next section will analyse the developments in case law after these first efforts in order to achieve a modicum of accountability.

3.3 Uruguay: the land of paradoxes

Uruguay had only recently started a true process towards full accountability for past human rights violations. The installation of the left-wing government in 2005 facilitated the efforts for prosecutions which tended to find creative ways to interpret the Expiry Law for bringing to justice as many responsible parties as possible; remarkably, the Uruguayan judicial order managed to indict high-ranking officials and former heads of state. The renewed accomplishments of jurisprudence increased the internal pressure with respect to the amnesty which still maintained vestiges of the past and, in this case,

[410] Almeida de Quinteros Maria del Carmen C/Poder Ejecutivo (Ministerio de Defensa Nacional) Amparo,' Ficha 216/99, Sentence No. 28 (10 May 2000), Ruling I(B)
[411] Supra note 341, p. 60
[412] Supra note 361, p. 316
[413] Ibid.

Uruguay proved again that it could obtain remarkable successes through the displacement of the Expiry Law. Nevertheless, the lateness of justice and the ambiguous stance of the judiciary, which characterise the current state of affairs, obscure these relevant results.

3.3.1 New impetus to judicial proceedings

After the *Quinteros* case ruling in 2002, which represented the first breach in the impunity apparatus, the assessment of criminal accountability through courts increased in a significant manner due to the exploit of judicial loopholes while the amnesty law was still valid. In 2005, this dynamic was energised by the election of Tabaré Vázquez, the first President belonging to the left-wing coalition Broad Front (Frente Amplio): indeed, the policies adopted by Vázquez and the successive Broad Front administrations would provide new impetus to justice and truth. Most significantly, the incumbent government admitted the validity of the amnesty, but allowed the trial of military members for the past breaches for the first time: anytime that the executive was be consulted, in accordance to article 3 of the Expiry law, it was acknowledged that certain specific cases fell outside of the scope of the law, something that the ground-breaking interpretation in Quinteros had already anticipated.[414]

For instance, in 2006 the first charges ever brough in Uruguay against military and police officers were prosecuted for a case of 28 disappearances.[415] However, the most dramatic judicial event regarded the case of Nibia Sabalsagaray, a young activist opposed to the military government who died in 1974 allegedly from torture. The victim's sister tried to appeal to the government for redress, but President *Vázquez* argued that the case was covered by the Expiry law;[416] nevertheless, in October 2008, public prosecutor Mirtha Guianze presented a writ of unconstitutionality for the Sabalsagaray case, in a strategic attempt to undermine said law. Basing herself on the dissident opinions of the 1988 Supreme court sentence, the attorney argued that the *Caducidad* law violated the separation of powers and the Constitution; plus, so her argument goes, Uruguay had also failed to comply to the resolution provided by the Inter-American Commission on Human

[414] Supra note 405, p. 103
[415] Supra note 30, p. 83
[416] Supra note 370, p. 496

Rights in 1992 because neither the events nor the responsible parties of the atrocious violence were clarified.[417]

Accordingly, the writ of unconstitutionality was explicitly stated in the Uruguayan Constitution and could be requested by any person who considered that his direct, personal and legitimate interest was harmed.[418] Thus, the lawsuit presented for *Sabalsagaray* had to be filed before the Supreme Court. At the end of October 2009, the Supreme Court ruled in favour of the arguments presented by the appellant: rejecting its own previous verdict, the Supreme Court ruled that articles 1, 3 and 4 of Expiry Law were unconstitutional.[419] The motivations given by the Court were connected indeed to the violation of the independence of the three branches of government, while also criticising the fact that the amnesty was not approved through the constitutionally mandated procedure requiring a special majority vote; moreover, the law failed to comply to international responsibilities in order to protect citizens' rights.[420] Most importantly, *Ley de Caducidad* was unconstitutional because contrary to treaty obligations, which retained a special rank in the juridical order either being incorporated in the constitution or being right below it:[421] since the expiry law had been implemented at the time human rights treaties were already enforced by Uruguay,[422] the Supreme Court deemed it unconstitutional *ab origine*.[423]

In spite of its innovative character, this leading case did not apply *erga omnes* because article 259 of the Constitution established that the Supreme Court could declare the unconstitutionality of a law only with respect to the specific case referred to the Court. Nevertheless, it was the first blow to impunity and subsequent rulings consolidated the Supreme Court's shift in attitude vis-à-vis crimes against humanity. Indeed, similar sentences declaring the unconstitutionality of articles 1, 3 and 4 of the Expiry Law were dictated in 2010 and 2011 respectively for the *Human Rights Organization* case which

[417] Supra note 405, p. 114
[418] Uruguayan Constitution 1967, art. 258
[419] Uruguayan Supreme Court. Sabalsagaray Curutchet, Blanca Stela: Denuncia, Excepción de Inconstitucionalidad Arts.1, 3 y 4 de la Ley No 15.848', Ficha 97-937/2004, Sentencia No. 355, 19 Oct. 2009
[420] Supra note 370, p. 496
[421] Supra note 419, par. III.8
[422] Uruguay had ratified several international treaties and covenants through the 1985 National Pacification Law, thus prior to the enactment of the Expiry law.
[423] Ibid., par. III.3; this was also the reasoning that surpassed citizens' will expressed through the plebiscite

comprised 19 murders committed between 1973 and 1976, and the *García Hernández, Amaral and others* case which focused on the murder of five Tupamaros in 1974.[424]

These landmark resolutions were accompanied by other important legal efforts which tended to dismantle the arbitrary application of the Expiry law, namely the arrest and trial of former Head of State Juan Maria Bordaberry on charges of responsibility for the coup and a number of politically motivated murders:[425] indeed, civilian leaders involved in crimes of homicide were not protected by any form of amnesty. Bordaberry was sentenced to 30 years of prison, an unprecedented verdict in Latin America for such a high-ranking position, and during that same year former minister Blanco received a 20-year sentence for the aggravated homicide of Elena Quinteros. Both leaders were also indicted for the assassinations of opposition legislators Zelmar Michelini and Gutierrez Ruiz among others. Finally, the Supreme Court confirmed also the conviction of Álvarez, former de facto president of the civil-military regime between 1981 and 1985 who perpetuated heinous violations of human rights, on charges of genocide.[426] These judicial episodes had been fundamental to dismiss the widely used justification of the armed forces that abuses had been only matters of individual excess or errors, shedding light on the fact that there was a systematic implementation of state terrorism.[427]

As already mentioned, the domestic sphere also provided complementary measures in order to deal with past wrongdoings. For instance, *Vázquez*'s government ordered excavations at military sites to locate the disappeared and instructed the military to share confidential information and carry out investigations to determine the whereabouts of the disappeared prisoners;[428] for the first time, the military showed signs of collaboration through the elaboration of a report with unprecedented admissions of the crimes .[429] Another form of acknowledgment came through the 2009 Reparations Law[430] which

[424] Lessa, Francesca. 2011. "Nunca Mas.The Politics of Transitional Justice in Argentina and Uruguay 1983-2010." *Latin American Centre, University of Oxford*, p. 39
[425] Supra note 361, p. 317
[426] Law no. 18.026, *Registro Nacional*, Oct. 4, 2006. Cooperation with the International Criminal Court on the fight against genocide, war crimes and crimes against humanity. Article 16 contains one of the most extensive definitions of genocide, encompassing victims such as trade unions or groups whose identity is based on gender, sexual orientation, cultural reasons, social reasons etc.
[427] Supra note 405, p. 105
[428] Supra note 336, p. 67
[429] Supra note 30, pp. 90-91
[430] Supra note 403

listed crimes of state terrorism such as systematic torture and mandated the creation of a Special Commission to provide remedies;[431] yet, a more obscure aspect of this legislation lay in the fact that those enjoying the benefits conferred by the reparations law cannot bring cases against the Uruguayan state, both domestically and internationally.[432]

For what regards the international sphere, a turning point in the erosion of impunity has been the *Gelman* verdict by the Inter-American Court of Human Rights (IACtHR) in 2011. However, it must be underlined that this sentence was only the endpoint of an overarching process which navigated through the various phases of judicial accountability in the country: indeed, it can be easily argued that this case embodies the history of Uruguay itself vis-à-vis impunity. In fact, notorious Argentine poet Juan Gelman's son and daughter-in-law were abducted by the military in Buenos Aires in 1976: while his son had been tortured and killed in a detention centre, daughter-in-law Maria Claudia Garcia Iruretagoyena de Gelman was transferred to Uruguay – a result of Operation Condor – and gave birth to her daughter, Maria Macarena, in a prison of Montevideo. The child would then be raised by the family of a Uruguayan police officer: during that time, many children of detainees met the same fate, growing up unaware of their background. Thus, Juan Gelman's search of his daughter-in-law and grandchild soon led him to deal with the Uruguayan non-existent human rights policy.[433]

As many plaintiffs seeking justice right after the return of democracy, Gelman's appeal to President Sanguinetti in 1998 did not bring to effective remedies. Indeed, after years of investigations, the poet had detected a young woman who might have matched with the profile of his granddaughter and so he asked the executive to open an investigation and run a DNA test to confirm the suspicions.[434] Sanguinetti promptly shut down the request and denied that any of Gelman's missing relatives was located in Uruguay; a critical juncture came about when the poet published an open letter asking for help to the President, which moved the dormant consciences and triggered a public campaign.[435] Accordingly, Sanguinetti would accuse Gelman for his discredit at the international level. However, the first phase of Uruguayan judicial proceedings under Sanguinetti's terms

[431] Supra note 424, p. 36
[432] Supra note 403, art. 22
[433] Supra note 398, pp. 33-34
[434] Ibid., p.38
[435] Supra note 424, p. 28

had been characterised by the absence of state-sponsored inquiries for past crimes. Accordingly,

> «Sanguinetti's obstinacy to Gelman's plight was symbolic of the government's approach towards justice throughout the late 1980s and 1990s. The government proved fundamentally unwilling to grapple with the legacy of human rights violations from the nation's military rule».[436]

The shift in political will demonstrated by President Jorge Batlle allowed for an investigation into Gelman's case and the poet's suspects were confirmed when the DNA tests resulted positive: grandfather and granddaughter reunited; this event set off other appeals, especially for missing children, and eventually led to the systematic analysis concerning the disappeared with the Commission for Peace. However, Juan and Macarena's Gelman journey for justice was not concluded: they attempted twice, in 2002 and 2005, to appeal to Uruguayan domestic courts for discovering the whereabouts of Gelman's daughter-in-law and clarifying the circumstances of Macarena's birth and adoption; the process would have also led them to the identification of the responsible parties. However, the Expiry Law was held in both cases and so Gelman decided to directly appeal to the Inter-American Commission on Human Rights in 2006, on the basis that the *Caducidad* law in Uruguay prevented investigations and sanction of perpetrators; ultimately, the case was handed to the Inter-American Court.[437]

After hearing the cases by the Gelmans and the state, the IACtHR considered past rulings regarding amnesties issued for crimes against humanity[438] and recognised Uruguay's responsibility for the forced disappearances committed during the military government.[439] Indeed, the Court found that amnesty was incompatible with the American Convention and other international instruments by stating that:

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[436] Supra note 398, p. 39

[437] Burt, Jo-Marie. 2011. "Challening Impunity in Domestic Courts: Human Rights Prosecutions in Latin America" In Félix Reátegui Carrillo, and International Center For Transnational Justice. *Transitional Justice: Handbook for Latin America*. Brasília ; New York: Brazilian Amnesty Commission, Ministry Of Justice, pp. 302-303

[438] Non-compatibility of amnesties with the American Convention was already assessed in *Almonacid Arellano et al.* case

[439] Inter-American Court of Human Rights, *Case of Gelman v. Uruguay*, Merits and Reparations, Judgement 24 February 2011

> «The failure to investigate the serious human rights violations committed in the present case, which occurred in the context of systematic pattens, evince the noncompliance with international obligations of the State, established by non-extendible norms».[440]

Thus, the Court recognised the systematic pattern of violence, along with the cross-border cooperation between authoritarian regimes, and expressed that an amnesty impeding the investigations and prosecutions into violations of human rights – especially for enforced disappearance – should be considered as having no legal effect and so as not capable of obstructing the investigation, identification and punishment of those responsible.[441] This consideration came about after the Court reviewed actions taken concerning the Expiry Law, namely the declarations of unconstitutionality already issued by the Uruguayan Supreme Court,[442] and stated that the state was always obliged to investigate especially these crimes that possess a *jus cogens* nature.[443]

The Court's verdict underlined the fact that serious human rights violations must allow victims a right to pursue truth, obtain an effective remedy and take part to proceedings.[444] Accordingly, the way in which the Expiry Law had been applied in Uruguay had undoubtedly influenced the state's obligation to investigate and punish human rights violations in the case at hand, thus breaching not only the right to judicial protection envisaged by the American Convention but also its very first provision: the obligation of state parties to respect the rights and freedoms of all the subjects over which they had jurisdiction.[445] In order to remedy this situation, the Court declared that Uruguay had the duty to investigate the facts and to identify, prosecute and, where appropriate, punish those responsible and adopt all the necessary domestic legislative measures in order to clarify the disappearance of Maria Claudia Garcia Iruretagoyena and the substitution of Maria Macarena Gelman's identity.[446] Moreover, the ruling required an official apology,

[440] Ibid. par. 231
[441] Ibid. para. 232, 234
[442] Ibid., para. 148, 150
[443] Ibid. par. 183
[444] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, art. 8 (Right to a fair trial)
[445] Supra note 439, par. 230
[446] Ibid., par. 252

thus having the state acknowledging its involvement in the heinous events.[447] Finally, the Court also ordered the state to provide for reparations for the suffered wrongdoings.[448]

In conclusion, the IACtHR affirmed that the Expiry Law lacked legal effect and instructed the Uruguayan state to guarantee that the law would never again constitute an obstacle to the investigation of the case and eventual punishment of the defendants.[449] This landmark ruling promoted truth and justice in Uruguay for all human rights cases which were protected by the amnesty law; yet, the level of compliance with the IACtHR's sentence was not completely predictable owing to the fact that this was the first case ever in Uruguayan jurisprudence to reach the regional Court and the Court itself could not enforce its decisions. Thus, it was not clear how the state would have abided by with the recommendations, especially vis-à-vis the effects of the amnesty.[450] However, Uruguay made significant steps, such as the acknowledgement of international responsibility in order to address the violations considered by the judgement and «take place in a public ceremony carried out by high-ranking national authorities and in the presence of the victims».[451] However, the most important stimulus given by the IACtHR regarded the possible abrogation of the Expiry Law, which was intrinsically linked to the citizens' will as the next section points out.

3.3.2 Abrogation of the amnesty

The sentence of the regional tribunal provided a useful support to the fight against impunity in Uruguay, especially for the dismantling of the Expiry Law. In fact, the progress that was made in courts pushed civil society groups to start a second plebiscite campaign to annul the law through a constitutional reform project, twenty years after the first referendum took place and sealed temporarily any chance of prosecution. The 2009 plebiscite confirmed the results of the 1989 one, since almost 48 percent voted for the nullification and did not reach the necessary quorum. Just a week after the *Sabalsagaray* ruling of the Supreme Court which denounced the unconstitutionality of the Expiry Law,

[447] Ibid., par. 262
[448] Ibid., par. 288
[449] Ibid., par. 321(11)
[450] Supra note 398, p. 43
[451] Supra note 439, par. 266, the recommendation was realized through the 2012 Public Act

Uruguayans chose to uphold the legislation.[452] Interestingly, Uruguay is the only country in Latin America which has this type of relation between popular participation and formal institutions: the Constitution only allows for citizen-initiated mechanisms with the involvement of the citizenry in constitutional amendment and law-making.[453] Within this framework, the chief question regarded whether the will of the people bested the Court's ruling.

In *Gelman v. Uruguay*, the IACtHR applied the doctrine of incompatibility to the Uruguayan amnesty and demonstrated that even episodes of direct democracy do not have legal validity compared to the Court's interpretation of the American Convention. In spite of the two referenda which approved the Expiry Law, the Court ruled that this popular approval «does not automatically or by itself grant legitimacy under International law».[454] Uruguay's response to the *Gelman* sentence was contradictory. While the IACtHR was working on the case, some segments of Parliament had started a process to elaborate a legislation that would nullify the problematic provisions of the Expiry Law; nevertheless, this project ultimately failed due to the Broad Front's divided opinions and the Chamber of Deputies did not pass the law by a thin margin.[455] The impetus for accountability seemed to be lost, but *Gelman*'s verdict revived the intense debates about the Expiry Law and led the executive to reopen previously archived cases.[456] Yet, this was not enough for the anti-impunity groups and the political sphere finally worked towards a more ample consensus with respect to accountability policies.

On October 2011, the Senate approved a bill addressing Expiry law, statute of limitations, and crimes against humanity. After intense discussions, the proposed law was also approved in the Chamber of Deputies along strict party lines, with the Broad Front voting unanimously in favour this time.[457] In compliance with the *Gelman* sentence and following internal pressures, the Expiry Law was finally abolished through the issuance of Law no. 18.831(*Ley de la Pretension Punitiva del Estado*) which expressly cancelled

[452] Lessa, Francesca, and Cara Levey. 2012. "Memories of Violence and Changing Landscapes of Impunity in Uruguay, 1985-2011." *Encounters: An International Journal for the Study of Culture and Society (Special Issue on Memory and Violence)* 5, p. 152
[453] Supra note 262, p. 43
[454] Supra note 439, par. 238
[455] Soltman, Daniel. 2013. "Applauding Uruguay' s Quest for Justice: Dictatorship, Amnesty, and Repeal of Uruguay Law No. 15.848. Recommended Citation." *Wash. U. Global Stud. L. Rev* 12 (4), p. 835
[456] Supra note 361, p. 321
[457] Ibid., p. 322

all the provisions of the current law and restored the punitive powers of the state for crimes committed during the authoritarian regime. Specifically,

> «The law is concise, clear, and uncompromising, and its overarching and explicit aim is to enable victims or their relatives to seek justice without the legal obstacle of the law of impunity remaining in their way».[458]

Indeed, the so-called Punitive Powers of the State law repealed the Expiry and restores the «full exercise of the punitive claims of the state for those crimes committed for the implementation of state terrorism until March 1, 1985, as included in article 1 of Law no. 15.848».[459] The introduction of this law allowed for prosecution of the most serious crimes and brought Uruguayan legislation in line with the sporadic judicial efforts such as the Supreme Court's decision in *Sabalsagaray* and the international human rights law especially with respect to the Inter-American System of Human Rights.[460]

The law dissipated the main obstacles to prosecutorial actions, eliminating the possibility of any procedural defaults since it explicitly stated that any bureaucratic term, prescription or expiry would not be calculated for the period between December 1986 and the date of enforcement of the Punitive Powers of the State law to the crimes of state terrorism cited in the first article.[461] Moreover, it removed any risk of statutory limitations by reclassifying crimes during the repressive government as crimes against humanity; until that moment, human rights violations during the authoritarian regime were usually adjudicated as ordinary crimes, like homicide, meaning that the could be subjected to a statute of limitations.[462] The newly approved law eliminated this hurdle with the definition of crimes against humanity in accordance with international treaties to which Uruguay was a signatory party.[463] Therefore, Law no. 18.831 abolished all the provisions that once represented the fundamental obstacle for human rights lawyers and activists, with the implicit consequences that now the judiciary had concrete independence over

[458] Michelini, Felipe. 2013. "Reflections on Uruguayan Law No. 18.831 a Year after Its Enactment." *Human Rights Brief* 20 (3), p. 3
[459] Law no. 18.831, *Registro Nacional,* Nov. 11, 2011, art. 1
[460] Supra note 458, p. 2
[461] Supra note 459, art. 2
[462] Supra note 361, p. 321
[463] Supra note 459, art. 2

what cases to open without prior approval of the executive and prosecutions for human rights violations would not be restrained by politics.[464]

3.3.3 New developments or new obstacles?

With the Expiry Law officially removed from the Uruguayan legal order, the future appeared promising for the advancement of judicial proceedings. In fact, the synergy between the shift in political approaches to past abuses and the increasing pressure from civil society generated a favourable environment to overturn the Expiry Law and win the fight against impunity in the country. Despite the elimination of the most representational legal obstacle, challenges to accountability still remain. Among these, the most worrisome is the contradictory position adopted by the Supreme Court with reference to the abrogative legislation, thus testifying impediments for the investigation and prosecution of crimes committed during Uruguay's military regime.

On February 2013, the Supreme Court passed a judgement on the constitutionality of the first three provisions of Law no. 18.831 and its decision had major repercussions in the legal scenario.[465] First of all, the Court upheld the constitutionality of article 1, thus asserting that the judiciary branch could not be dependent on the executive in the conduction of inquiries as previously established in the Expiry Law. The restoration of the full punitive powers of the state was not questioned because it allowed the state also to fulfil the IACtHR's ruling in *Gelman*.[466] However, the judgement surprised human rights observers with the subsequent assertions of the judicial body: by a majority of four to one, the Supreme Court declared articles two and three of Law no. 18.831 unconstitutional, invoking the principle of non-retroactivity (*ex post facto*).[467]

On the subject of article 2, the chief question regards whether a law can be applied to actions committed in the past and confer upon them legal effects for the future. Accordingly, the Uruguayan Constitution does not mention statutory limitations or the

[464] Supra note 455, p. 837
[465] Uruguayan Supreme Court. M.L., J.F.F., O. — Denuncia Excepción de Inconstitucionalidad Arts. 1, 2 y 3 de la Ley N 18.831, Ficha 2-109971/2011, Sentencia No. 20, 22 Febr. 2013.
[466] Supra note 458, p. 7
[467] Burt & Lessa, Feb. 28 2013. Recent Sentence by Uruguayan Supreme Court Obstructs Search for Truth and Justice. Available at: https://www.wola.org/analysis/recent-sentence-by-uruguayan-supreme-court-obstructs-search-for-truth-and-justice/

non-retroactivity principle.[468] Yet, article 10 of the Constitution envisaged *nulla poena sine lege* to the extent that private actions of persons not affecting public order or others should be outside the jurisdiction of magistrates. Since human rights violations committed between 1973 and 1985 reveal a methodical system of repression and crimes that could not have possibly fallen outside the judiciary's authority, non-retroactivity should not be contemplated because those breaches were already classified as such. Conversely, the Supreme Court denied this domestic dynamic and blatantly ignored also international law, providing no references to the right of *habeas corpus* or *jus cogens*.[469]

Moreover, article 3 was deemed to be unconstitutional in the Supreme Court's ruling on similar bases, namely the complete dismissal of treaties which provide an exhaustive definition of crimes against humanity that Uruguay ratified before the country's authoritarian turn;[470] the contempt of Uruguay's international obligations is expressed through the lack of mentions of rights to truth, access to justice and reparations of the victims. Consequently, this judgement led to the reclassification of crimes against humanity as ordinary crimes, going back to the situation under the aegis of the Expiry Law.[471] Through this verdict, the Supreme Court posed significant obstructions to the pursuit of truth and justice and, more importantly, it created confusion and divergence in the interpretation of the legislation because Supreme Court decisions on constitutional matters do not set a precedent and only have *inter partes* effects.

The subsequent jurisprudence regarding the status of crimes against humanity and the principle of non-retroactivity has been contradictory and signalled that de facto impunity found a way to resist in the post-Expiry law judicial scenario. This seems to be confirmed by the fact that the Supreme Court held the same stance in a verdict of 2017, whereby a woman claimed to have been subjected to torture and unlawful detention in 1972.[472] By a majority of three to two, the Supreme Court argued that the crimes committed could not be considered crimes against humanity at the time and so they fell under the scope of

[468] Supra note 458, p. 7
[469] Supra note 458, pp. 7-8
[470] The 1945 London Agreement; the 1949 Geneva Conventions; the 1970 Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.
[471] Supra note 467
[472] Uruguayan Supreme Court. AA – Denuncia Excepción de Inconstitucionalidad Arts. 1, 2 y 3 de la Ley N 18.831, Ficha 395-141/2012. Sentencia No. 680, 25 Sept. 2017

statutory limitations.[473] Once again, the central argument was that criminal conduct adopted during the period of rupture from the constitutional order must be judged according to national criminal law in force when these crimes occurred, effectively excluding the perpetrators of offences which were not codified or restricting the scope of more severe punishment: the decision of the Supreme Court contends that crimes committed were prescriptible because at the time those crimes were part of that category.[474] Additionally, so the argument goes, legislation overriding the statute of limitations for crimes against humanity could not be applied to the current case because the incorporation of treaties for crimes against humanity had been enacted after the perpetration of those crimes: the principle of non-retroactivity thus rendered articles 2 and 3 of Law no. 18.831 unconstitutional.[475]

Thus, Uruguay's back-and-forth on the constitutionality of the Punitive Powers of the State law demonstrates how formal efforts do not always coincide with essential changes. The erratic jurisprudence on the category of human rights and non-applicability of statutory limitations only preserves impunity and shelters perpetrators from justice. Other structures undermining the struggle to achieve full accountability involve also the lateness of prosecutions: indeed, only a thin percentage of cases had received a final verdict after the abrogation of amnesty law.[476] Observers such as Skaar acknowledge that judicial independence is still an issue in Uruguay due to the fact that there are no constitutional guarantees for the budget, leading the judiciary to rely on the other branches for funding, and that institutional arrangements subject the appointment of Supreme Court justices to the Parliaments by a two-thirds vote for a significantly short ten-years tenure.[477] This design dictates that courts will always be swayed by political viewpoints, depending on which parties has the majority in order to select judges; this of course will have repercussions on the entire judicial system, owing to its deeply hierarchical and

[473] Lessa, Sklodowska-Curie, Burt. 7 Nov. 2017. New Ruling by Uruguay's Supreme court of Justice once again jeopardizes the search for truth and justice for dictatorship-era crimes, available at: https://www.wola.org/analysis/new-ruling-uruguays-supreme-court-justice-jeopardizes-search-truth-justice-dictatorship-era-crimes/

[474] Castro, Alicia. 2018. "DERECHOS HUMANOS Y DELITOS DE LESA HUMANIDAD." *Revista de Derecho Público* 54, p. 11 (own translation)

[475] Supra note 473

[476] Supra note 30, p. 85

[477] Supra note 370, pp. 500-501

conservative nature which compels lower court magistrates not to overstep certain limits especially in human rights cases.[478]

Indeed, the judiciary had been slow and inefficient in the assimilation of human rights jurisprudence, meaning that there is a resistance to complying with international law and a preference of national instruments – although international norms have the same legal standing as national ones. This can be noticed through the fact that most Uruguayan judges have yet to apply the crime of disappearance instead of homicide, which is to be associated with the desire to maintain statutes of limitations in force.[479] Whenever a judge would go against this predominant guideline, there would be consequences: in this regard, one of the most shocking episodes has been the unexplained transfer of judge Mariana Mota, one of the few magistrates who actively moved forward with human rights cases, to a civil court.[480] Indeed, the judge applied the legal term "disappearance" in the case of two missing Uruguayans in Paraguay and, for the first time in Uruguayan judicial history, the Court of Appeals upheld the sentence and accepted the implementation of this crime in 2011.[481] Mota's removal is one of the signs that impunity in Uruguay is still present and persistent and that victims' rights are jeopardised.

Uruguay presents mixed signals when it comes to assessing progress in the direction of accountability. Currently, there is no doubt that national courts still need to solve legal cases that have awaited for a judgment for more than 35 years; the lateness of justice and the recalcitrance towards international law on Uruguay's part have even led some human rights activists to seek justice abroad, in reaction to the "Pinochet effect": from a complaint lodged in Italy at the end of the 1990s, an investigation initially involving disappeared Uruguayans soon encompassed a multiplicity of cases in the Southern Cone and *Operation Condor* trial under the lead of prosecutor Capaldo took form.[482] Indeed, the Italian process was composed of three main accounts: the first report involved the

[478] Supra note 30, p. 82
[479] Ibid., p. 87
[480] Burt. 20 February 2013. Judge's Removal Causes Concerns over Human Rights Investigations in Uruguay. Available at: https://www.wola.org/analysis/judges-removal-causes-concerns-over-human-rights-investigations-in-uruguay/
[481] Supra note 30, p. 84
[482] Italy accepted the case because art. 8 of the Penal Code authorizes the investigation of political crimes committed against Italian citizens abroad; it was not a case of universal jurisdiction, but its effects were significant especially for Uruguay

murder of four Italo-Chileans citizens; the second one involved the kidnapping of six Italo-Argentine citizens; and the last one included the disappearance of 13 Italo-Uruguayans. After many sentences and appeals, in July 2019 the First Court of Appeal declared life imprisonment for 18 defendants that have been previously acquitted and condemned also other 12 Uruguayans. Apart from the evident message that crimes against humanity could be punishable anywhere, the sentence handed down in Rome has been significant for Uruguay because not only it allowed the conviction of two former military officers but, most importantly, the Oriental Republic of Uruguay was a plaintiff in the process.[483] Thus, the verdict is in clear contrast with the paralysed judicial situation in the country.

Notwithstanding the slow pace of justice and these constant hurdles, there also important steps forward that the country is taking in order to improve the situation. Namely, the creation of a Prosecutor's Office Specialised in Crimes against Humanity in 2018 marked a major progress in the legal panorama;[484] the Office is exclusively dedicated to all the offences committed during the period defined by the 2009 Reparations Law which are either pending or have been initiated in the national territory.[485] It is still soon to assess the effects of this instrument, but an encouraging sign has been the stance of the Supreme Court: when three retired military officers appealed to the Supreme Court in order to denounce the creation of the Specialised Office as unconstitutional on the basis that it infringed the right to freedom, equality before the law and due process, the highest judiciary body unanimously dismissed these arguments and claimed that prosecutors would collaborate with the judges as part of the criminal process.[486]

Finally, an unpredictable agent for human rights could be newly elected President Luis Lacalle Pou, whose office will officially start in March.[487] In fact, Uruguay held elections at the end of 2019 and the National Party's candidate won. After three consecutive Broad Front administrations, the return of a more conservative party at the executive could entail

[483] SERPAJ. Informe 2019. Derechos Humanos en el Uruguay, pp. 25-31
[484] Law no. 19.550, *Registro Nacional*, Nov. 9, 2017
[485] Ibid., art 2
[486] Suprema Corte declaro constitucional creacion fiscalia de delitos de lesa humanidad. El Observador. Available at: https://www.elobservador.com.uy/nota/suprema-corte-declaro-constitucional-creacion-de-fiscalia-de-delitos-de-lesa-humanidad-2019531175015
[487] BBC. November 28 2019. Uruguay election: Lacalle wins presidency as rival concedes. Available at: https://www.bbc.com/news/world-latin-america-50587029

some important implications, especially with regards to judicial proceedings. Indeed, the Broad Fronts administrations led to the spectacular rulings of important high-ranking officials but also allowed for strong delays at the court bench. The new administration would have to improve the collaboration with the judiciary and attempt to apply some reforms in order to increase the efficiency of investigations and foster the incumbency of more liberal judges that would revise the hierarchical and conservative system from within. Hopefully, concrete changes will come with a faster pace so as to guarantee to victims the truth and justice they deserve.

4. Comparing Chile and Uruguay: similarities and differences in reckoning with the past

As countries of the Latin American Southern Cone, both Chile and Uruguay had been influenced by the overarching international context of the Cold War in general and the national security doctrine in particular. Their histories overlap insofar as the armed forces came to view themselves as the legitimate guarantors of the state, a notion which was expressed through several actions that changed the institutional settings and led the way to gross violations of human rights for this purpose. The resulting effect had been the establishment of an authoritarian regime, although the modalities in which the military accomplished this final political arrangement differed in the two countries: with strong polarisations existing in the respective societies, Chile's immediate coup d'état inaugurated instantly a reversal of the constitutional order while Uruguay already presented authoritarian approaches before the conventionally recognised start of its own repressive government.

The regimes had both been characterised by an organic bureaucracy through which the executive could emanate constitutional legislation and mask its increasingly brutal forms of dissidents' persecution. Indeed, state-sponsored violence shaped the political, legal and social scenario because multiple actors reacted in different ways to the crimes committed by state agents. Most importantly, this authoritarian turn removed all the guarantees and safeguards provided by the Constitutions, leaving Chileans and Uruguayans with very limited rights and freedoms; on this note, the institutions that were supposed to defend the citizenry were emptied of their prerogatives, with jurisdiction over civilians passing to military tribunals in both countries. This did not imply that opposing voices were

completely shut down: on the contrary, the Chilean and Uruguayan military governments soon had to deal with internal disapproval of their policies which set the stage for democratic transitions. Nonetheless, legacies of the past jeopardised the process towards accountability.

As amply analysed, the Southern Cone countries transition to democracy was negotiated with the dominant military elites: the acceptance of constitutional reforms in Chile and the Naval Club Pact in Uruguay attest that future leaders were willing to compromise in order to obtain full stability but partial justice. Yet, the negotiations differed in the approach adopted to resolve the issue of human rights: in Uruguay, the dilemma acquired political undertones in the sense that democratic participants did not engage in open debates through official channels and their statements about truth and justice could not be reconciled with the secrecy of the meeting among political parties and armed forces. Difficulties in the implementation of human rights policies were not admitted. Conversely, the style of negotiations in Chile immediately expressed a high degree of transparency and underlined the willingness of the parties to actively contribute to the pursuit of justice and truth, thus partially undermining the military's grasp on politics and society.[488]

Indeed, it is noteworthy to notice that military regimes were highly institutionalised and relied on a sort of "distorted" presidentialism which was maintained also for the transitions. More specifically, the institutional order set during and after the democratic transitions was heavily influenced by the role of the presidency. Both countries' transitional justice mechanisms, or their absence thereof, had depended on the political will of heads of state who either decided to implement effective policies to face past abuses or to completely turn the page and move on without a minimal account. Of course, the latter case applies to Uruguay, which attempted to elaborate commissions, but these did not receive any official recognition from Sanguinetti's administration; instead, Chile's National Truth and Reconciliation Commission issued a report with detailed descriptions of the wrongdoings. Nonetheless, even the most minimum efforts put

[488] Barahona de Brito, Alexandra. 1999. "Assessing Truth and Justice Policies in Uruguay and Chile." In Human Rights and Democratization in Latin America: Uruguay and Chile. Oxford: Oxford University Press, pp. 199-200

forward by both countries had to deal with persistent instruments that precluded the opportunity to reach satisfactory results for victims' demands.

In this sense, the most prominent tools have been the amnesty laws, which were preserved or drafted for persuading the military to either initiate or tolerate democratic elections. However, these two instances of negotiated transitions with respect to amnesty differed in the sense that, unlike Chile, Uruguay did not inherit any amnesty law. The very first amnesty that had been implemented in the country, aiming at national pacification, could be actually acknowledged as a transitional justice mechanism which brought about positive effects insofar as political prisoners were released and armed forces were not exonerated for human rights transgressions. It was after the ensuing juridical momentum that military officers started to resist the accountability process in favour of their own jurisdiction and the newly elected parliament decided to pass the Expiry Law, an amnesiac amnesty which would obstruct future investigations; in spite of the important changes executed with Batlle, the lateness in opening cases and publicly recognise the past dramatically affected the country's path towards justice; undergoing transition after a few years, Chile learnt from the Uruguayan experience that it had to move swiftly and take necessary measures in a short span of time, which also explains the brief temporal mandate of the truth commission and its non-negotiable narrative.[489]

Paradoxically, even if Uruguay's restoration of democracy did not have any institutional limitations nor military locks, it was Chile the country which took swift measures right after the transition in spite of the authoritarian enclaves. Uruguayan transitional justice had been slow-paced because the incoming political class itself contributed to the designation of the legal restraints, whereas Chile already had a problematic legacy to confront. Indeed, the amnesty laws set a framework which received different responses. In Uruguay, the judiciary lacked independence and judges who opposed the hierarchical judicial structure were rare birds often penalised for their work; accordingly, when Vázquez decided to adopt a more prosecution-friendly approach, trials against high-ranking responsible parties began even if the judiciary's structure remained unreformed. If in Uruguay the executive's position pushed for the first relevant achievements, in Chile a willing government was not enough because the independent judiciary resisted

[489] Supra note 143, p. 1465

prosecutions against perpetrators of violence; it is important to recall that at first the Supreme Court comprised judges appointed by Pinochet. Thus, Chilean lawyers – and Uruguayan counterparts before the amnesty's displacement – had to rely on loopholes and creative interpretations in order to ensure a modicum of judicial inquiries.

Therefore, the ability or willingness of the government to adopt transitional justice mechanism is tied not only to past legacies of the military rule but also to the conditions underlying the democratic regime in connection with institutional bodies and national characteristics. Having already listed the quality of presidential leadership and judicial independence, along with the question whether trials and truth recovery were considered centrepieces of the human rights agenda, Chile and Uruguay can be considered as part of the same category of countries grappling with transitional justice due to different reasons: firstly, they both took part in Operation Condor and collaborated through their security apparatus; secondly, these countries experienced an authoritarian military regime where the state was the chief perpetrator of gross violations of human rights; Chilean and Uruguayan anti-impunity groups had to deal with the obstacles of amnesiac amnesties that sheltered armed forces. Consequently, both nations had to endure the strong reactions elicited among the elites when immunity was challenged.

Moreover, it is worthwhile also to mention that both Chile and Uruguay had manifested a certain degree of resistance to international stimuli during some instances even if their constitutional orders had incorporated treaties and conventions especially referring to the respect of human rights and freedoms. In particular, the international and regional contexts support countries in a meaningful way by facilitating the definition of issues, expectations and agents' actions; once again, the countries differed in the manner of their departure from external pressures: regarding the amnesty, Chile heavily relies on the interpretative capacity of lawyers in courts and so the Inter-American Commission on Human Rights did not echo with political authorities nor the Inter-American Court's verdict in *Arellano* brought to significant changes; Uruguay held a similar position for the first years after the transition, but the *Gelman* case definitely gave legitimacy to the regional system because it ultimately contributed to the repeal of the Expiry Law.

Undeniably, Uruguay started late its process towards justice with respect to Chile and other Southern Cone countries, which were already implementing effective policies like

trials, truth commissions and reparations before the turn of the millennium. However, the emblematic cases that managed to indict notable criminal actors in Uruguay advanced significantly the transitional justice process to the point that the country succeeded in overturning its amnesty law. However, this process does not mean that prosecutions for past grievous human rights infringements will occur because some of the main bodies/actors that have been listed may preserve the culture of impunity: these elements include but are not limited to conservative judiciary, uninterested executive and ambiguous position of important organs like the Supreme Court of Justice.

On the contrary, Chile's efforts to promote accountability had started early and slowly worked toward the dismantling of authoritarian enclaves. Nonetheless, the junta's amnesty law remains valid but its efficacy in preventing proceedings to perpetrators has been reduced due to the circumvention of its scope and the definition of disappearance as an ongoing crime. Therefore, calls for repeal and annulment of this military legacy are rejected on the basis that the amnesty per se is not being applied in practice, a dynamic which still implies a resistance to accountability. Yet, in terms of concrete achievements, the use of legal loopholes has allowed for justice and trials kept taking place to meet the demands of survivors and human rights advocates. Interestingly, for what regards the amnesty, Chile might be achieving more with an amnesty law still in place than Uruguay in terms of truth recovery and judicial proceedings. However, based on recent developments, Chile's Achilles heel is represented by another authoritarian vestige: the 1980 Constitution, whose elimination has been a constant component of the human rights discourse.

Recent developments in both countries vis-à-vis transitional justice reveal that nowadays the chief questions do not focus whether or not to pardon or prosecute liable individuals; prosecutions will be carried out, but the issues lie in the position that bodies charged with this task will assume. Since there are even now signs of resistance to external pressures and neither the Chilean nor Uruguayan Supreme Courts' judgments have the capacity to set a binding precedent, the current situation could be jeopardised by possible setbacks in the interpretation of legislation and political agents could always influence how the formal institutional order actually implements measures to reckon with past abuses. Indeed, Chilean protests or Uruguayans appealing to other national courts are all signs that there had not been enough prioritisation of accountability, in spite of the efforts so

far put into the fight against impunity. Within this framework, the fairly positive balance sheet of both countries with reference to their human rights records presents contradictions and ambiguity. The past looms over Chile and Uruguay and it is safe to assume that justice is still in transition for these Southern Cone countries.

Conclusion

The dissertation has assumed a theoretical approach in order to examine transitions to democracy in Chile and Uruguay and assess the effectiveness of transitional justice in both case studies. First of all, the research project has carried out an overview of the state of the art with respect to transitional justice for the purpose of gathering a comprehensive understanding of this recent doctrine in the international scenario and identifying its chief advantages; indeed, the implementation of transitional justice occurs when countries undergo a political change, intended as a transition to democracy, and need to reckon with gross violations of human rights committed by the outgoing government. Therefore, a plethora of mechanisms has been formulated by observers and policymakers to cope with these grievous situations and restore democratic values fostering the protection of human rights and the promotion of non-recurrence.

Significantly, the inquiry has taken into account some of the chief measures adopted especially in Latin America to achieve the aforementioned goals; the classification of transitional justice instruments was based on the level of accountability that each of these tools would grant to new leaderships and injured parties. Namely, the review of devices such as trials, amnesties, truth commissions and reparations considered both benefits and pitfalls and revealed that concerted efforts have been more effective to combat impunity. Additionally, these efforts were supported through the investigation of reforms applied to the institutional order; in this sense, an analysis of constitutionalism was done to understand how the domestic sphere had been influenced by transitional justice insofar as amendments to constitutions, the revision of the role of the judiciary, the rearrangement of presidential prerogatives and so on revealed a rationale that looks at the past while contemplating the future, in a truly transitional justice fashion. Moreover, the domestic sphere has also been framed vis-à-vis regional devices of justice, with a thorough overview of the inter-American system enshrined in the American Convention on Human Rights. Finally, all of the above considerations were applied to the transitions of Chile and Uruguay.

The comparative analysis proceeded in two main directions: firstly, the dissertation inspected the principal pieces of legislation which contributed to create a national situation whereby heinous atrocities were perpetrated by the military government and

essential safeguards such as the writ of *habeas corpus* or *amparo* were either suspended for an unspecified period of time or completely removed. This digression is not a mere aggregation of historical experiences but serves the function of explaining the reason why nowadays the two countries under examination still struggle with their past, despite their consistent human rights records in recent years. In fact, the assessments concerning past judicial initiatives has led the research project to uncover new jurisprudential reflections: consequently, the inquiry has undertaken a detailed review of the *corpus iuris* which was modified or introduced in order to demolish the authoritarian architecture on both countries, with different results. In particular, the analysis was supported by the study of Constitutions, newspaper articles, academic journals, unpublished material, sources of both qualitative and quantitative nature and, most importantly, landmark cases at the international, regional and domestic levels.

Arguably, one of the main fallacies in this study has been the lack of a more comprehensive approach that would also present a proper focus on civil society efforts, which were nonetheless pivotal in advancing the fight against impunity in both countries; yet, the research project mainly emphasised official initiatives undertaken by the state in order to explore domestic legal efforts and other transitional justice mechanisms executed for reinforcing the fledgling democracy. Thus, some tentative conclusions about what these measures have scored lead to the fact that Chilean and Uruguayan transitions, by their very nature, produced persistent hurdles for new leaderships and human rights advocates. The negotiated character of these transitions marked that the armed forced managed to preserve authoritarian enclaves and influence the democratic institutional and social fabric; especially in these cases, the pursuit of justice and truth was significantly obstructed. At the same time, transitional justice mechanisms were valuable to establish individual accountability, produce a national narrative for the violations, promote reconciliation, provide reparations to victims and strengthen the rule of law. This ambiguous situation characterising the comparative study of Chile and Uruguay is still present and indicates that there has yet to be a proper closure.

On this matter, it is noteworthy to consider transitional justice and its implications. The lateness of Uruguayan present judiciary in processing responsible parties even though the amnesty law has been abrogated in 2011, much like the recent protests in Chile calling for a new Constitution that would not be linked anymore with the authoritarian regime,

indicate that core social, political and legal arrangements still echo the abusive past. Within this backdrop, transition must be evaluated as a long-term process whose effects could be noticed after some time has passed between the demise of the military government and the establishment of democracy; this would explain the contemporary difficulties of Chile and Uruguay in achieving accountability. Therefore, events such as the impending referendum for a new Constitution in Chile or the recent sentence of Uruguayan officers in Rome, cannot be considered out of transitional justice's scope insofar as they are linked with vestiges of past human rights violations.

By way of conclusion, transitional justice must be deemed as an aspiring added value that helps to advance demands of justice and truth, although the repressive wrongdoings will never be fully solved. In this sense, transitional justice is not a teleological doctrine but a pragmatic theory to ensure that states explicitly acknowledge the grave abuses that have taken place within their borders, especially in cases where government officials have been either involved or responsible for them, and push them to take proactive initiatives by means of truth recovery, judicial proceedings, compensations and so on. When analysed on their own, many post-transitional moments in the history of Chile and Uruguay vis-à-vis the protection of human rights failed to improve justice and shortcomings were always a possibility. Thus, it is important to apply a more flexible conception of transitional justice, which is based on a conception of time not only linked to the very first period after the transition per se but engaged with the wide array of events taking place in the long run as long as these events are directly connected to the complexities of justice and reconciliation for the concerned society and require the employment of transitional justice mechanisms. Accordingly, this viewpoint shows that authoritarian legacies are being dismantled because even setbacks contributed to the resistance to impunity. Indeed, for Chile and Uruguay, "transition" is still ongoing and transitional justice is more than ever substantial.

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Executive summary

The heterogeneity of transitional justice

The innovative character of transitional justice as an academic inquiry stands in its pluralist denotation which testifies various shifts in the interpretation of the field over time. Following Ruti Teitel's definition, transitional justice can be defined as the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes; yet, this field of inquiry has expanded and modified its conceptual boundaries. The very first phase expressing a feeble orientation towards transitional justice is linked to the post-war period and, in particular, to the Nuremberg International Criminal Tribunal, which embodied the attempt to come to terms with mass atrocities through supranational judicial means and marked the emergence of transitional justice within the international legal landscape: namely, it led to the ground-breaking assignment of responsibility to individuals and the creation of new categories of crimes.

A more conscious identification of the transitional justice field among theorists and practitioners was carried out in the late 1980s in light of the democracy's third wave of transitions from nondemocratic to democratic regimes in Southern Europe, Latin America and Eastern Europe that began in the 1970s. The post-Cold War phase was characterised by the presence of widely different national circumstances which shared the grievous duty of coming to terms with past abuses by former perpetrators. In this sense, the rise of transitional justice as a discipline is inherently political, since justice mechanisms were chiefly implemented by the political leadership during moments of regime transitions. Discussions taking place during that time highlighted questions such as: whether international law obliged states to punish violators of human rights; whether successor regimes had a minimum duty to establish the truth after the abuses; whether discretion and prudence were necessary in particular circumstances when seeking justice; and how to cope with the challenges arising out of human rights abuses made by military authorities. Thus, thorny questions emerging from the debates led to a proper systematisation of devices, mechanisms and processes that significantly expanded the instrumentation to promote human rights. Since there were no hard or fast rules on how to confront and process authoritarian experiences, transitional justice shifted from a largely legal and internationalist paradigm of human rights violations to a jurisprudence of forgiveness and reconciliation for dealing with the past and respecting local necessities. Moving beyond concepts of liability and accepting pragmatic principles, nations witnessed the rise of alternative transitional justice resolutions and forewent a universalising notion of human rights in favour of an *ex post* and backward-looking justice.

Nevertheless, the importance of tribunals did not disappear in the mist of practical necessities. Preferring alternative methods to prosecution did not hinder the obligation of states to investigate and punish mass violations of humanity's rights and the doctrine of universal jurisdiction came to the foreground due to pervasive conflicts that did not share the same exceptionality of transitions in the climate of globalisation. During the so-called "steady-state" phase, transitional justice widened its conceptual boundaries and its mechanisms became fairly normalised, as important instances such as the workings of International Criminal Tribunals for the former Yugoslavia and Rwanda and the subsequent creation of the International Criminal Court could attest. Most importantly, these judicial devices catered that upper governmental echelons could be potentially responsible for mass atrocities, attesting a newfound commitment from the international community to contribute in building a new regime which recognised the obligation of states to investigate and punish human rights offenders.

After the sequence of legal-institutional events starting from the 1970s and including post-Cold War instances, transitional justice acquired major self-awareness as a field of practice and study around the early 2000s onwards. The evolution of the field has been codified through different approaches in order to explain the increasing interconnections among a vast range of actors and reformulate transitional justice within contemporary terms. All the alternative approaches have in common the overcoming of the truth versus justice dilemma that dominated the first years of the field and the recognition that there is no "one-size-fits-all" formula, thus propelling reflections that constantly broadened transitional justice's definition(s) and mechanisms, yet the interpretations and focal points are distinct. While Lutz & Sikkink operated within a "justice cascade" discourse to underline the interplay between states, transnational networks and courts, the United Nations assumed a more holistic approach and defined transitional justice as «The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof». Conversely, observers like Wendy Lambourne focused more on tangible realities of population in need of healing and supporting the integration of both economic and social rights, core elements to prevent further abuses, within a more transformative discourse. It is meaningful to deduce that conceptions of justice were stretched out and redefined to encapsulate other significances; however, they all held on to the significant pillar that transitional justice now must necessarily include both retributive and restorative dimensions.

The new generation of approaches to transitional justice has been capable of overcoming dilemmas from the early discussions about the field while responding to emerging ones. The present criticisms of the discipline span from discussions on its very notion and validity within the academia to its more specific normative contents and ultimate praxis. These scholarly reproaches are directly connected to the fact that conflict or post-conflict contexts are replacing post-authoritarian situations as the most common settings for transitional justice application in an ever-increasing trend. In fact, what was viewed as a legal phenomenon responding to extraordinary events is now becoming a reflection of ordinary times that could affect the integrity of the field. On this matter, the growing acknowledgment of the field explicitly reflects a paradigm shift to complementary means and ends beyond strict criminal accountability. Due to this persistent and consistent broadening of the field from human rights accountability in democratic transitions to transition involving a range of legal regimes and mechanisms, as well as complex set of goals beyond those of accountability and democratisation, concerns have been brought to the foreground regarding the validity of transitional justice as an organic field.

Accordingly, the different *foci* of research that characterise modern-day transitional justice should be considered as a discipline and an approach at the same time; by leaving its retributive notion as the sole prerogative, this "field" does not currently present a single theory that encapsulates its nuances because, more than interdisciplinarity, the negotiability applicable to disparate contexts represents its essence. In other words, transitional justice can be considered «a principled application of justice in distinct circumstances». Finally, the differences relating to the distinct objectives, experiences, interests and values that constitute this heterogenous field should be considered as an important opportunity vis-à-vis human rights for three reasons: firstly, following the field's traditional inception, they have opened the possibility for retribution, rebuilding and redress; secondly, they have laid the groundwork for consistent change within society through the redesign of structures and institutions; lastly, they are not exclusively backward looking, but reveal important chances to prevent further conflicts and non-recurrence of past gross human rights violations.

The mechanisms of transitional justice

The main theoretical positions are translated in practical terms through mechanisms to manage stakeholders' competing demands and achieve accountability. Indeed, the core understanding of accountability is directly connected to a criminal dimension for past abuses perpetrated by former state actors or connected agents; thus, one of the most traditional policies adopted to reckon with heinous crimes of outgoing regimes has been criminal proceeding. The affirmative obligation to prosecute the responsible parties can be carried out by means of state trials, third country trials and

international trials. Accordingly, it is demonstrated that perpetrators of human rights violations will be punished for their criminal conduct also by means of extraordinary jurisdiction which confers to a nation the legitimacy to prosecute even if the offence was committed outside its boundaries and the person does not present a specific bond with the concerned state.

Thus, judicial proceedings deliver a means of punishing past perpetrators for their grave violations; moreover, criminal courts represent a public forum where specific findings are confirmed and the room for speculation is diminished, while education of citizenry about the extent of prior abuses is simultaneously accomplished. Overall, there is a consistent strengthening of the rule of law whereby incumbent leadership reconstructs the judiciary system and creates a *caesura* with respect to credibility, trust and legitimacy vis-à-vis the previous government. Hence, two main narratives are satisfied: the restoration of restoration of dignity and deterrence, intertwined by the unfortunate relationship between abusers and abused. Nevertheless, criminal proceedings might not deliver the expected results in practical terms due to the extensiveness of abuses and violations covering the whole system. This concern is echoed also by the possibility of negotiations and immunities granted to perpetrators in a tit-for-tat arrangement for more information; additionally, if trials are carried out in domestic courts, the more common feature is that fledgling democracies cannot sustain fair and transparent trials. Consequently, many countries have resorted to other methods to ensure that the aims of democracy and human rights would be attained.

The employment of amnesties stems from the acknowledgment that influential anti-democratic forces might threaten the recently obtained and fragile equilibrium, so as to curb political spoilers and strengthen the construction and consolidation of democracy. According to Freeman, an amnesty is an extraordinary legal measure whose primary function is to remove the prospects and consequences of criminal liability for designated individuals or classes of persons in respect of designated types irrespective of whether the persons concerned have been tried for such offenses in a court of law. This definition has led to different responses, since amnesties denote an act of forgiveness – or forgetfulness – that a government extend to a category of individuals who satisfy the act's terms, eliminating the criminality of past actions carried out and declaring that those persons shall not be punishable. Nonetheless, amnesties are criticised for not letting states carry out their primary duty to prosecute offenders and leaving room for impunity in exchange for the end of a repressive regime; in fact, many observers describe amnesty as impunity because authoritarian governments adopted amnesic amnesties that would not aim at reconciliation but only protect perpetrators of atrocities obstructing trials. However, some scholars also argue that accountable amnesties created in a democratic setting, with the participation of the citizenry and the exclusion of human rights violators

from the provision, would facilitate the transitional process and construct the foundations of a democratic government. As a consequence, opinions regarding amnesties should be reviewed in light of their contextualisation and characteristics.

Moving along the accountability spectrum, since the 1980s, truth commissions have become a staple in the transitional justice discourse and practice. Following Hayner's definition, a truth commission is (1) is focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorised or empowered by the state under review. Standing at the crossroads between claims for liability and pragmatic challenges, truth commissions are generally understood to be bodies whose aim is to execute official investigations which can encompass atrocities led by the military or other governmental agents or by armed opposition forces. This transitional justice mechanism adopts a largely victim-centred approach whereby society as a whole is called to contribute in the collection of information and enjoy the subsequent dissemination of truth about past human rights violations. Indeed, truth commissions are argued to be one of the most effective measures to obtain reconciliation to the extent that they can give recommendations to newly established democracies for future reforms. However, opening up the archives of the past and inspect deeply into the violations do not acquire significance nor foster rights-abiding attitudes if the commission is not considered legitimate by the citizenry or if it escapes certain complexities for political convenience.

However, the most victim-centred approach with the greatest potential to bring about a socioeconomic awareness into the transitional justice agenda is represented by reparations, accomplished either through judicial or administrative processes. The principal method to obtain reparations for the damages incurred is judicial adjudication, which envisages an individual victim bringing the case to trial; yet, due to the sheer amount of victims, most countries in transitions have decided to resort to administrative solutions in the form of programmes engaging with the potential claimants of reparations. Since they are designed to redress the harm resulting from an unlawful act violating the rights of a person, reparations could be manifested through material or symbolic actions. Material actions relate to credit, funding projects, welfare services and so on to alleviate the offence, while symbolic reparations are associated to official apologies, memorials and so on to restore the victim's dignity. However, much of the reparations' practical implementation depends on the constraints posed by competing demands and coupled with scarce funds, especially if it is considered that reparations are not temporary but serve for a long-term political scheme fostering human rights and development.

Regarding the effectiveness of the transitional justice toolbox so far analysed, it is noteworthy to mention that these mechanisms are usually analysed in combination with other instruments because they do not exist in a vacuum and a transitional context demands a combination of significant efforts. On this note, the implementation of transitional justice instruments depends on the evolution of international treaties to trace a state's accountability, while also having to consider the specific context. In fact, the domestic dimension is consistently underscored in the sense that the transitional process is best fulfilled through the national process, guided by a national justice plan and steered by specially appointed independent national institutions: in other words, transitional justice mechanisms must be initiated and validated by the interpretation of constitutional tenets in order to function properly. Hence, constitutionalism has also evolved through the lens of the transition paradigm and constitutional agendas within transitional justice have influenced nation-building purposes by filling the legal and political vacuum.

Constitutionalism as a legal doctrine according to which the authority and legitimacy of governments derives from a body of law whose ultimate source is the population itself – namely the Constitution – is moving beyond its conventional borders and defying its entrenched standards to distance itself from a purely monistic approach. Political transitions bring about paradoxical conditions questioning and broadening the canon; indeed, constitutionalism in transition assumes a dual directionality because legal practices had to combine their long-established progressive attitude with an awareness towards the past. This Janus-faced feature is ultimately attributed to the developments in transitional justice and unfolding contextual contingencies thereof. Consequently, "transitional constitutionalism" is charged with the daunting task of providing a sound mechanism to transform the political order previously liable of violence – for instance, either through a new constitution or with the return of predecessor one – into an accountable one, with special attention towards rebuilding social values and gathering political consensus.

In conclusion, constitutionalism has also been affected by the rise of transitional justice and the implications in its application have been manifold. Arguably, constitutionalism had to be reconceptualised in light of politics; through this process, the functions have broadened so as to include the facilitation of the transition from a regime to another, with subsequent agenda reforms in order to (re)construct the polity and provide a source of legitimacy to the fledgling government depending on the typology of transition occurred. Indeed, transitional constitutionalism is not only delineated by its prerogative of limiting and organising an internal order, but by its transformative of taking the past and build upon it the new state's political identity. This process bestows the

constitutionalist doctrine with more responsibilities, in a dynamic process where the political dimension, the international scenario and constitutionalism complement each other.

The case of Latin America leads to further considerations regarding transitional constitutionalism, which has adjusted the organization of the state in terms of power relations by developing a robust system of checks and balances an resizing the executive power. The revision of constitutionalism as a forward-looking doctrine in the aftermath of severe violations of inalienable rights has provided the region with a new outlook to deal with their contingent difficulties and transform the legal culture; in particular, there has been a significant effort in curbing the prerogatives of presidents who had legislative powers and could issue emergency decrees. Conversely, the goal has been to revise constitutional measures for strengthening the judiciary, especially for mechanisms of judicial safeguard such as the writ of *amparo* and *habeas corpus*. Thus, due to the growing ratification of human rights treaties, the development of legal interpretations more in line with the political context of each country, and the establishment of new mechanisms to ensure the protection of human rights and the correct implementation of the constitution, Latin America is on a promising path for promotion of human rights.

These last considerations are further corroborated by the workings of the Inter-American system for the protection of human rights, which originated from the development of the Organization of American States (OAS) with the purpose of achieving peace and justice in the Continent. The current system is codified by the American Convention on Human Rights and is composed by two main bodies: the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). These organs function under a two-tiered system, since complaints must pass through the Commission before referring to the Court; the Commission acts as a gatekeeper to the Court and has the power of monitoring member states' behaviour and issuing advisory opinions. The IACHR recognises various channels to receive complaints about violations of the Convention, on the condition that all the remedies under domestic law should have been exhausted and the temporal scope for the complaint lodging must be satisfied. Importantly, the Commission can elaborate recommendations or even put itself at the disposal of the parties in order to reach a friendly settlement; when neither the recommendations are followed nor a friendly settlement is reached, the Commission forwards the case to the Court.

As the only judicial organ set up by the American Convention, the Court is the principal instrument of the regional system to assure compliance with respect to human rights. As already underlined, the Court cannot consider a case *propio motu* and so it can be deemed as a last resort mechanism which fulfills two main functions: issuing advisory opinions or solving contentious disputes. First of all, in

its advisory function, the Court involves the highest number of legal instruments and subjects, yet the consultative practice does not have binding effects. In fact, the advisory function offers an alternative judicial method that is devised to support states and organs in their compliance with and application of human rights treaties and to avoid sanctions associated to the contentious judicial process. Within this framework, the Court cannot assess a state's responsibility. However, in its contentious jurisdiction, the Court adjudicated mandatory rulings, but its prerogatives are limited *ratione personae* and *ratione materiae*. Nevertheless, the Court has always attempted to contribute in significant ways to promote human rights.

Indeed, the jurisdiction of the Court only covers cases in which it can interpret the Convention's provisions, provided that the interested states have explicitly accepted this authority. Within this framework, the rulings of the IACtHR condemn human rights abuses but also assess the overall behaviour of the involved sate with respect to its institutional structure; this has undoubtedly steered the Court toward the elaboration of concrete answer by means of *effet utile*. Therefore, the court cannot be considered a criminal tribunal because it does not have the power to adjudicate on specific individuals or state agents but only on states. Consequently, the judicial organ has developed a method to deepen the engagement between the inter-American system and domestic legislation: in the *Almonacid Arellano* case, the Court introduced the conventionality control doctrine, a principle under which judges and other national authorities are required to assess the compatibility of the domestic *corpus iuris* with the American Convention. In this sense, the conventionality control might be classified as a method to guarantee non-recurrence of gross human rights violations in the region.

Accordingly, the main advantage of a regional perspective on human rights rests on the fact that it is more in touch with the juridical, political and social conditions that have distinguished Latin American states; the awareness of the cultural context has ultimately led the IACtHR to adopt a more comprehensive approach in reaction to violations and consider also the internal nuances that have characterised concerned states. In turn, as already acknowledged, this pioneer type of work has contributed to the development of normative standards for transitional justice mechanisms and processes due to the constant dialogue of the regional system with internal orders that allows for a wide array of actors participating in the discovery and enforcement of truth and justice.

Pacted transitions and delayed justice in Chile and Uruguay

As countries of the Latin American Southern Cone, both Chile and Uruguay had been influenced by the overarching international context of the Cold War in general and the national security doctrine in particular; consequently, their histories overlap insofar as the armed forced came to view themselves as the legitimate guarantors of the state. Strong polarisations of society existing in both countries led

to a takeover by the armed forces, although this was carried out in different manners. In Chile, the rise of a military regime occurred after a coup d'état, marking a prolonged period whereby individual liberties were significantly restricted and institutional safeguards removed or modified to accommodate the new government through decree laws. Conversely, Uruguay already presented authoritarian stances before the conventionally recognised start of its own repressive government in 1973 due to the growing reliance on the armed forces by previous political leaders. Both authoritarian regimes in Chile and Uruguay presented an organic bureaucracy through which the executive could emanate constitutional legislation and conceal its increasingly brutal forms of dissidents' persecution, executing de facto state-sponsored violence on the citizenry. This repressive turn removed all the guarantees and safeguards provided by the Constitutions, leaving Chileans and Uruguayans with very limited rights and freedoms. On this note, the institutions that were supposed to defend the citizenry were emptied of their prerogatives, with jurisdiction over civilians passing to military tribunals in both countries.

This process was facilitated by the establishment of states of exceptions. Indeed, the very first actions of the incumbent Chilean government was to declare a state of siege which was to be considered as a state of war caused by internal commotion; in this way, the military junta acquired all the executive, legislative and constituent powers with the removal of the Congress and the Constitutional Tribunal. Consequently, the right to legal proceedings and *habeas corpus* were suspended while restriction over civil and political rights was implemented. Since internal commotion equalled a state of internal war, the military rationale followed that specific courts such as Military Tribunals were allowed to assert jurisdiction over civilian cases. The Supreme Court, which possessed monitoring powers over every Chilean judicial body, declared that it had no competence over War Councils because of the states of exception in force. Moreover, the authoritarian government also adopted decree law no. 788 according to which all measures whether past or future applied by virtue of the state of siege would assume the status of amendatory rules; junta's decrees assumed a constitutional status.

Nonetheless, the Chilean repressive regime implemented Constitutional Acts in order to set a framework in which basic concepts such as the rule of law, democracy and individual rights were affirmed; yet, these constitutional guarantees were shadowed by Act no. 4 which provided that the right to a writ of *amparo* would be suspended altogether during states of exception. Arguably, more than the Constitutional acts, it was the Amnesty Law Decree 2.191 issues in 1978 which would represent one of the major hurdles for the restoration of democracy; indeed, an amnesty was granted to all individuals who committed criminal acts, whether as perpetrators, accomplices or conspirators, during the state of siege in force from the start of the coup until March 1978, covering the more

repressive years of the authoritarian regime. Finally, the institutional design was significantly changed through the creation of a new Constitution in 1980, in accordance with the notion of "protected democracy"; the articles listed aimed at either reinforcing the power of the military or limiting the scope of action for the protection of individuals. Within this constitutional framework, substantial rights were explicitly stated and the Constitutional Tribunal was officially reintroduced, but the President could arbitrarily arrest, detain, expel from the country, limit freedom of information and resort to *de facto* limited entitlements due to the absence of benchmarks such as due process. Moreover, the Council for National Security COSENA overviewed the actions of any authority of the Constitution that could affect the institutional order or national security. Finally, political pluralism was heavily restricted for advocates of alternative political ideas and the traditional proportional representative system was substituted by a majoritarian binomial system which would second the forces pro-junta and maintain the military status quo.

Uruguay presented similar facets even before the official military regime came to power. Already at the end of the 1960s, democratically-elected President Jorge Areco Pacheco imposed "Prompt Security Measures", a constitutional instrument declaring a state of exception and conferring upon the executive more power to fight against subversives who were principally identified as members of the urban guerrilla group known as MLN-Tupamaros. This attitude was further consolidated by Pacheco's successor President Juan María Bordaberry who enacted the State Security Law on July 1972, according to which ordinary crimes were to be considered on par with military offences. The final phase of the growing control of the military over the civilian realm finally occurred when the executive issued the dissolution of the Parliament through decree no. 464 and established the creation of the State Council to assume legislative prerogatives. Accordingly, the 1967 Constitution started to be amended by means of Constitutional Acts in anticipation of the completion of a new Constitution: these acts suspended the elections and halted political pluralism with several restrictions on candidates for Marxist or pro-Marxist parties. Most importantly, the military regime set up a Ministry of Justice which would have competence over the relation between the executive and the judicial powers and other jurisdictional entities with the exclusion of military bodies; this signified the impossibility for victims of human rights to recur to the judiciary for remedy. Nevertheless, the Uruguayan executive power masked its oppressive measures with the emanation of Act no. 5 asserting that the state recognised human rights as a natural expression of the man as a matter of principle.

With respect to this original institutional background, internal disapproval for the constitutional projects led to an inevitable return to democracy. The negotiated character of both Southern Cone countries' transitions marked that the armed forced managed to preserve authoritarian enclaves and

influence the incoming democratic institutional and social fabric. In fact, the acceptance of constitutional reforms in Chile and the Naval Club Pact in Uruguay attest that future leaders were willing to compromise in order to obtain full stability but partial justice; this difficult affair required a balance between justice and politics. Specifically, the Chilean *leyes de amarre* or mooring laws granted the resume of political pluralism but ensured that the newly elected government could not change certain provisions of the Constitution nor influence the armed forces' autonomy. The continuity of authoritarian elites was granted through the maintenance of the electoral system and the presence of conservative non-elected Senators, along with the amnesty law of 1978 and the majority of pro-Pinochet Supreme Court justices. Moreover, the military regime also issued Organic Constitutional Laws regulating the life and independence of military members which were required a higher quorum to be modified.

The negotiation in Uruguay occurred in 1984 through the Naval Club Pact, a secret forum dominated by pragmatic necessities and contradictory pressures where military concerns for explicit immunity provisions clashed against civil demands for accountability. The final result signalled the reprise of the 1967 Constitution, with the return to *habeas corpus* and the establishment of the writ of *amparo*. Military prerogatives were limited vis-à-vis their appointment and the Uruguayan National Security Council survived only as an advisory body. Despite these results, the cost of drastically reducing military demands for the assurance of national elections was the implicit acceptance of impunity for agents of repression and torture. In fact, the negotiators did not engage in open debates through official channels and their statements about truth and justice could not be reconciled with the secrecy of the meeting; thus, difficulties in the implementation of human rights were not admitted

On the contrary, the style of negotiations in Chile immediately expressed a high degree of transparency and underlined the willingness of democratic parties to actively contribute to the pursuit of justice and truth, thus partially undermining the military's grasp on politics and society. The most evident instance is the National Commission for Truth and Reconciliation which was formed with the intent of clarifying the abhorrent events of the junta regime and determining the truth in the national narrative. Although responsible parties refused to collaborate for the location of the disappeared or the full disclosure of victims' fate, the Commission served the function of acknowledging the past and encouraged the ratification of international treaties for human rights and reparations such as a pensions' programme. Alas, the Commission's main findings could be used by the governments for prosecutorial aims, yet the amnesty law was still in force and could not be repealed due to the conservative bloc in the Senate.

Indeed, both countries had to deal with persistent instruments that precluded the opportunity to reach satisfactory results for victims' demands, among which amnesty laws were the most problematic ones. Interestingly, in Uruguay this hurdle was set up by the incoming democratic executive in accordance with the project of national reconciliation and long-lasting peace; indeed, the 1986 Law on the Expiration of the Punitive Claims of the State, or Expiry Law, abolished the state's capacity to prosecute crimes committed until the date of transition by military and police officials whether for political reasons or in fulfilment of their official capacity and in obeying orders from superiors during the *de facto* period; the amnesty also diminished the control of the judiciary insofar as the judge in charge of the denunciation would have to demand to the executive whether the case under investigation was covered by the law. It is noteworthy to underline that the Uruguayan Supreme Court deemed the Expiry Law as constitutionally envisaged, while dissident opinions claimed that the Constitution did not allow state powers to delegate their original competences, such as judicial ones.

Undergoing transition after a few years, Chile learnt from the Uruguayan experience that it had to move swiftly and take necessary measures in a short span of time, which also explains the brief temporal mandate of the truth commission and its non-negotiable narrative. Therefore, in both countries, the use of legal loopholes has allowed for justice and trials to meet the demands of survivors and human rights advocates. While the first attempts at challenging the amnesty in Chile failed, owing to the fact that the Supreme Court held it as a legitimate implementation of legislative prerogatives, the year 1998 marked a prosecutorial turn that led judges to abandon a purely formalistic notion of legality in favour of the amnesty's circumvention. Significantly, the *Poblete Córdova* case enshrined the doctrine of "ongoing crime" for forced disappearance: in order to investigate without a statute of limitations, the crime of disappearance was reconceptualised as "ongoing" or permanent because the whereabouts of the victim were unknown, and so the offense could not be assessed with absolute certainty. Consequently, amnesty could not limit the judge's capability to investigate on the victim's fate; yet, once the investigation was over, amnesty could still be applied.

Additionally, the Chilean judicial domestic sphere was further stimulated in taking into account the international dimension and improving legal actions against upper military echelons when Pinochet was detained and processed in London due to an inquiry about Operation Condor occurring in Spain. In this instance of universal jurisdiction, the Judicial Committee of the House of Lords rejected the *habeas corpus* appeal lodged by the Chilean general's lawyers and argued that Pinochet as a former head of state did not enjoy immunity from prosecution. In spite of the eventual release of Pinochet on medical grounds after three different trials in the United Kingdom, the domestic mechanism of judicial accountability in Chile was set in motion. The "Pinochet Effect" can be deemed as a shift in

justice which energised the human rights movement due to the acknowledgment that no one was above the law, not even high-ranking officers. As a result, the creative efforts for the interpretation of amnesty were pushed in the *Sandoval* case, which allowed conviction and sentencing of perpetrators despite the amnesty law.

In Uruguay, truth recovery efforts did not significantly affect the country and the first successive attempt was achieved only in 2000 with the Commission for Peace, which recognised the state's official narrative about past violations. The Commission investigated the dynamics behind forced disappearances, but it did not recommend nor provide evidence for the prosecution of alleged wrongdoers. At the same time, any attempt at seeking justice was blocked by the amnesty. The landmark case that started to shift the judicial attitude has been the *Quinteros* case, which presented a writ of *amparo* in a case of disappearance without any punitive purpose but only to access information concerning the whereabouts of a missing person. Indeed, *amparo* was assessed and soon the investigation assumed a criminal character in order to charge former Minister of Foreign Affairs Blanco based on the fact that the defendant was a civilian and so he did not enjoy the Expiry Law. Significantly, the *Caducidad* law provided immunity only to military and police officials who committed crimes by following orders, thus excluding all the high-ranking members of the armed forces or civilian leaders involved in the gross violations of human rights. As a result, it was recognised that certain specific cases fell outside of the scope of the law. This ground-breaking interpretation was advanced also in a writ of unconstitutionality for the *Sabalsagaray* case, in which it was argued that the Expiry law had violated the separation of powers prescribed by the Constitution and Uruguay failed to comply with a report of the Inter-American Commission on Human Rights in 1992: the Supreme Court held that certain provisions of the *Caducidad* law were indeed unconstitutional because contrary to human rights treaty obligations in force that had a special rank in the juridical order. In other words, the Supreme Court deemed the amnesty unconstitutional *ab origine*.

Finally, the *Gelman v. Uruguay* verdict by the Inter-American Court of Human Rights in 2011 recognised Uruguay's responsibility for the forced disappearances committed during the military government. Undeniably, the Court found the Expiry Law to be incompatible with the American Convention and other international instruments, thus ruling that the law had no legal effect and instructing the Uruguayan state to guarantee that the *Caducidad* law would never again constitute an obstacle to the investigation of the case and eventual punishment of the defendants. Finally, the Court underlined that even episodes of direct democracy do not have legal validity compared to its interpretation of the American Convention. In spite of the two referenda which approved the Expiry

Law in 1989 and 2009, the IACtHR ruled that this popular approval did not automatically or by itself grant legitimacy under international law. In compliance with the *Gelman* sentence and following internal pressures, the Expiry Law was finally abolished through the issuance of Law no. 18.831 which expressly restored the punitive powers of the state vis-à-vis wrongdoers for crimes committed during the authoritarian regime and put an end to the fundamental obstacle to truth and justice.

The new impetus for accountability in both Chile and Uruguay, achieved through different methods, seemed to point to promising developments: this proved to be true only partially. A package of constitutional reforms approved in 2005 in Chile removed appointed senators, who had frequently blocked amendment proposals that could threaten the influence and autonomy of the military elites and divested the armed forces of their constitutionally mandated role as guarantors of the institutional order. Moreover, Chile's Constitutional Tribunal was empowered with concrete law review for certain cases through the writ of inapplicability, which is assessed when the effects generated by the implementation of the statute are unconstitutional in that particular case, even though the piece of legislation complies with the Constitution. The reforms also allowed for an additional type of abstract review, namely the writ of unconstitutionality, allowing judges to consider laws already approved by the legislature as unconstitutional: this concrete feature was coupled with the abstract *erga omnes* effects.

Nevertheless, the reforms did not completely remove all the authoritarian enclaves from the Constitution, such as the Organic Constitutional Laws and especially the amnesty – even if its alternative interpretation had improved accountability. On this matter, the IACtHR issued a judgment in 2006 for the *Almonacid Arellano* case affirming the incompatibility of the amnesty and establishing that the domestic judiciary should act in the interest of the American Convention; yet, contrary to Uruguay, this sentence did not bring about effective results. Moreover, the Supreme Court refused to recognise enforced disappearance as an ongoing crime in 2013, evidencing an erratic and divergent behaviour. Finally, recent protests in 2019 demonstrated how the goal of justice for past human rights violations has not been reached because another vestige of the past, namely the Constitution signed under Pinochet, regulated the Chilean institutional order. In a historical agreement President Pinera and the opposition scheduled a referendum on April 26, 2020 inquiring Chilean citizens about whether or not they want to begin a constitutional process, which would require further plebiscites to appoint members and to accept or reject the new Constitution.

Correspondingly, despite the elimination of the most pervasive legal obstacle, challenges to accountability still remain in Uruguay. Among these, the most worrisome is the contradictory position adopted by the Supreme Court with reference to the abrogative legislation, thus testifying

impediments for the investigation and prosecution of crimes committed during Uruguay's military regime. In fact, the Supreme Court passed a judgment in 2013 on the constitutionality of Law no. 18.831 with major repercussions in the legal scenario; the Court invoked the principle of non-retroactivity to argue that the Punitive Powers of the State law was unconstitutional, demonstrating how formal efforts do not always coincide with essential changes. The back-and-forth of the jurisprudence on the category of human rights and non-applicability of statutory limitations only preserves impunity and shelters perpetrators from justice. Moreover, judicial independence in Uruguay is still an issue because the judiciary has to rely on other branches for funding and the appointment arrangements for Supreme Court justices are swayed by political viewpoints depending on which party has the majority. On this matter, it will be interesting to assess how recently elected President Lacalle Pou, the first conservative exponent after four left-wing administrations, will engage with the judicial branch.

In conclusion, neither the Chilean nor Uruguayan Supreme Courts' judgments have the capacity to set a binding precedent and so the current situation could always be jeopardised by possible setbacks in the interpretation of legislation or by political agents influencing how the formal institutional order actually implements measures to reckon with past abuses. Overall, it is safe to say that there has not been enough prioritisation of accountability, in spite of the efforts into the fight against impunity. Within this framework, the fairly positive balance sheet of both countries with reference to their human rights records presents contradictions and ambiguity. The past looms over Chile and Uruguay and it is safe to assume that justice is still in transition for these Southern Cone countries.

Therefore, transitional justice proves to be not a teleological doctrine but a pragmatic theory to ensure that states explicitly acknowledge the grave abuses that have taken place within their borders, especially when government officials have been either involved or responsible for them, and push them to take proactive initiatives by means of truth recovery, judicial proceedings, compensations and so on. When analysed on their own, many post-transitional moments in the history of Chile and Uruguay vis-à-vis the protection of human rights failed to improve justice and shortcomings were always a possibility. Nevertheless, more flexible conception of transitional justice, which is based on a conception of time not only linked to the very first period after the transition per se but engaged with the wide array of events taking place in the long run as long as these events are directly connected to the complexities of justice and reconciliation for the concerned society and require the employment of transitional justice mechanisms. Accordingly, this viewpoint shows that authoritarian legacies are being dismantled because even setbacks contributed to the resistance to impunity. Indeed, for Chile and Uruguay, "transition" is still ongoing and transitional justice is more than ever substantial.