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Dirty Legal War: Human Rights and the Rule of Law in Chile 1973-1995, The

Edward C. Snyder

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THE DIRTY LEGAL WAR: HUMAN RIGHTS AND THE RULE OF LAW IN CHILE 1973-1995

*Edward C. Snyder**

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THE DIRTY LEGAL WAR: HUMAN RIGHTS AND THE RULE OF LAW IN CHILE 1973-1995

The disappeared are driving me crazy!
I don't believe they exist.

- Chilean Supreme Court President
Israel Borquez, during a meeting
with relatives of the disappeared, 1981.

I. INTRODUCTION

On September 11, 1973, the Chilean Armed Forces emerged from their barracks to violently quash the floundering government of Salvador Allende Gossens, plunging Chile into a nightmare world from which it has yet to recover. From that date, under the iron hand of General Augusto Pinochet, Chile was transformed from a peaceful, egalitarian society into a nation of enemies, ruled by a military government that subverted democratic principles, violated the most basic human rights, and flouted the rule of law with impunity.

The dictatorship found method in its madness. Instead of defying the juridical order, the junta utilized it to construct an elaborate facade of legitimacy around dictatorial rule. Recognizing Chile's traditional respect for and observance of the rule of law, General Pinochet utilized the letter of the law to violate its spirit, and created the perfect fascist legal system to process "enemies of the state." Constitutionally authorized states of exception were employed to their maximum effect. The jurisdiction of wartime military tribunals was expanded to encompass civilian violators of a multitude of crimes. In 1980, Pinochet presided over the drafting of a new constitution affirming and validating the legal system he had created by decree. Human rights violations were systemic, and fear and terror became institutionalized.

As lawless stormtroopers roamed the land abducting, torturing, and executing Chilean citizens, the Chilean judiciary, the principle guarantor of civil and political rights, watched and did nothing. In fact, this third branch of constitutional government, blinded by ideology, became utterly politicized and subservient to the military dictatorship, sacrificing the citizens it was sworn to protect in order to appease the voracious appetite of a rogue "national security" state. The Chilean judiciary, particularly the Chilean Supreme Court, did everything in its power to allow the military regime to carve the nation into a design suitable to its taste by trampling the rule of law, unfettered by even a pretense of respect for human rights. In fact, infiltrated by the executive through the expansion of military justice, the Chilean judiciary ceased to exist as an independent branch of government.

Fortunately, another section of the prestigious and once-revered Chilean legal profession had the courage and conviction to challenge the dictatorship and its "Inquisitional" judicial system. Soon after the 1973 coup, these lawyers and judges began a struggle to restore the rule of law, the independence of the judiciary, and the observance of basic human rights norms. Faced with

insurmountable obstacles, including direct governmental violence and harassment, these lawyers persevered and managed to win some small, yet significant victories. However, even with the return of democracy in 1989, the election of Patricio Aylwin as President of the Republic, and subsequent publication of the Report of the Chilean National Commission on Truth and Reconciliation, this struggle over human rights continues within the legal profession and the nation. The Chilean Supreme Court, still stacked with Pinochet-era judges, continues to deny recognition of, and punishment for, the most blatant, proven human rights abuses of the Pinochet regime. Until these abuses are not only recognized, but adequately punished under the law, respect for human rights in Chile will only be seen as a charade, and true national reconciliation will remain a pipe-dream.

In the wake of the successful Summit of the Americas, in which the United States, Canada and Mexico officially invited Chile to join the North American Free Trade Agreement (NAFTA),¹ the United States is possessed of a unique opportunity to influence the future legal and political make-up of Chile. As the collapse of the Mexican peso revealed so clearly, economic fortunes are inextricably linked to political realities, and just as Mexico has been forced by economic crisis to finally deal with its long-entrenched political liabilities,² so too must Chile be forced to confront the demons of its past with linger in the present. The United States should use its new found leverage to pressure Chile into reforming its judicial system, including abolishing the archaic judicial hierarchy and repealing those laws that have obstructed the pursuit of justice in Chile. Above all, the United States must insist that Chile put an end to the legalized impunity of the Armed Forces that has corrupted the entire social and political fabric of the country and prevented true national reconciliation.

II. THE HALCYON YEARS

Since its independence from Spain in 1810, the Chilean republic had always remained a bastion of democratic stability and enlightened civility in a continent full of tyrants and revolutionaries.³ Its leaders and "officials prided themselves on scrupulous attention to constitutional norms and legal procedures," families "donned their 'Sunday best'" on election day, and law was considered the most prestigious profession.⁴ Heavily frowned upon, corruption was almost non-existent while political debate was kept within the bounds of the law.⁵ With a large middle class, Chileans, often described as the English of Latin

1. See e.g., David LaGesse, *Chile is Invited to Join NAFTA*, DALLAS MORNING NEWS, Dec. 12, 1994, at 1A. As of this writing, and notwithstanding the economic crisis in Mexico, the United States continues to pursue negotiations aimed at including Chile in the NAFTA. Clay Chandler, *U.S. Vows to Continue Trade Talks with Chile*, WASH. POST, Mar. 18, 1995, at C2.

2. It is generally acknowledged that political problems in Mexico, particularly the festering crisis in Chiapas and the two political assassinations, contributed to the flight of foreign investment capital that ultimately led to Mexico's decision to devalue the peso. See Todd Robertson, *How a Miracle Went Wrong*, WASH. POST, Jan. 8, 1995, at A26. See also, Henry Kissinger, *Aiding Mexico is not just Economics — It's National Security*, L.A. TIMES, Jan. 29, 1995, at M2.

3. See, e.g., PAMELA CONSTABLE & ARTURO VALENZUELA, *A NATION OF ENEMIES: CHILE UNDER PINOCHET* (1991).

4. *Id.* at 20, 116.

5. *Id.* at 21.

America, always favored accommodation and compromise over confrontation and never fell into the clutches of militarism as did neighboring countries.⁶ Because of this history, the events of the last twenty years are extraordinary.

The basis for Chile's legal, political, and social order lay in its constitution, the first of which was conceived in 1833. Following the liberal tradition inspired by the example of the United States, the Constitution of 1833 attempted to combine the elements of parliamentary and presidential regimes by creating executive and legislative branches holding equal power.⁷ However, in contrast to the United States, the juridical power was invested in a judiciary completely dependent on the Executive.⁸ In 1855, the Chilean Civil Code was adopted. Drafted mostly by Andres Bello and inspired by the Napoleonic Code, Chile's Civil Code became a model for the rest of Latin America.⁹ Subsequent years witnessed the establishment of commercial and penal codes, a judicial code, and the adoption of civil marriage ceremonies, which further contributed to Chile's juridical foundation.

The 1925 Constitution was drafted largely in response to constitutional inadequacies evidenced by the rising power of the legislative branch, which provoked the armed forces to intervene directly in politics for the first time in Chilean history.¹⁰ The new constitution expanded the powers of the presidency at the expense of the legislative branch and finally established the judiciary as an autonomous state power, supreme in the administration of justice.¹¹ The rule of law was thus enshrined and the Supreme Court was given the power to declare the application of a law unconstitutional.¹² Political and civil rights were codified, due process of law and the right to a fair trial assured, and personal freedom guaranteed by a system of *Amparo* (habeas corpus).¹³

Chile's traditional respect for constitutional norms and human rights was also reflected in its adherence to the many international conventions and declarations that sought to establish international norms for the protection of human rights. A founding member of both the United Nations and the Organization of American States (OAS), Chile was one of the countries on the drafting committee which produced the 1948 Universal Declaration of Human Rights.¹⁴ Chile, as member of the OAS, was bound by the provisions of the

6. *Id.* From 1830 to 1973 Chile was under direct military rule for a total of thirteen months. *Id.* at 20.

7. Eugenio Velasco, *The Allende Regime in Chile: An Historical and Legal Analysis: Part I*, 9 LOY. L.A. L. REV. 480, 481 (1976) [hereinafter Velasco (I)].

8. *Id.* at 483 n.5.

9. *Id.*

10. *Id.*

11. *Id.* at 485.

12. CHILE CONST. (1925) art. 86, in 1 AMOS J. PEASLEE, CONSTITUTIONS OF NATIONS 412, 429 (William C. Wells & Dorothy W. Peaslee trans., 1950) [hereinafter CHILE CONST. (1925)].

13. *Id.* arts. 9 (political rights), 16 (*Amparo*), Ch. III (constitutional guarantees). The *Recurso de Amparo* grants individuals the right to petition the court on behalf of a detained person. The court may request the presentation of the detainee before his/her immediate release or the correction of illegalities. Article 16 of the Constitution provided that any person could present an appeal to the Appeals Court for a writ of *Amparo* on behalf of a person illegally detained. An appeal from the ruling of the Appeals Court would go the Supreme Court.

14. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., Part I, at 71, U.N. Doc. A/810 (1948); A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN THE WORLD* 25 (1989).

American Declaration on the Rights and Duties of Man and has also ratified the Geneva Conventions of 1948.¹⁵ In 1972, during the Allende regime, Chile ratified the International Covenant on Civil and Political Rights.¹⁶

III. THE PRECIPICE: THE ALLENDE YEARS

In the presidential elections of 1970, the Popular Unity (*Unidad Popular*), a coalition of leftist parties, including the Socialist and Communist parties of Chile, won thirty-six percent of the vote, sending their candidate, Socialist Senator Salvador Allende Gossens, to La Moneda presidential palace as the first freely elected Marxist head of state.¹⁷ With such a slim electoral victory, prudence would have suggested that Allende pursue a cautious, moderate program. Instead, President Allende immediately embarked on a massive campaign of political, social, and economic transformation which sent shock waves through Chilean society.

President Allende's professed goal, noble or foolhardy depending on one's political orientation, was the creation of a socialist state in Chile.¹⁸ Taking advantage of loopholes in the legal system, Allende seized private property such as estates and factories and transferred it to the state as "area[s] of social property."¹⁹ The legal loopholes utilized by the Allende regime consisted of a series of decree-laws from the 1930s which authorized the temporary requisition of products or basic goods "when abnormalities in the production process made it necessary for the public interest."²⁰ The Popular Unity government conveniently used these emergency laws to requisition not only products but the producing companies as well.

The same legislation also allowed government "intervention" into the management of a company or agricultural estate when a labor conflict paralyzed it and disrupted the national economy.²¹ The Allende government appointed intervenors who did nothing to resolve the labor problems, which resulted in the company or estate becoming the permanent property of the state.²² In some cases, pro-Allende workers would provoke the labor dispute, paving the way for surprisingly prompt governmental intervention.²³ Through this system Allende's government expropriated hundreds of Chilean firms and estates, many

15. American Declaration on the Rights and Duties of Man, 9th Int'l Conference of American States (1953).

16. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 174 (*entered into force* Mar. 23, 1976). However, the military regime, buttressed by the Supreme Court, consistently maintained that it was not bound by the Covenant, even though it had promulgated the Convention in 1976. *See also* Decree Law No. 778, *Diario Oficial*, Nov. 30, 1976; *infra* note 82 and accompanying text.

17. CONSTABLE, *supra* note 3, at 23.

18. Neal Panish, *Chile Under Allende: The Decline of the Judiciary and the Rise of a State of Necessity*, 9 LOY. L.A. INT'L & COMP. L.J. 693, 698 (1987). For a harsh criticism of the Allende regime, see SUZANNE LABIN, CHILE: THE CRIME OF RESISTANCE (1982).

19. Eugenio Velasco, *The Allende Regime in Chile: An Historical and Legal Analysis: Part II*, 9 LOY. L.A. L. REV. 711, 714-23 (1976) [hereinafter Velasco (II)].

20. *Id.* at 714.

21. *Id.*

22. *Id.* at 715.

23. *Id.*

foreign-owned companies, and nationalized the banking system and copper industry.²⁴

The great ideological divide which was splintering the nation also affected the Chilean judiciary. The courts were perceived as conservative and even reactionary by the left-leaning Allende government.²⁵ On the other hand, Chilean judges were offended by Allende who, they claimed, openly flouted legal procedures and abused executive authority in his drive to build socialism.²⁶ When peasants and workers seized estates and factories under Allende's orders, the courts sided with their owners and denounced Allende's circumvention of property laws.²⁷ Judges drafted orders admonishing the workers and peasants to return the expropriated land and factories to their rightful owners, only to be overruled by Allende's Interior Ministry, which refused to authorize police forces to carry out the orders.²⁸

Tension mounted towards the end of Allende's presidency. The Supreme Court became the target of severe and disparaging criticism from Popular Unity officials. Just months before Allende was ousted a war of words broke out between the judiciary and the executive branch, best exemplified by an exchange of letters in which the Supreme Court accused the government of orchestrating a complete "breakdown of the legal order in the country."²⁹ This mutual lack of respect and outright hatred laid the foundation for the judiciary's support of the military coup and helped explain its subsequent alliance with the Pinochet regime. In retaliation for having its constitutional authority stolen from it by the Allende regime, the Chilean judiciary handed itself over willingly to the dictatorship that followed.

IV. IN THE IRON HAND OF DICTATORSHIP: PINOCHET'S CHILE

The military takeover of Chile was quick and relatively bloodless; the real bloodshed occurred after the military assumed firm control.³⁰ The immediate victims of the coup and those that were rounded up in the aftermath included former members of the Popular Unity government, leftist party members, and peasant and union organizers.³¹ Many of these were promptly executed. In the days following the coup, the Chilean military assumed complete political and judicial control of the nation and embarked on a reign of terror, determined to

24. LABIN, *supra* note 18, at 31; Panish, *supra* note 18, at 698 n.39.

25. Robert G. Vaughn, *Proposals for Judicial Reform in Chile*, 16 *FORDHAM INT'L L.J.* 577, 582 (1992-93).

26. CONSTABLE, *supra* note 3, at 116.

27. *Id.*

28. Panish, *supra* note 18, at 700-01.

29. Velasco (II), *supra* note 19, at 726 (quoting a letter to President Allende from the Chilean Supreme Court dated May 1973). A July 1973 letter from the Supreme Court was especially vicious: "The President has undertaken the task, specially difficult and painful for him since he only knows the Law through hearsay, of determining for this Supreme Court the rules for the interpretation of the Law, a duty which . . . belongs exclusively to the judiciary and not the executive." *Id.* at 726-27.

30. INTERNATIONAL COMMISSION OF JURISTS & CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS, CHILE: A TIME OF RECKONING 51 (1993) [hereinafter *INT'L COMM.*].

31. *Id.* at 51-52. Many people supported the coup of September 11, including the upper and middle classes, the Church, the judiciary, and the Chilean Bar Association.

eradicate all remaining vestiges of the Allende years. Under the guise of unrelenting states of emergency, the military and other counter-subversive agencies weeded out suspected leftists and sympathizers through a campaign of abductions, torture, and executions, and managed to keep the Chilean populace cowed and submissive for more than a decade.

A. *The Terrible Years: 1973-1978*

1. Rule by Decree

The military government that took power, a junta comprising the heads of the army (General Pinochet), navy, air force, and *Carabineros* (paramilitary police), began issuing decree laws within days of the coup.³² In its first decree the junta stated that it had assumed power in order to restore Chile to democracy and the rule of law which it claimed had been trampled under Allende.³³ The same decree also appointed General Pinochet as President of the junta, with power to exercise executive functions.³⁴ The new government declared an immediate state of siege and defined it as a "state or time of war" in order to allow the military tribunals to assert jurisdiction over civilians under the Code of Military Justice.³⁵ The same decrees expanded the use of the death penalty.³⁶ A week later this state of constitutional exception was reinforced by a state of emergency which was to last until 1988.³⁷

The new government assumed legal power just as discretely. It abolished the Congress by decree,³⁸ and conferred on itself the executive, legislative, and constituent powers prescribed by the Constitution.³⁹ The junta then set about creating an authoritarian legal framework by decree,⁴⁰ releasing a torrent of

32. The military regime employed Decree Laws (decree laws) in its legislative functions. These are norms dictated by a *de facto* government which is not constitutionally established. In contrast, a Supreme Decree is one issued by a legitimate president. Supreme Decree No. 355 issued by President Aylwin established the National Commission on Truth and Reconciliation. REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 74 n.j (Phillip Berryman trans., 1993) [hereinafter REPORT].

33. Decree Law No. 1, *Diario Oficial*, Sept. 11, 1973.

34. *Id.* See also Genaro Arriagada Herrera, *The Legal and Institutional Framework of the Armed Forces in Chile*, in MILITARY RULE IN CHILE 130 (J.S. Valenzuela & Arturo Valenzuela eds., 1986). In 1974, Pinochet forced a decree through the junta naming himself President of Chile. Decree Law No. 806, *Diario Oficial*, Dec. 16, 1974.

35. Decree Law No. 3, *Diario Oficial*, Sept. 11, 1973; Decree Law No. 5, *Diario Oficial*, Sept. 12, 1973. See CODE OF MILITARY JUSTICE art. 81 (Chile). This state of war persisted until September 9, 1975. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, THE SITUATION OF HUMAN RIGHTS IN CHILE 185 (1985) [hereinafter IACHR].

36. Decree Law No. 5, *Diario Oficial*, Sept. 12, 1973.

37. Decree Law No. 4, *Diario Oficial*, Sept. 11, 1973.

38. REPORT, *supra* note 32, at 58.

39. Decree Law No. 128, *Diario Oficial*, Nov. 16, 1973; Decree Law No. 527, *Diario Oficial*, Dec. 17, 1974.

40. The first legal challenge to the new "order" created by the junta questioned the constitutional validity of some of the early decrees that substantially affected rights guaranteed by the 1925 Constitution. To cure this constitutional "annoyance," in 1974 the junta issued Decree No. 788, which retroactively legalized the actions taken by the security forces under prior decrees by giving those decrees the status of constitutional amendments, thus providing *post facto* constitutionality for decrees, irrespective of whether they conflicted with the Constitution or not. Decree Law No. 788, *Diario Oficial*, Dec. 4, 1974. See INT'L COMM., *supra* note 30,

legislation that partially suspended all mayors,⁴¹ placed all government workers on "interim status,"⁴² banned labor unions, outlawed leftist parties,⁴³ suspended all other parties,⁴⁴ imposed media censorship, and annulled all electoral registration lists.⁴⁵ In 1975, the junta issued decrees amending the 1925 Constitution to allow the security forces to detain citizens *incomunicado* for five days without charging them with a crime and to establish procedures for the use of military tribunals.⁴⁶

Mass detentions, executions, and "disappearances" followed. Raids on suspected leftist strongholds continued day after day until over 45,000 people were being held for interrogation in army barracks, training camps, and soccer stadiums.⁴⁷ By December of 1973, some 1,500 civilians had been killed either in confrontations, torture chambers, or executions by firing squads after summary sentencing by military war tribunals.⁴⁸

In an attempt to assuage mounting international and domestic criticism, the junta, in 1976, issued a set of four "constitutional acts" which sought to reaffirm basic concepts of law, democracy, rights, and duties. These acts were viewed by the government as the first step in the implementation of a new constitution which would provide legitimacy for the existing state of affairs and convince critics that the military regime, in fact, respected human rights.⁴⁹ But what the government gave with one hand it took away with the other. For example, Constitutional Act No. 3 was an impressive catalogue of rights, freedoms, and duties of Chilean citizens. It even envisioned the right to *Amparo* appeals.⁵⁰ But Act No. 4 laid out the framework through which these same rights could be restricted, suspended, or lost during states of exception.⁵¹ Moreover, in 1977, the junta modified the Acts and declared that the right of *Amparo* appeal was inapplicable during times of emergency.⁵²

2. The DINA

The Directorate of National Intelligence, known by its Spanish acronym DINA, was established in June 1974 under Decree No. 521 as an autonomous,

at 80; REPORT, *supra* note 32, at 75.

Decree law number 788 was nicknamed the "Varsol Law" after a local household detergent. CONSTABLE, *supra* note 3, at 128. It provided the courts with the legal basis for the rejection of a host of appeals questioning the constitutional validity of many prior decrees. INT'L COMM., *supra* note 30, at 80.

41. Decree Law No. 25, *Diario Oficial*, Sept. 19, 1973.

42. Decree Law No. 6, *Diario Oficial*, Sept. 12, 1973. Three hundred thousand Chilean workers lost their jobs for political reasons between 1973 and 1974. AN AMERICAS WATCH REPORT, THE VICARÍA DE LA SOLIDARIDAD IN CHILE 12 (Dec. 1987) [hereinafter VICARÍA].

43. Decree Law No. 77, *Diario Oficial*, Oct. 13, 1973.

44. Decree Law No. 78, *Diario Oficial*, Oct. 17, 1973.

45. Decree Law No. 130, *Diario Oficial*, June 14, 1974.

46. Decree Law Nos. 1008, 1009, *Diario Oficial*, May 8, 1975.

47. CONSTABLE, *supra* note 3, at 20.

48. *Id.* "In early 1990, mass graves were discovered near Pisagua containing a number of cadavers with their hands bound and bullet holes in their heads." *Id.* at 34.

49. REPORT, *supra* note 32, at 83-84.

50. *Id.* at 84-85.

51. *Id.* at 84.

52. *Id.* at 85.

self-sufficient intelligence and counter-insurgency agency beholden only to General Pinochet.⁵³ From its inception, the primary role of the DINA was the liquidation of political parties and "enemies of the state" considered "dangerous" to national security.⁵⁴ "Disappearances" became the trademark of the DINA, designed to terrorize political opponents and cow the citizenry.⁵⁵ Victims were seized without arrest warrants, often in broad daylight and in front of witnesses, including family members, and held *incommunicado* for long periods of time.⁵⁶ Torture was practiced systemically by the DINA during interrogations.⁵⁷

By August 1977, the DINA had worn out its welcome.⁵⁸ In that year it was dissolved and a new, "cleaner" agency emerged to take its place - the National Center of Information (CNI).⁵⁹ The CNI was subordinate to the Ministry of Interior instead of being directly linked to the junta as was the DINA.⁶⁰ Although its powers were identical to those exercised by the DINA, the CNI adopted a subtler method of repression and terror. Instead of abducting people in broad daylight, the CNI chose to stage elaborate "shoot-outs" with alleged leftist terrorists.⁶¹ The CNI was officially declared a part of the Armed Forces for all jurisdictional and disciplinary purposes.⁶²

B. Institutionalization and Backlash: 1978-1989

In March 1978, the state of siege in existence since September 11, 1973, was lifted,⁶³ but the state of emergency remained in force. Decree No. 1877 still allowed the detention of citizens for up to five days, and systematic torture continued.⁶⁴ During this period military rule was consolidated and institutionalized. The Amnesty Law⁶⁵ was issued in 1978 and the new constitution promulgated in 1981.

53. INT'L COMM., *supra* note 30, at 57-58. See Decree Law No. 521, *Diario Oficial*, June 14, 1974. This decree was published in two parts. Three "secret" articles, which gave the DINA discretionary powers to raid premises and detain suspects, were published separately in a limited edition supplement to the *Diario Oficial*. INT'L COMM., *supra* note 30, at 58. The military government allegedly created ninety-eight secret or partly-secret laws between 1973 and 1985. CONSTABLE, *supra* note 3, at 129.

54. INT'L COMM., *supra* note 30, at 59. The DINA even had a foreign branch which was responsible for the 1976 murder of Chilean exile and former Popular Unity official, Orlando Letelier, and a colleague Ronnie Moffit. REPORT, *supra* note 32, at 611-12.

55. INT'L COMM., *supra* note 30, at 60.

56. *Id.*

57. *Id.*

58. Pressure by the United States, under then newly-elected president Jimmy Carter, was regarded as partially responsible for the elimination of the DINA. REPORT, *supra* note 32, at 632.

59. The CNI was created by Decree Law No. 1878, *Diario Oficial*, Aug. 13, 1977. Decree Law No. 1876, *Diario Oficial*, Aug. 13, 1977, abolished the DINA by repealing Decree Law No. 521. REPORT, *supra* note 32, at 88.

60. AN AMERICAS WATCH REPORT, HUMAN RIGHTS AND THE "POLITICS OF AGREEMENTS" 41 (July 1991) [hereinafter POLITICS OF AGREEMENTS].

61. INT'L COMM., *supra* note 30, at 66.

62. "The law [Decree Law 2882] was enacted specifically to protect from prosecution a civilian collaborator of CNI, a doctor who had certified the good health of a torture victim, Federico Renato Alvarez Santibáñez, soon before the victim died." POLITICS OF AGREEMENTS, *supra* note 60, at 41 n.68.

63. INT'L COMM., *supra* note 30, at 64.

64. *Id.* at 64-65.

65. See *infra* part V.C.

During this period, increasingly violent armed insurrectionary activity began to crop up around the country. The government responded by launching a new wave of repression. Shadowy, right-wing death squads with links to the secret police, such as the "September 11th Commandos," named for the date of the military coup, emerged to threaten, intimidate, and kidnap opponents.⁶⁶

The Arms Control Law, originally enacted in 1972 under the Allende regime,⁶⁷ ironically became a major legal weapon in the government's battle against sedition. The law was modified in 1977 by Decree No. 400, which stipulated that persons charged under the law would be subject to the jurisdiction of the military courts.⁶⁸ The penalties for violation of the Arms Control Law had already been increased drastically by an earlier decree issued in 1973, which prescribed the death penalty.⁶⁹

A decline in the economy, coupled with a concomitant increase in political opposition and protest, resulted in a backlash of repression. Pinochet was met with increasing demands for democratic, free elections, and within two days after a paralyzing strike in late October 1984, he issued a state of emergency and a subsequent state of siege pursuant to the authority vested in him by the 1980 Constitution.⁷⁰ Ten days later, the military government added a third layer of repression by declaring a State of Danger of Disturbance to Internal Peace, the new state of emergency created by the 1980 Constitution.⁷¹

Pinochet also introduced a new Anti-Terrorist Law in May 1984 which drastically increased sanctions and expanded the use of the death penalty to sixteen offenses labeled "terrorist" by the State.⁷² This law permitted the security forces to make arrests and searches without warrants, hold detainees *incommunicado* for thirty days without officially charging them of any crime, and place suspects within the jurisdiction of the military courts once again.⁷³ In addition, the law also empowered the CNI to carry out all aspects of the investigation on behalf of the military tribunals.⁷⁴

As democratic opposition activity surged in 1985 and 1986 and terrorist activity increased, cases of government-instigated torture, executions, and "disappearances" surfaced again.⁷⁵ Then in 1986, General Pinochet himself was attacked as his motorcade, returning to Santiago from the countryside, was

66. AN AMERICAS WATCH REPORT, HUMAN RIGHTS CONCERNS IN CHILE 3 (Mar. 1987) [hereinafter HUMAN RIGHTS CONCERNS].

67. INT'L COMM., *supra* note 30, at 67.

68. *Id.*

69. *Id.*

70. Int'l Commission of Jurists, *Human Rights in the World*, 36 REV. 1 (Niall MacDermot ed., 1986).

71. *See infra* note 90.

72. Decree Law No. 18.314, *Diario Oficial*, May 17, 1984. *See* Int'l Commission of Jurists, *Legal Instruments of Political Repression in Chile*, 34 REV. 57 (1985).

73. Decree Law No. 18.314, *Diario Oficial*, May 17, 1984, arts. 10, 11, 13. *See* INT'L COMM., *supra* note 30, at 69, 95. This expansion of the jurisdiction of military tribunals also had defensive implications. *See infra* note 102 and accompanying text.

74. Decree Law No. 18.314, *Diario Oficial*, May 17, 1984, art. 12.

75. William D. Zabel, et al., *Human Rights and the Administration of Justice in Chile*, 42 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 435 (May 1987).

ambushed and five of his bodyguards killed.⁷⁶ Infuriated, Pinochet reintroduced the state of siege, which remained in effect for four months while both government and right-wing death squad violence erupted anew.⁷⁷

The security forces acclimated themselves to the new, visible, and high profile forms of non-violent protest by combining full-scale crowd control measures, such as the use of water cannons, with large-scale raids on Chilean neighborhoods — particularly poor neighborhoods (*poblaciones*).⁷⁸ In these sweeps, known as *allamientos*, the security forces would round up hundreds of “suspects” and then interrogate them.⁷⁹ The *Carabineros* estimated that they alone arrested almost 900,000 people during 1985,⁸⁰ while *Investigaciones*, the civil detective force, claimed to have detained 80,000 in 1986.⁸¹ While the majority of these detainees were subsequently released, cases of government instigated torture, executions and “disappearances” also surfaced again during this period of hostility and repression.⁸²

C. *The Human Rights Toll*

When the Rettig Commission finished its Report in 1991, it had catalogued over 2,100 Chilean citizens that had been executed or had “disappeared” during the military regime.⁸³ Half of these victims had been sentenced to death by military courts (War Councils) in the months following the coup, shot while trying to escape, or killed during the increasingly violent protests that were frequent after 1983. The other half, less about 200 military personnel killed during the regime, simply “disappeared.”⁸⁴

The conduct of the military regime during its long reign violated many fundamental principles of human rights provided by both the 1925 and the 1980 constitutions. The rights to personal freedom and integrity, due process and a fair trial, freedom of expression, information, and association, as well as the fundamental right to life, were all ruthlessly abridged during the dictatorship. The military regime flouted the law and ignored even the constitution it had created in its prosecution of ideological warfare, all based on states of exception which lasted over fifteen years.

The actions of the Pinochet regime also violated several international conventions on the protection of human rights to which Chile was a party. Many actions taken by the government under its “legal” authority violated provisions of the International Covenant on Civil and Political Rights, which

76. INT'L COMM., *supra* note 30, at 71.

77. Zabel, *supra* note 75, at 435-36. Following the attempt, four opposition party members were killed, allegedly by the self-styled “September 11th Commandos” as “eye for an eye” retribution. The Commandos’ fifth victim, a lawyer for the *Vicaría*, barely escaped with his life. INT'L COMM., *supra* note 30, at 71-72.

78. Zabel, *supra* note 75, at 435.

79. *Id.* A single such *allamiento* resulted in the arrest of 2,000 men from the same neighborhood. Ninety-four percent were later released. HUMAN RIGHTS CONCERNS, *supra* note 66, at 17-18.

80. HUMAN RIGHTS CONCERNS, *supra* note 66, at 17. Note that this figure represents eight percent of the Chilean population.

81. *Id.*

82. *Id.* at 11.

83. REPORT, *supra* note 32, at 883.

84. *Id.* app. II.

Chile ratified in 1972 under Allende.⁸⁵ The regime also violated the basic tenets of the 1948 Geneva Conventions, the Universal Declaration of Human Rights, the American Convention on Human Rights,⁸⁶ and the American Declaration on the Rights and Duties of Man. All of these were designed to protect similar rights, such as the rights to life, personal liberty, and due process enshrined in Chile's constitutions.

V. INSTITUTIONALIZATION OF TERROR: PINOCHET'S LEGAL SYSTEM

The military dictatorship in Chile erected a complex web of legal instruments with which to repress the Chilean people. Camouflaged by states of exception that revoked constitutional rights, the security forces were able to operate offensively without restrictions, utilizing their own military justice system to prosecute and then imprison or execute civilians suspected of subversion. The military's defensive strategy, designed to cover the tracks left during the early, bitter years of repression, was centered around the Amnesty Law, which, to this day, obstructs the prosecution of those accused of human rights abuses occurring prior to 1978. This law, combined with the Anti-Terrorist Law of 1984 which transfers jurisdiction over crimes committed by military personnel to the military's own tribunals, has effectively insulated the military from retribution for even the most severe human rights offenses. Of course, this legalized impunity could never have occurred without the complete complicity of a highly politicized and subservient judiciary.

A. *The States of Exception*

Ironically, several provisions of the 1925 Constitution were used by the junta in the early days of the coup to impose order. These included the constitutionally mandated states of exception.⁸⁷ The Constitution of 1925 conferred upon the national Congress the power to declare a state of constitutional exception.⁸⁸ However, these states of exception could only remain in force for less than six months, and they permitted very limited restrictions on public freedoms.⁸⁹

In a series of decrees, the government created a complex hierarchy of states of exception, which could be declared by the government in cases of internal disturbance, subversion, or public calamity. These included the state of siege, the most repressive, the state of emergency, and in the wake of the 1980 Constitution, the State of Danger of Disturbance to Internal Peace. The states of exception were renewed constantly, with the state of emergency in force from 1973 until 1988 when the plebiscite was held.

85. See Int'l Commission of Jurists, *supra* note 72, at 59. Though promulgated as law by the Pinochet regime in 1976, the law was not published in the *Diario Oficial* until 1989. This minor omission provided the Supreme Court with the legal basis to reject human rights appeals based on the International Covenant on Civil and Political Rights. See *infra* part V.E.3.

86. At that time, Chile was not a party to the American Convention on Human Rights. IACHR, *supra* note 35, at 150.

87. CHILE CONST. (1925), *supra* note 12, arts. 44, 72.

88. *Id.* art. 72.

89. IACHR, *supra* note 35, at 109.

The state of siege, which lasted from 1973 until 1978, and which was reinvoked in 1980, 1984, and 1986 for brief periods, provided the junta with a powerful weapon with which to impose its "order" on Chilean society. The Executive was empowered to arbitrarily detain citizens, censor the press, restrict free movement, and expel people from the country.⁹⁰ It could also suspend the rights of association, freedom of information, expression, and assembly, as well as the right to *Amparo* appeals.⁹¹

The state of emergency provided the Executive with the power to suspend or restrict personal freedom, the right of assembly, freedom of information and the right to work.⁹² The authorities could also restrict the right of association and impose press censorship.⁹³ The third state of exception, that of Danger of Disturbance to Internal Peace, was created by the 1980 Constitution and will be discussed below.

B. *The Military Tribunals*

One of the major weapons employed by the Pinochet regime in its legal war against political adversaries was the use of military tribunals to prosecute suspected enemies of the state and to later provide a defensive shield for the regime when assailed for human rights abuses. Through the expansion of the jurisdiction of the military tribunals, the Executive was able to subvert the judicial system by infiltrating, and gradually usurping, the machinery of justice.

The military regime employed two different types of tribunals with contrasting objectives in its legal war with the "enemies" of the state. In order to prosecute its offensive war against the leftists, the junta established wartime military tribunals (so-called War Councils - *Consejos de Guerra*) under its state of siege powers.⁹⁴ These courts, under the direct supervision of the local military zone commander,⁹⁵ had jurisdiction over civilians as well as military personnel during times of war.⁹⁶ The second prong of the regime's strategy, its defensive plan, involved the utilization of peace-time military courts to steal jurisdiction from civilian courts over cases involving alleged human rights abuses by members of the security forces.⁹⁷ Once in the hands of the military courts, these cases were, with very few exceptions, summarily closed.

90. See CHILE CONST. (1980) art. 39, in 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CHILE (Albert P. Blaustein & Gisbert H. Flanz eds., 1991) [hereinafter CHILE CONST. (1980)].

91. *Chile, Second Periodic Report*, [Apr. 5, 1984] 2 Y.B. HUM. RTS. COMM. 379, 380-81, U.N. Doc. CCPR/C/32/Add.1 [hereinafter Y.B. HUM. RTS. COMM.].

92. *Id.* at 380.

93. *Id.*

94. The junta had declared a "state of war" in conjunction with its installation of a State of Siege under Decrees 3 and 5 of September 1973. See *supra* note 35 and accompanying text.

95. CODE OF MILITARY JUSTICE art. 16 (Chile).

96. *Id.* arts. 71, 72, as reinforced by Decree Law No. 5, *Diario Oficial*, Sept. 12, 1973, and Decree Law No. 1009, *Diario Oficial*, May 8, 1975. See also Thomas O'Keefe, *The Use of the Military Justice System to Try Civilians in Chile*, 61 N.Y. ST. BAR J. 46 (1989); IACHR, *supra* note 35, at 178, 184-85.

97. CODE OF MILITARY JUSTICE art. 5(3) (Chile), as modified by Decree Law No. 640, *Diario Oficial*, Sept. 10, 1974.

The War Councils, each composed of seven military officers,⁹⁸ dispensed justice under the special procedural rules for times of war in the Code of Military Justice. These regulations severely limited rights of defense, procedural guarantees, and provided for much harsher sentences, including the death penalty.⁹⁹ The defendants were not allowed to cross-examine prosecution witnesses, and contrary to principles of due process, there was no right to an appeal from a War Council sentence.¹⁰⁰ Most of the officers enlisted as judges lacked legal training.¹⁰¹ There was no minimum time allowed for the defense to prepare its case, and evidence could be kept secret by the military prosecutors.¹⁰² In one case, a lawyer was given less than twenty-four hours to review the cases and prepare the defenses of twenty-five suspected leftists, who were subsequently convicted and sentenced to twenty years in prison.¹⁰³

Within weeks of the coup, War Councils were functioning in cities and towns throughout Chile, with an estimated 6,000 Chileans tried by these courts during the first three years of military rule.¹⁰⁴ The War Councils were responsible for many of the executions following the September coup, and approximately 200 suspects were sentenced to death under their jurisdiction.¹⁰⁵

The constitutional basis for the utilization of the War Councils was suspect from the beginning. Under the Code of Military Justice, War Councils can only be established during a time of external or internal war in which organized military forces are involved.¹⁰⁶ The fact that no such organized force existed during or after the coup led the Truth Commission to denounce the tribunals as "illegal" in its 1991 Report.¹⁰⁷ The Commission also criticized the practice of the military tribunals in sentencing "enemies of the state" for alleged crimes they had committed prior to the "state of war" being in effect.¹⁰⁸ War Councils, in the wake of the coup, had routinely imposed the death penalty for actions allegedly taken by the accused before September 11, 1973 when the state of siege was installed.¹⁰⁹ In doing so the military courts violated Article 11 of the 1925 Constitution as well as the Article 18 of the Criminal Code enshrining the universally accepted prohibition of *ex post facto* laws.

The legal fictions underlying the utilization of war tribunals were further attenuated by a 1981 decree stipulating that crimes which resulted in the death

98. IACHR, *supra* note 35, at 185.

99. CHILEAN COMMISSION ON HUMAN RIGHTS, REPORT ON HUMAN RIGHTS IN CHILE 1984-1985, at 7, 13 (1985) [hereinafter CHILEAN COMMISSION, REPORT].

100. *Id.* at 7; REPORT, *supra* note 32, at 102-03.

101. INT'L COMM., *supra* note 30, at 55.

102. CODE OF MILITARY JUSTICE art. 130 (Chile). The Code of Military Justice does not stipulate a minimum period in which a lawyer may prepare a defense; the grant of that period is at the discretion of the military commander convoking the War Council. *Id.* See IACHR, *supra* note 35, at 191.

103. CONSTABLE, *supra* note 3, at 118.

104. *Id.*

105. *Id.*

106. CODE OF MILITARY JUSTICE arts. 73, 419 (Chile); REPORT, *supra* note 32, at 99. In the United States, military tribunals may try civilians only during foreign invasion or civil war during which civil authority does not exist. 10 U.S.C. § 802(a)(10) (1988).

107. REPORT, *supra* note 32, at 99-100.

108. *Id.* at 101.

109. *Id.*

or serious injury of members of the security forces would be dealt with by the wartime military tribunals, even though no "state of war" officially existed.¹¹⁰ Human rights lawyers argued vigorously that to establish the tribunals in peacetime was a "juridical fiction," but the Supreme Court upheld the action in a 1985 decision.¹¹¹

The peacetime courts were also structured under military hierarchy with the courts of first instance (*Juzgado Institucional*) comprised of one military judge.¹¹² The military appeals courts (*Cortes Martiales*) were composed of three military judges and two civilian judges and usually issued verdicts with a 3-2 military majority.¹¹³ The jurisdiction of peacetime military tribunals was gradually expanded to encompass all actions taken by the security forces.¹¹⁴ For example, the Anti-Terrorist Law of 1984 added to the jurisdiction of peacetime military courts common crimes committed by military personnel in "military or police premises," which it defined as "any duly delimited space, vehicle . . . in which a military or police authority performs his function."¹¹⁵ Thus, the human rights violations committed by security forces in army barracks, training camps and other detention centers, where the most egregious violations occurred, were effectively removed from the purview of civilian justice.

The military tribunals completely lacked judicial autonomy. The War Councils consisted entirely of military officers with no legal training who were subject to military discipline.¹¹⁶ If a ruling displeased their superiors, military judges could be removed or retired for "disloyalty."¹¹⁷ The three military judges on the peacetime military appeals court, under prior law, had permanent tenure and thus enjoyed limited independence. This situation was changed in 1977 when the junta passed a decree amending the Code of Military Justice to revoke the permanent tenure of the judges and place them on active service, subordinate to their military commanders.¹¹⁸ Any notions of judicial independence and "impartiality" were discarded as the tribunals, fulfilling their military functions, waged a legal war on ideological grounds.

In theory, the Chilean Supreme Court enjoys supervisory powers over the military tribunals under Articles 80 and 86 of the Constitution, which state that the Supreme Court "has direct supervision. . . over all the Tribunals of the Nation."¹¹⁹ However, the Supreme Court eagerly yielded this power in the immediate aftermath of the coup when it declared that it had no competence to

110. Decree Law No. 3655, *Diario Oficial*, Mar. 10, 1981. The state of war had been lifted in September 1975.

111. Decision of Jan. 29, 1985, Supreme Court. See CHILEAN COMMISSION, REPORT, *supra* note 99, at 6, 13.

112. CODE OF MILITARY JUSTICE art. 16 (Chile).

113. INT'L COMM., *supra* note 30, at 91-92; O'Keefe, *supra* note 96, at 45.

114. IACHR, *supra* note 35, at 175-82.

115. Decree Law No. 18.314, *Diario Oficial*, May 17, 1986.

116. IACHR, *supra* note 35, at 184; POLITICS OF AGREEMENTS, *supra* note 60, at 39.

117. CONSTABLE, *supra* note 3, at 134.

118. Decree Law No. 1769, *Diario Oficial*, Apr. 30, 1977. See IACHR, *supra* note 35, at 184; O'Keefe, *supra* note 96, at 45.

119. CHILE CONST. (1925), *supra* note 12, art. 86. See also ORGANIC CODE OF TRIBUNALS arts. 108, 540 (Chile); CODE OF MILITARY JUSTICE art. 70-A (Chile).

supervise the War Councils.¹²⁰ This abdication of its supervisory role over the military courts was subsequently codified in the 1980 Constitution.¹²¹

Even after the lifting of the state of siege in 1978, which in "theory" legally removed the immunity of the military tribunals, the usurpation of judicial power by the military, and hence by the Executive branch, continued unabated. A host of decree laws passed by the junta since 1973 had so expanded the jurisdiction of the military tribunals that even journalists could be brought before such a court for defaming the integrity of the military.¹²² As mentioned, the Arms Control Law had been amended in 1977 to place violators under the authority of the military courts, and the 1984 Anti-Terrorist Law also provided for military jurisdiction. By the mid-1980s, ninety-five percent of those processed by the military courts were civilians.¹²³

The wide authority of the military tribunals gave enormous power to military prosecutors, who collaborated closely with the secret police and often flatly refused to cooperate with civilian judges.¹²⁴ In 1980, the Office of the General Military Prosecutor was created and given broad powers to initiate prosecutions as well as oversee and intervene in military trials.¹²⁵ This office contributed to the streamlining of military prosecution, as it provided the command control necessary for mobilized justice. Ad Hoc Military Prosecutors became responsible, with the close collaboration of the CNI, for the entire investigation of a case and for the accumulation of evidence.¹²⁶ The investigations and trials run by these Ad Hoc Military Prosecutors provoked the United Nations Special Rapporteur on Chile to denounce them as a "particularly odious and unjust instrument to repress and cause insecurity to the citizens."¹²⁷

C. The 1978 Amnesty Law

One of the most formidable obstacles faced by the defenders of human rights in Chile has been the Amnesty Law promulgated by the military government in 1978.¹²⁸ This law effectively obstructs investigations into human rights crimes committed during the early, and harshest years of the regime. The law bestows amnesty on all persons who took part in politically motivated criminal acts while the state of siege was in effect between 1973 and

120. Decisions of Nov. 13, 1973 and Aug. 21, 1974, Supreme Court. See *infra* note 157 and accompanying text.

121. CHILE CONST. (1980), *supra* note 90, art. 79.

122. Decree Law No. 18,314, *Diario Oficial*, May 17, 1986 (anti-terrorist law) art. 1(24). See INT'L COMM., *supra* note 30, at 91; O'Keefe, *supra* note 96, at 46-47. Journalists were sent to prison for printing cartoons of military officials. CONSTABLE, *supra* note 3, at 135. For examples of these decrees see Decree Law No. 77, *Diario Oficial*, Oct. 8, 1973; Decree Law No. 81, *Diario Oficial*, Nov. 6, 1973; Decree Law No. 604, *Diario Oficial*, Aug. 9, 1974; Decree Law No. 890, *Diario Oficial*, Aug. 26, 1975; Decree Law No. 400, *Diario Oficial*, Dec. 6, 1977.

123. O'Keefe, *supra* note 96, at 44.

124. CONSTABLE, *supra* note 3, at 136.

125. INT'L COMM., *supra* note 30, at 91. See Decree Law No. 3425, *Diario Oficial*, June 14, 1980.

126. INT'L COMM., *supra* note 30, at 96.

127. *Report on the Situation of Human Rights in Chile*, U.N. Commission on Human Rights, U.N. Doc. E/CN.4/1988/7 (1988).

128. Decree Law No. 2191, *Diario Oficial*, Apr. 19, 1978.

1978.¹²⁹ In effect this law provides a legal pretext for the courts to close investigations into deaths and “disappearances,” thereby ensuring impunity for those responsible. The utility of this law for the Pinochet regime is obvious, and the law is still invoked today to block prosecution of present and former military officials.¹³⁰

The interpretation of this law by the courts has resulted in horrible consequences for relatives of the dead and “disappeared.” The courts, under the direction of a Supreme Court ruling, have consistently used the law to close cases at the investigatory stage, before indictments are handed down.¹³¹ This obviously conflicts with the spirit of the law as a criminal cannot be truly “amnestied” without ever having been found guilty of the commission of some crime.¹³² Thus the law forecloses the possibilities for many relatives of victims to at least discover the truth surrounding the crime which took place against their loved ones.

D. Pinochet's Constitution

The Constitution, authorized by General Pinochet and approved by a national plebiscite conducted under both States of Siege and Emergency, represented a radical departure from Chile's past democratic traditions. States of exception were codified, freedom of the press and association were restricted, and a Council of National Security was established and given broad powers to intervene in matters involving “national security,” the definition of which was left intentionally vague.¹³³ Acting with foresight, Pinochet added provisions to the Constitution that guaranteed the military a special role in society and effectively removed it from the control of elected government officials.¹³⁴

The new Constitution greatly expanded the power of the Executive to declare states of exception without consultation or review. Transitory Article 15 gave the President the power to pronounce a state of emergency at his discretion and authorized him to declare a state of siege with the approval of the junta and corresponding revocation of the right to *Amparo* appeals.¹³⁵ The Constitution created a third class of exception: the “Danger of Disturbance to Internal Peace”, under which the President was empowered to detain Chilean citizens for up to twenty days without arraignment, expel “dangerous” persons from the

129. *Id.* art. 1.

130. See *infra* note 266 and accompanying text. One hundred human rights cases have been permanently closed and 800 temporarily closed because of the Amnesty Law. U.S. Dep't of State, *Chile Human Rights Practices, 1994*, Mar. 1995 [hereinafter Dispatch 1995]. However, the Amnesty Law was recently struck down by a Santiago appeals court. See *infra* note 282 and accompanying text.

131. See *infra* notes 178-80 and accompanying text.

132. *Id.*

133. CHILE CONST. (1980), *supra* note 90, art. 95. The Council of National Security is composed of the President, at that time, Pinochet, the commanders of the army, navy, air force and Carabineros, and the presidents of the Senate and Supreme Court. *Id.* See IACHR, *supra* note 35, at 36-37; INT'L COMM., *supra* note 30, at 28.

134. CHILE CONST. (1980), *supra* note 90, art. 93; INT'L COMM., *supra* note 30, at 33. The insulation of the military from civilian control has presented problems for the new democratic leaders of Chile. See *infra* notes 278-81 and accompanying text.

135. CHILE CONST. (1980), *supra* note 90, arts. 15, 40-41. See also INT'L COMM., *supra* note 30, at 67.

country, and confine individuals to restricted areas of the country for up to three months.¹³⁶ The power to declare this new state of exception rested exclusively with the President, and was not susceptible to review or appeal, "except to the authority which decreed them," i.e., General Pinochet himself.¹³⁷ This provision, preventive in nature, allowed the Executive to suspend constitutional rights even when no disturbance had in fact occurred, based on his sole interpretation of a situation.¹³⁸ Furthermore, the state would remain in force for six months and could be renewed indefinitely by the President at his discretion.¹³⁹

The new Constitution formalized the exemption of military tribunals from the supervision and control of the Supreme Court.¹⁴⁰ The protective remedy of *Amparo* established by the Constitution was also weakened and, of course, held inapplicable in states of exception.¹⁴¹ The new Constitution also institutionalized ideological warfare against the left, criminalizing doctrines considered to "attack the family, or propagate . . . a conception of the society, the State or the legal order of a totalitarian character or based on the class struggle."¹⁴² With such a vague definition, even groups advocating the liberalization of divorce laws could be declared illegal.

The powers conveyed on the Executive by the new constitution were so sweeping, the citizen's recourse against them so minimal, and the conditions for imposing them so arbitrary that the Inter-American Human Rights Commission declared that the 1980 Constitution "gravely injure[s] the international order in matters protecting human rights."¹⁴³

E. The Judiciary

The Chilean judiciary failed in its primary mission to safeguard the civil and constitutional rights of Chilean citizens in three respects. First, the Chilean courts, especially the Supreme Court, refused to wield their constitutionally mandated power of *Amparo*. Second, the courts yielded jurisdiction over civilian cases to military tribunals regardless of whether the case involved matters legally falling under the military codes or not. Finally, with few exceptions, the courts allowed the security forces of Chile to operate with impunity by refusing to prosecute even the most blatant, proven human rights violations committed by the security forces. To avoid a direct confrontation with the military government, the judiciary closed cases at the investigative stage, turned proven human rights violators in the security forces over to the military tribunals, and voided

136. CHILE CONST. (1980), *supra* note 90, Transitory art. 24. This new state of exception became effective at the same time the new Constitution entered into force and continued until August 1988, two months before the national plebiscite.

137. *Id.*

138. See IACHR, *supra* note 35, at 41.

139. CHILE CONST. (1980), *supra* note 90, art. 24. See also IACHR, *supra* note 35, at 41.

140. CHILE CONST. (1980), *supra* note 90, art. 79.

141. *Id.* arts. 20, 21.

142. *Id.* art. 8. See IACHR, *supra* note 35, at 37.

143. IACHR, *supra* note 35, at 42.

suits based on the Amnesty Law of 1978. All of these actions resulted in the loss of life, liberty, and human dignity by those affected.

1. The Chilean Judicial System

The legislation which created the modern judiciary in Chile, the 1857 Organic Code of Tribunals, established a single, unified judicial system, under the tutelage and disciplinary control of the Supreme Court, with authority in "all judicial matters."¹⁴⁴ The 1925 Constitution established an appointments system based on merit and seniority, which helped create a patently hierarchical judicial structure.¹⁴⁵ The seventeen members of the Supreme Court dominated the rest of the judiciary "like a feudal power," as one appeals court judge stated.¹⁴⁶ Appointed for life, they oversaw the entire system of rank and promotion and could suspend other judges or dismiss them for insubordination or other sins.¹⁴⁷ This hierarchical system was reinforced by the 1980 Constitution which reiterated the economic, administrative and disciplinary dominion of the Supreme Court over the lower courts.¹⁴⁸

The Supreme Court also plays a major role in its own revitalization in conjunction with the executive power. A judge of the Supreme Court is appointed by the President from a list of five candidates from the Courts of Appeals selected by the Court itself (the *quinas*).¹⁴⁹ The Supreme Court also nominates candidates for the appeals courts, which in turn select candidates for the lower courts.¹⁵⁰ Until 1991, the legislature was excluded altogether from this selection process. The combination of the importance of seniority in the judicial hierarchy and the role of the Supreme Court in selecting its own members insulates the judicial bureaucracy and permits the development of informal standards, rules, and practices which resulted in the judicial nonfeasance of the Pinochet years.

2. Judicial Independence?

As mentioned before, the conflict and open antagonism that developed between the Popular Unity government and the judiciary, particularly the Supreme Court, led directly to the latter's open support for the military coup and subsequent toleration of human rights violations. Ideological polarization blinded the judiciary and produced a situation where, if a prisoner was a leftist, "he represents not a human being but three years of Allende," as one appeals court judge stated.¹⁵¹ Judges thus became oblivious to the plight of the accused, and engaged in judicial self-limitation and inaction that only exacerbated the human rights trauma that resulted. Siding with the junta's version of the truth in all matters, the judiciary rejected *Amparo* appeals, closed cases against suspected

144. See generally ORGANIC CODE OF TRIBUNALS (Chile).

145. CHILE CONST. (1925), *supra* note 12, art. 86. See INT'L COMM., *supra* note 30, at 75.

146. CONSTABLE, *supra* note 3, at 130.

147. ORGANIC CODE OF TRIBUNALS art. 96 (Chile).

148. CHILE CONST. (1980), *supra* note 90, art. 79.

149. Y.B. HUM. RTS. COMM., *supra* note 91, at 382; INT'L COMM., *supra* note 30, at 75.

150. INT'L COMM., *supra* note 30, at 213.

151. CONSTABLE, *supra* note 3, at 125.

human rights violators in the military, and yielded jurisdiction to the military without question.

The first ruling by the Santiago Appeals Court in 1973, rejecting an *Amparo* appeal lodged after the military coup, set the tone for the subsequent rejection of thousands of such appeals.¹⁵² As in this first case, the courts invariably deferred to the power of the Executive to detain people at random under the state of siege declared by Decrees Nos. 3 and 5.¹⁵³ Over 9,000 appeals were rejected by the civilian courts of the capital, Santiago, during the dictatorship.¹⁵⁴ The Supreme Court alone rejected all but ten of 5,400 *Amparo* appeals between 1973 and 1983.¹⁵⁵ Petitions based on violations of the procedures regulating the states of siege were also unsuccessful. In fact, in order to further clarify its position on the matter, the Supreme Court ruled in 1974 that detainees could be held *incommunicado* indefinitely at the discretion of the executive without infringing the regulations of the state of siege.¹⁵⁶

The courts also yielded their power of jurisdiction and allowed the military tribunals to encroach into spheres normally reserved for civilian justice. This resulted in legalized impunity for members of security forces accused of human rights violations, as the civilian judges trying them would inevitably transfer the case to a military tribunal. Immediately after the coup the Supreme Court ruled that it had no competence to supervise the military war tribunals and neither could it amend or overturn the decisions of such courts.¹⁵⁷ This ruling rested on the principles set forth in Article 74 of the Code of Military Justice governing a state of war, which provided that the sole source of disciplinary control over war tribunals rested with the commander of the military zone in which the tribunal sat.¹⁵⁸ Of course the Supreme Court did not waste its time in determining whether a "state of war" actually existed in Chile at the time, which, as already mentioned, required that organized armed groups be in operation.¹⁵⁹ Thus the Supreme Court yielded its power to ensure due process and allowed ordinary legislation to supersede constitutional guarantees.¹⁶⁰

The lower courts, as they were dependent on the Supreme Court for authority and direction, naturally followed the Court's guidance.¹⁶¹ At the investigatory level, civilian judges would accept the "official" version of events and dismiss charges against military personnel, or declare themselves juridically

152. INT'L COMM., *supra* note 30, at 83.

153. *Id.*

154. POLITICS OF AGREEMENTS, *supra* note 60, at 36.

155. CONSTABLE, *supra* note 3, at 122.

156. Decision of July 30, 1974, Supreme Court. *See* REPORT, *supra* note 32, at 123.

157. Decisions of Nov. 13, 1973 and Aug. 21, 1974, Supreme Court. *See* REPORT, *supra* note 32, at 126; IACHR, *supra* note 35, at 157.

158. Decision of Aug. 21, 1974, Supreme Court; IACHR, *supra* note 35, at 191; INT'L COMM., *supra* note 30, at 88. *See* CODE OF MILITARY JUSTICE art. 74 (Chile).

159. *See supra* notes 106 and accompanying text.

160. This was the position taken by the one dissenting judge, Jose Maria Eyzaguirre, who correctly argued that when the Constitution comes into conflict with ordinary legislation, like the Code of Military Justice, the former should triumph over the latter. INT'L COMM., *supra* note 30, at 89.

161. Note the comments of Judge Rene Garcia Villegas, "If the Supreme Court was on its knees, committed body and soul to the military regime, what could the lower levels do, if they depend on the highest court alone for their tenure and promotion?" *Id.* at 79 n.47.

“incompetent” to handle human rights cases involving security forces.¹⁶² Such cases would then be transferred to a military tribunal that would promptly close them, citing the Amnesty Law.¹⁶³ The excessively passive stance of the courts, reflected in their acceptance of the explanation of events provided by government officials, use of the Amnesty Law, and yielding of proper jurisdiction, helped shield human rights violators and created an aura of impunity around the security forces which only exacerbated the situation.

3. Boot-Licking Lackeys - The Chilean Supreme Court

The Supreme Court was especially steadfast in its endorsement of the military government and its policies. In contrast to the treatment received by the majority of governmental institutions after the coup, the Chilean Supreme Court was left untouched by the junta and was allowed to clean its own house by dismissing judges who were sympathetic to the Allende regime.¹⁶⁴ The Court's public stance against the Allende regime enabled the military authorities to justify their assumption of power as a necessary step for the restoration of the rule of law; after all, the judiciary was on their side. In its Decree Law No. 1, the military government pledged to “guarantee the full effectiveness of the judiciary,” while for his part the President of the Supreme Court expressed his “most intimate satisfaction” with the coup.¹⁶⁵ Pinochet and his government paid careful homage to the members of the Supreme Court, who were given state cars and chauffeurs.¹⁶⁶ Thus, early on, the relationship between the junta and the Supreme Court was one of mutual respect and ideological affinity.

The special relationship the military government had established with the Supreme Court bore fruit. In his speech inaugurating the 1975 judicial year, Supreme Court President Enrique Urrutia complained that the courts system had been overwhelmed by the number of *Amparo* appeals filed on behalf of the detained and “disappeared” which, he claimed, had been lodged “on the pretext” of arrests and on behalf of persons who “in reality” had merely left the country of their own accord.¹⁶⁷ Urrutia then went on to accuse the relatives of the “disappeared” of seeking publicity and disrupting the administration of justice.¹⁶⁸

The Court even entered into public disputes in defense of the junta and the legal system it had created. For example, in the wake of the *Quemados* case,¹⁶⁹ the Court issued a formal statement upbraiding the Archbishop of Santiago for his criticism of the trial court's decision absolving accused military

162. CONSTABLE, *supra* note 3, at 134.

163. *Id.*

164. INT'L COMM., *supra* note 30, at 73. This deference to the judiciary also differed markedly from the treatment received by the Supreme Courts of Argentina and Uruguay, which were dismissed *en masse* following the military coups of 1976 and 1977, respectively. *Id.* at 74 n.43.

165. *Id.* at 78. See Decree Law No. 1, *Diario Oficial*, Sept. 11, 1973.

166. CONSTABLE, *supra* note 3, at 117.

167. INT'L COMM., *supra* note 30, at 80.

168. *Id.*

169. See *infra* note 212 and accompanying text.

officers.¹⁷⁰ Of course, this was no radical departure for the same highly politicized Supreme Court that had publicly called for the ouster of the previous regime in 1973.

Abdicating its independence and judicial responsibilities, and acting as a political ally of the military regime, the Supreme Court ruled for the government in every case that came before it. In the wake of the coup it agreed with the junta that a "state of war" existed and then yielded control of the military tribunals without second thought. The Court even allowed the War Councils to continue to operate despite the fact that the junta itself had not declared that the "state of war" was still in existence, in clear contravention of the law. The Court then contradicted itself in order to protect the regime by ruling that, in fact, no "state of war" had existed in Chile for purposes of the Geneva Convention.¹⁷¹ It also set the precedent of permitting human rights cases to be closed at the investigatory stage under the Amnesty Law - another barbarity of jurisprudence. This infamous and farcical history reveals the Supreme Court for what it had become: a simpering, eager-to-please judicial quisling.

4. The Exception

A few judges braved the wrath of military regime and the legal hierarchy and began to question the established order. In 1977, when the first *Amparo* appeal was finally accepted by the Santiago Appeals Court,¹⁷² a timid minority movement within the judiciary began to take shape.

However these judges faced tremendous obstacles in attempting to uncover the truth concerning detainees and the "disappeared." Under a procedure laid down by the Supreme Court in 1975, the appeals courts were required to make all inquiries concerning detainees directly to the Ministry of the Interior, which routinely ignored them, and could not investigate the circumstances of detention on their own initiative.¹⁷³ The security forces and law enforcement agencies simply sat on requests for information for as long as they wished, without the slightest risk of sanction, or responded that the person missing had not been detained and had probably just left the country.¹⁷⁴ Moreover, the DINA consistently refused to allow judges access to detention centers and the government would not permit members of DINA to testify in court proceedings.¹⁷⁵ These procedures guaranteed the security forces using secret detention centers absolute freedom from interference. The urgent matter of protecting lives thus became mired in time-consuming paper trails while prisoners were tortured and killed.

One courageous and tenacious judge however, Judge Carlos Cerda, fought for justice and suffered the consequences of defying the judicial hierarchy. Investigating the 1976 "disappearances" of ten Communist Party members, Judge

170. Zabel, *supra* note 75, at 439.

171. *See infra* note 208.

172. This case was eventually transferred to a military tribunal and promptly closed. INT'L COMM., *supra* note 30, at 86.

173. *Id.* at 83-84, 93.

174. Amnesty International, *Chile Briefing*, Oct. 1988, at 11.

175. REPORT, *supra* note 32, at 122.

Cerda, as the *ministro en visita*, discovered evidence implicating the security forces in the abductions.¹⁷⁶ In 1986 the judge indicted thirty-eight military personnel, including Air Force General and former member of the governing junta, General Gustavo Leigh.¹⁷⁷ However, on appeal to the Santiago Appeals Court, the case was closed based on the 1978 Amnesty Law.¹⁷⁸ This ruling was subsequently upheld by the Supreme Court, despite the fact that the investigation was far from complete.¹⁷⁹ However, Judge Cerda refused to give effect to the judgement, arguing that the Amnesty Law only applied to the final judgement in a case and not to the investigatory stages before guilt had even been established. For his defiance, Judge Cerda was suspended twice and finally dismissed from the judiciary.¹⁸⁰

VI. THE HUMAN RIGHTS STRUGGLE

In May 1975, relatives of the "disappeared," under the aegis of the *Comite de la Cooperacion para la Paz*, formed an association and presented an appeal to the Supreme Court requesting the appointment of a judge (*ministro en visita*) to investigate the fate of 163 prisoners "disappeared" since the day of the coup. Over a year later the Supreme Court rejected the appeal, thus beginning the legal struggle for human rights in Chile which continues to this day.

A. *The Champions of Human Rights*

1. *The Comite de la Cooperacion para la Paz*

With the Congress disbanded and the judiciary on its knees, the Catholic Church emerged as the great defender of human rights in Chile. Within weeks of the coup, the Church, together with the Rabbinical Council, three Protestant churches, and the World Council of Churches, launched the *Comite de la Cooperacion para la Paz* (Committee of Cooperation for Peace).¹⁸¹ This organization came to the aid of relatives of human rights victims, processed *Amparo* petitions and denunciations of the government on their behalf, and pressed for united action. In 1974, the *Comite* spearheaded the formation of groups of relatives of the "disappeared," the first of its kind in Latin America.¹⁸²

In 1975, the *Comite* began to file legal suits and *Amparo* appeals on behalf of detainees and "disappeared" persons.¹⁸³ In its first two years of operation

176. This evidence came in the form of a former member of an Air Force intelligence unit who had decided to "come clean" and tell all he knew to a human rights organization. Zabel, *supra* note 75, at 455-56.

177. *Id.* at 456; INT'L COMM., *supra* note 30, at 102-03.

178. Zabel, *supra* note 75, at 457.

179. *Id.*

180. POLITICS OF AGREEMENTS, *supra* note 60, at 47; Zabel, *supra* note 75, at 459-60. Other judges that tried to make a difference were harassed and threatened. Judge Jose Canovas was threatened by phone, pursued at high speeds by anonymous cars, and had his house broken into, while Judge Rene Garcia Villegas was threatened and ultimately suspended from the bench by the Supreme Court for his outspoken criticism of the government. CONSTABLE, *supra* note 3, at 133; INT'L COMM., *supra* note 30, at 107.

181. VICARÍA, *supra* note 42, at 5.

182. *Id.* at 7.

183. *Id.*

the *Comite* handled more than 7,000 cases and filed 2,342 *Amparo* petitions.¹⁸⁴ This activity began to annoy the military regime. *Comite* members began to receive threats and many were arrested.¹⁸⁵ Finally General Pinochet himself demanded that the Church dissolve the *Comite*.¹⁸⁶ Under pressure from its brother churches, the Catholic Church reluctantly conceded to this demand and closed the *Comite* in 1975.

2. The *Vicaría de la Solidaridad*

The Catholic Church, under the aegis of Cardinal Silva (known in government circles as the "Red Cardinal"),¹⁸⁷ was not so quick to give up. In January 1976, Cardinal Silva announced the creation of a new legal aid agency, the *Vicaría de la Solidaridad*, which enjoyed the full protection and control of the archdiocese.¹⁸⁸ Like its predecessor, the *Vicaría* provided free legal assistance to the relatives of human rights victims and also filed law suits on behalf of the dead and "disappeared." It also opened medical clinics, dispensed food to the needy and supported the creation of peasant organizations and labor unions.¹⁸⁹

With a permanent legal staff of eight lawyers, and with the aid of some forty "cooperating" lawyers, the *Vicaría* was able to sustain the legal struggle for human rights.¹⁹⁰ The legal work performed by the *Vicaría* attorneys included the filing of *Amparo* appeals for detainees, requesting the appointment of special investigative judges (*ministros en visita*) in human rights cases,¹⁹¹ the defense of prisoners before military and civilian tribunals, and the documentation of evidence concerning human rights violations.¹⁹² In accordance with its religious underpinnings, however, the *Vicaría* would not defend persons charged with criminal violence or terrorist acts.¹⁹³

The *Vicaría* experienced the same levels of intimidation as the *Comite*. *Vicaría* workers were murdered, arrested, and abducted. In 1976, the director of the *Vicaría*'s legal department was expelled from the country.¹⁹⁴ The manager of the *Vicaría*'s archives was one of the murder victims in the "Degollados" case.¹⁹⁵ The *Vicaría* even weathered a full scale attack on its reputation by the government in which the military, trying to discredit the organization, attempted to link its human rights work to organized terrorism.¹⁹⁶

184. CONSTABLE, *supra* note 3, at 120.

185. VICARÍA, *supra* note 42, at 7-8.

186. *Id.* at 8.

187. CONSTABLE, *supra* note 3, at 120.

188. *Id.*

189. VICARÍA, *supra* note 42, at 10-11.

190. *Id.* at 9.

191. *Id.* at 22. It was the *Vicaría* which sought and obtained the appointment of *ministros en visita* in the *Degollados* and *Quemados* cases. *Id.* See *infra* notes 209-17 and accompanying text.

192. VICARÍA, *supra* note 42, at 18-20. This documentation was heavily relied upon by the Rettig Commission in its report.

193. *Id.* at 20.

194. *Id.* at 9.

195. *Id.* at 37. See *infra* notes 210-11 and accompanying text.

196. VICARÍA, *supra* note 42, at 40-42. See *infra* note 209 and accompanying text.

But, with the continued full support of the Catholic Church, the *Vicaría* survived. Even Pinochet could not vanquish the Catholic Church.

In November 1992, after the publication of the Rettig Commission's Report on Truth and Reconciliation, the *Vicaría de la Solidaridad* declared its mission complete and disbanded itself, after having investigated 40,000 cases of repression allegedly committed during military rule.¹⁹⁷

B. *Obstacles*

Throughout the court system, the work of the human rights lawyers was regarded with suspicion and even hostility. For the most part, the entire judicial establishment had little sympathy for the leftists, and most Chilean lawyers were unwilling to represent them in court.¹⁹⁸ For their part, most judges, still bitter from the Popular Unity years, viewed human rights lawyers and their clients with contempt and were not eager to facilitate the proceedings of such cases.¹⁹⁹ It is not surprising, then, that these same judges rejected *Amparo* appeals.

However, the treatment human rights lawyers received from their colleagues within the legal profession was a blessing compared to that afforded by the military authorities. General Pinochet and other officials publicly linked human rights activists with "international terrorism."²⁰⁰ Outright assassination attempts,²⁰¹ death threats, summary detentions and prolonged incarcerations, exile,²⁰² raids on offices, and surveillance have all been experienced by the human rights lawyers of Chile.²⁰³

Intricate government designs to discredit the *Vicaría de la Solidaridad* included the 1985 arrest of three *Vicaría* employees, including human rights lawyer Gustavo Villalobos. The three were arrested after aiding a wounded man who was later proven to have been involved in the robbery of a bakery which resulted in the death of a policeman.²⁰⁴ The human rights workers were then accused, under the Arms Control Law, of being active members of the "terrorist" group that carried out the robbery.²⁰⁵ The government sought to use this case to link the *Vicaría's* human rights work with terrorist activity.²⁰⁶

197. *Chilean Rights Unit Wraps Up Its Work*, WASH. TIMES, Nov. 28, 1992, at A2.

198. CONSTABLE, *supra* note 3, at 119.

199. *Id.* at 121.

200. Zabel, *supra* note 75, at 440.

201. After the 1986 assassination attempt on General Pinochet, Luis Toro, a *Vicaría* lawyer prosecuting the *Quemados* case, received several death threats from the right wing death squad "September 11th Commandos." Toro barely escaped with his life when heavily armed men attempted to abduct him from his home in the middle of the night. *Id.* at 468-69.

202. In 1976 two human rights lawyers were seized and forced onto a plane for Argentina. CONSTABLE, *supra* note 3, at 121.

203. Zabel, *supra* note 75, at 439-40. See Lake Sagaris, *Chile: Fighting to Abolish Tyranny*, 15 STUDENT LAW. 24 (1987).

204. Sagaris, *supra* note 203, at 26.

205. *Id.* at 26-27; Zabel, *supra* note 75, at 473-74.

206. Zabel, *supra* note 75, at 474. The government assigned the case against Villalobos to the infamous Ad Hoc Military Prosecutor Fernando Torres Silva, who also had authority over the assassination attempt on Pinochet and a case involving the discovery of a large cache of arms alleged to belong to terrorist. *Id.* at 475.

The 1978 Amnesty Law has proven to be the most formidable obstacle faced by human rights lawyers in Chile. In an effort to circumvent the Law, some human rights lawyers argued in 1990 that, under the 1949 Geneva Conventions prohibiting amnesties for wartime crimes, to which Chile was bound, the government could not give amnesty to security forces suspected of "war crimes," because the government itself had declared the country to be at war in order to justify the use of wartime military tribunals.²⁰⁷ The Supreme Court, not surprisingly, rejected this argument, asserting that the nation had not been in a "state of war" in accordance with the Geneva Conventions, thus contradicting its landmark 1974 ruling in which the Court relinquished the power to supervise military tribunals because a "state of war" existed.²⁰⁸

One of the most sensational human rights cases to emerge out of the Pinochet era is the "*Degollados*" ("cut-throats") case. In March 1985, the Director of Archives of the *Vicaría* was kidnapped along with two other Communist Party members. They were later found lying in a road with their throats slashed. After a courageous investigation by the *ministro en visita*, Judge Jose Canovas Robles, ten members of the *Carabineros* were arrested.²⁰⁹ However, because the crime involved members of the security forces, the case was turned over to the military tribunals and eventually went to the Supreme Court, where it was dismissed for lack of evidence.²¹⁰

Another controversial case (known as the "*Quemados*" case) involved the burning of two college students, one of U.S. citizenship, by security forces in 1986. The two students had been attending a protest rally when they were stopped by an army patrol and, according to the testimony of twelve eyewitnesses, doused with gasoline and set ablaze.²¹¹ Rodrigo Rojas, who had lived most of his life in the United States, died of his burns.²¹²

The civilian judge investigating the case (*ministro en visita*) ignored eyewitness testimony and accepted the "official" version of the events based on the testimony of the accused soldiers.²¹³ He did not question why the students were left on a country road instead of being taken to a hospital. Instead, he released all of the accused except the commanding officer, whom he indicted with criminal negligence for failing to take the students to a hospital.²¹⁴ After filing his report, the judge promptly declared himself "incompetent" to decide the case against the officer because of the involvement of military personnel and turned it over to the military tribunals. The resulting public outrage forced the military court to upgrade the charge to "unnecessary violence."²¹⁵ However,

207. Herrera, *supra* note 34, at 130. See *supra* note 35 and accompanying text.

208. POLITICS OF AGREEMENTS, *supra* note 60, at 46 n. 75. A Santiago appeals court recently rejected this interpretation by the Supreme Court, and ruled that the Geneva Convention did apply to the Amnesty Law. See *infra* notes 282-83 and accompanying text.

209. This action dealt such a harsh blow to the Commander of the Carabineros and junta member General Cesar Mendoza that he resigned his position. Zabel, *supra* note 75, at 449.

210. *Id.* at 452-53; INT'L COMM., *supra* note 30, at 70-71.

211. Zabel, *supra* note 75, at 442; Sagaris, *supra* note 203, at 29.

212. Zabel, *supra* note 75, at 443.

213. *Id.* at 444-45; Sagaris, *supra* note 203, at 30.

214. Zabel, *supra* note 75, at 444-45.

215. *Id.* at 446.

in 1990, the military tribunal ruled that the burnings were accidental and caused by the students themselves.²¹⁶ In 1993, the Supreme Court upheld this decision.²¹⁷

VII. DEMOCRACY TRIUMPHANT?

A. *The Return of Democracy*

The 1980 Constitution, which entered into force on March 11, 1988, envisaged a step-by-step transition to democracy. For eight years, Chile was governed under the Constitution's "transitory" articles, with General Pinochet ruling the nation "transitionally" as the executive branch and the junta assuming the functions of the legislature.²¹⁸ The national , held on October 5, 1988, was the first occasion in which the Chilean people had been allowed to vote on Pinochet's rule since the 1973 coup. The month in which the plebiscite occurred was the first month without a state of exception. The people responded with a resounding "No" to military rule with 54.7% of the vote.²¹⁹

Riding a strong mandate for change, the opposition forces formed a coalition, the Concentration for Democracy (*Concertacion para la Democracia*) and began laying the groundwork for the December 1989 presidential elections.²²⁰ The parties united behind Patricio Aylwin of the Christian Democrats Party. On election day, the voters delivered an overwhelming victory to the *Concertacion*, electing Aylwin as President with fifty-five percent of the vote.²²¹ Democracy had returned to Chile.

B. *Aylwin and the Truth Commission Report*

One of President Aylwin's first priorities was the resolution of human rights abuses committed by the preceding regime.²²² To this end, the National Commission for Truth and Reconciliation was established in 1990 by the new government.²²³ The Commission represented President Aylwin's most important initiative in confronting the legacy of human rights violations by the military regime. Although Aylwin had explicitly rejected the establishment of special courts to try those responsible for criminal acts, as was done in

216. POLITICS OF AGREEMENTS, *supra* note 60, at 42. The judge accepted the soldiers' story that the students knocked over the gasoline, which they allegedly were about to use to make a firebomb, while they were lighting a flame. Of course this story does not account for the fact that there were no burns on the students' feet or the lower parts of their legs.

217. U.S. Dep't of State, *Chile Human Rights Practices, 1993*, Jan. 31, 1994, 4 [hereinafter Dispatch 1994].

218. INT'L COMM., *supra* note 30, at 27; IACHR, *supra* note 35, at 16.

219. The successful economic programs of the military regime, as well as fear of a return to the tumultuous Allende years, convinced almost forty-five percent of the voting Chilean population to affirm a fifteen year old ruthless dictatorship. John Greenwald, *Fall of the Patriarch*, TIME, Oct. 17, 1988, at 36.

220. See, e.g., CONSTABLE, *supra* note 3, at 296-320.

221. *Id.* at 316.

222. Arturo Valenzuela & Pamela Constable, *Democracy in Chile*, CURRENT HIST., Feb. 1991, at 53 [hereinafter Valenzuela].

223. Supreme Decree No. 355, *Diario Oficial*, Apr. 25, 1990.

neighboring Argentina,²²⁴ the government did want to clarify the truth behind the executions, tortures and "disappearances" of the preceding years in order to foster "the moral climate indispensable for reconciliation and peace."²²⁵

The Commission spent a year analyzing data and conducting interviews and then released its Report amid great fanfare. The Commission was critical of the Allende regime, stating it was responsible for creating the confrontational atmosphere that resulted in the 1973 coup. But, the Commission reserved its harshest words for the military government and the judiciary. It rejected the military regime's principle justifications for its repressive policies, that a "state of war" existed in 1973, by noting that the "opposition" had turned over their posts peacefully, and that large numbers of the detained had, in fact, turned themselves in voluntarily.²²⁶ The Commission also rejected the legal arguments supporting the utilization of wartime military tribunals to try civilians which the military had put forth and the judiciary had accepted,²²⁷ and launched a full-scale attack on the judiciary, which it accused of intensifying the process of systematic violations of human rights through its abdication of judicial responsibility.²²⁸

The report enraged several Supreme Court judges, who refused to acknowledge that they had neglected their duty during the dictatorship.²²⁹ The Court released a public statement accusing government authorities of creating a climate of animosity and denigrating the judiciary.²³⁰ Pinochet also blasted the Report and warned that "[t]he Army of Chile solemnly declares that it will not accept being placed as if on trial before the citizenry for having saved the freedom and sovereignty of the homeland at the insistence of the civilian population" and accused the Commission of being "principally responsible for the tragedy experienced [by the nation] in their capacity as senior leaders of the Popular Unity."²³¹

C. Reform

Legal reform became the major goal of the Aylwin administration once it took office, and a variety of reform legislation followed in the wake of the installation of the transition government. In May 1990, the new justice minister, Francisco Cumplido, proposed a package of laws (commonly referred to as the "Cumplido Laws") that would permit the investigation of human rights abuses, eliminate the death penalty, remove crimes committed by civilians from military jurisdiction and reduce the broad state of exception powers created by the

224. See, e.g., AMNESTY INTERNATIONAL, ARGENTINA: THE MILITARY JUNTA AND HUMAN RIGHTS, REPORT OF THE TRIAL OF THE FORMER JUNTA MEMBERS (1987).

225. INT'L COMM., *supra* note 30 at 130-31 (quoting presidential address to the nation by President Aylwin on April 23, 1990).

226. REPORT, *supra* note 32, at 129.

227. *Id.* ch. III.

228. *Id.* ch. IV.

229. Int'l Commission of Jurists, *Chile: Official Report on Violations of Human Rights During the Military Regime*, 46 REV. 2, 5 (Adam Dieng ed., 1991).

230. INT'L COMM., *supra* note 30, at 219.

231. POLITICS OF AGREEMENTS, *supra* note 60, at 33

military regime.²³² However, by the time this legislation got through the Congress,²³³ it had been severely watered down.²³⁴ Although the death penalty was retained for some thirty offenses,²³⁵ the new laws that emerged did modify the Anti-Terrorist Law so as to define terrorism in more limited terms.²³⁶ Law 19.047 modified the Code of Military Justice to reduce the jurisdiction of the military tribunals by placing civilian violators of such laws as the Arms Control Law and Anti-Terrorism Law within the jurisdiction of civil courts.²³⁷ The same law also reformed the structure of the military appeals court by endowing a three year tenure on the three military judges and removing the requirement that they remain on active duty.²³⁸

But the Law failed to alter the existing rules in the Code of Military Justice which gave military tribunals jurisdiction over crimes committed by military personnel during service or on military premises.²³⁹ This glaring omission means that one of the major reasons for the failure of investigations into human rights crimes continues to exist.

The new government also attempted to repeal or amend the Amnesty Law²⁴⁰ in order to ensure that it did not constitute an impediment to the investigation and punishment of human rights abuses.²⁴¹ Although the Supreme Court upheld the constitutionality of the law in 1991,²⁴² the government decided not to risk a politically costly parliamentary confrontation on the issue and instead took the position that the reform of Article 5 of the Constitution provided sufficient basis for the investigation of grave human rights crimes.²⁴³ This vacillation on the government's part was a matter of political calculation, as the armed forces had expressed displeasure at what it saw as the advent of anti-military "witch hunts," and the Supreme Court had already revealed its position on the issue.²⁴⁴ The government's action, or rather

232. *Id.*

233. The pro-Pinochet conservative parties enjoy a legislation-blocking advantage in the Senate. Valenzuela, *supra* note 222, at 54.

234. *Id.* at 55.

235. Supreme Law No. 19029, *Diario Oficial*, Jan. 23, 1991. See POLITICS OF AGREEMENTS, *supra* note 60, at 53-54.

236. Supreme Law No. 19027, *Diario Oficial*, Jan. 24, 1991.

237. Supreme Law No. 19047, *Diario Oficial*, Feb. 14, 1991. This law reopened many human rights cases that had been previously closed by the military courts. Dispatch 1995, *supra* note 130.

238. *Id.* This reversed the 1977 decree passed by the junta that had eliminated tenure. See *supra* note 118 and accompanying text.

239. INT'L COMM., *supra* note 30, at 167.

240. The United Nations Special Rapporteur on Chile pointed out that the Chilean Amnesty Law served as a model for the "Pacification Law" promulgated by the Argentine military junta in 1984, which was repealed by the new democratic government as one of its first acts. *Id.* at 195-96.

241. *Id.* at 193-95.

242. See *infra* note 272 and accompanying text.

243. INT'L COMM., *supra* note 30, at 199. The 1989 amendment to Article 5 of the Constitution required Chile to act in conformity with international human rights instruments it had ratified by placing them above national law. POLITICS OF AGREEMENTS, *supra* note 60, at 44.

244. INT'L COMM., *supra* note 30, at 199.

inaction, certainly did not seem to advance its professed goal of resolving past human rights crimes.²⁴⁵

Following the release of the Report, with its harsh criticism of the Judicial branch, the focus of the administration turned to the reform of the judiciary. President Aylwin declared the judiciary to be in crisis and lacking public respect and trust.²⁴⁶ In 1991, the government introduced legislation which included proposals for increasing the size of the Supreme Court from seventeen to twenty-one judges, creating a national judicial council, modifying court procedures, altering judicial evaluation and selection standards, and creating a judicial college.²⁴⁷ The most important of these proposals would establish the National Council of Justice. This organ, to be composed of representatives of the legislature, executive and judiciary as well as members of expert bodies such as the Bar Association and university law faculties, would assume responsibility for planning, administration, and budgetary control of the judiciary.²⁴⁸ In addition, the Council would be responsible for judicial candidate selection, thus eliminating the old system of judicial self-election.²⁴⁹

The Supreme Court, naturally, responded negatively to the judicial reform proposals. It especially disliked the idea of a National Judicial Council which, the Court concluded, would be unconstitutional.²⁵⁰ The Court, ironically, expressed fears that the judiciary would become politicized should the proposals come to fruition.²⁵¹

The government submitted its package of judicial reform proposals to Congress in April 1991. It met with strong opposition both within the Congress and within the judiciary itself.²⁵² In May 1992, after over a year of parliamentary negotiation, the legislation became stalled and the government, facing growing resistance, abandoned the idea of a National Council of Justice.²⁵³ However, a compromise was reached whereby the system of judicial appointment would remain the same, with the sole addition that the appointment of judges be subject to Senate ratification.²⁵⁴ Thus, the government achieved some small success in its efforts to tame the Chilean judiciary.

D. *The Problems Persist*

The new government inherited a host of laws and procedures that effectively insulate the military from recrimination. Under the 1980 Constitution, the President may not remove the commanders of the armed forces without their

245. However, the government's reform of Article 5 led to the recent court decision invalidating the Amnesty Law. See *infra* note 282 and accompanying text.

246. Vaughn, *supra* note 25, at 599.

247. *Id.* at 598-99.

248. INT'L COMM., *supra* note 30, at 221; Vaughn, *supra* note 25, at 599.

249. Vaughn, *supra* note 25, at 599.

250. *Id.*

251. *Id.*

252. INT'L COMM., *supra* note 30, at 245.

253. *Id.* at 246.

254. *Id.* at 246-47.

consent.²⁵⁵ So called "tie-up" laws (*leyes de amarre*) passed by Pinochet in his last months in office transferred non-military intelligence-security personnel and records to the armed forces command, thus shielding them from civilian control as well.²⁵⁶ Meanwhile, the 1978 Amnesty Law has proven an intractable problem for the resolution of human rights crimes. Despite charges of human rights abuses during the seventeen-year military dictatorship, only a handful of lower-ranking police officials have been jailed.²⁵⁷

The judiciary also continues to pose problems. During the eighteen years of military rule, General Pinochet appointed a substantial majority of the present membership of the Supreme Court. In 1984, the government increased the number of judges on the Court from thirteen to seventeen,²⁵⁸ and then, during his last year in office, General Pinochet passed the so-called "Rosende Law", offering generous retirement bonuses to elderly Supreme Court members, and obtained seven new appointments.²⁵⁹ President Aylwin has thus far appointed only one Supreme Court judge.²⁶⁰ Thus, ten of the seventeen judges were appointed by Pinochet, seven of them after he lost the 1988 plebiscite.²⁶¹

During the Aylwin government's first year, human rights cases continued to pass to military jurisdiction. For example, after the 1990 discovery of a mass grave at Pisagua, the Military Prosecutor General demanded jurisdiction, arguing that since Pisagua had been an army camp, the location of the grave suggested military involvement.²⁶² The Supreme Court sustained this argument and, after the transferral of jurisdiction, the case was closed.²⁶³

However, the Aylwin government met with some successes in the struggle to reconcile past abuses. In 1993, the Supreme Court ruled, in what has been described as an "historic decision," that the DINA was directly responsible for the 1974 "disappearance" of a Chilean citizen.²⁶⁴ This ruling marked the first time a Chilean court had specifically named an official agency of the Pinochet dictatorship in a human rights case.²⁶⁵ Unfortunately, the Court also held that the Amnesty Law applied to the crime.²⁶⁶ In that same year a new Supreme Court judge appointed by President Aylwin sentenced retired general Manuel Contreras, former head of the DINA, and another officer to seven year prison terms as the intellectual authors of the murder of Orlando Letelier.²⁶⁷ The

255. CHILE CONST. (1980), *supra* note 90, art. 93; POLITICS OF AGREEMENTS, *supra* note 60, at 2; Dispatch 1994, *supra* note 217, at 1.

256. POLITICS OF AGREEMENTS, *supra* note 60, at 3.

257. *Chile Judge Sentences Policemen for 1985 Murders*, Reuters, Mar. 31, 1994, available in LEXIS, Nexis Library.

258. Vaughn, *supra* note 25, at 586.

259. INT'L COMM., *supra* note 30, at 215.

260. Dispatch 1995, *supra* note 130.

261. *Id.*

262. POLITICS OF AGREEMENTS, *supra* note 60, at 41-42.

263. *Id.* at 42.

264. *Supreme Court Rules Secret Police Responsible for Political Disappearance*, NOTISUR-LATIN AM. POL. AFF., Oct. 1, 1993.

265. *Id.*

266. *Id.*

267. Dispatch 1994, *supra* note 217, at 3.

appeal of that case is still pending.²⁶⁸ A major breakthrough occurred in March, 1994, when a Chilean judge sentenced fifteen former policemen to long prison terms for involvement in the *Degollados* case after an eight year investigation.²⁶⁹

The political process also succeeded in finally impeaching a Supreme Court judge. After a chamber of the Court transferred a human rights case to military jurisdiction in late 1992, the Chamber of Deputies voted along party lines to impeach three judges for "gross neglect of duties."²⁷⁰ Surprisingly, three pro-Pinochet opposition Senators joined the governing coalition to vote to remove the presiding judge of the chamber, Herman Cereceda, the second-ranking member on the Supreme Court, from office.²⁷¹

However, the Supreme Court remains undaunted. In 1991, the Court unanimously upheld the 1978 Amnesty Law. Overruling human rights lawyers who argued that the Law violated basic rights guaranteed in the 1980 Constitution as well as in international treaties, the Court held that the Geneva Convention of 1949, which forbids amnesties for war crimes, did not apply because no state of war existed in Chile.²⁷² This obviously contradicted its 1974 ruling that a state of war did exist. The Court also held the International Covenant on Civil and Political Rights inapplicable to events in Chile before 1989, the date the decree promulgating the International Covenant on Civil and Political Rights as law was published in the *Diario*, despite the fact that the treaty had been ratified in 1972 and officially promulgated as law in 1976.²⁷³

More recently, the Supreme Court upheld a military tribunal's finding that the victims in the "*Quemados*" case had indeed accidentally burned themselves, despite the considerable amount of evidence implicating members of the Armed Forces.²⁷⁴ In 1993, the Court also dropped charges against former *Carabineros* commander and ex-junta member, General Mendoza, who had been implicated in the "*Degollados*" case.²⁷⁵ The Court then ruled against reopening the investigation into the circumstances behind the 1976 death of a Spanish diplomat, despite urgent requests by the Ministry of Foreign Affairs.²⁷⁶ Yet,

268. On January 10, 1995, the Chilean Supreme Court began deliberations on the appeal by General Contreras and Brigadier General Pedro Espinoza. *Chile: Supreme Court to Decide Fate of Ret. Gen. Manuel Contreras in Orlando Letelier Case*, NOTISUR-LATIN AM. POL. AFF., Jan. 20, 1995. As of this writing, the verdict is still pending.

269. *Chile Judge Sentences Policemen for 1985 Murders*, *supra* note 257. See *supra* note 209 and accompanying text. In September 1994, a Chilean court raised the sentences of three of the former police officers to life imprisonment. *Chile Court Raises "Cut-throat" Sentences to Life*, Reuters, Sept. 30, 1994, available in LEXIS, Nexis Library.

270. Dispatch 1994, *supra* note 217, at 4.

271. *Id.*

272. Valenzuela, *supra* note 222, at 55.

273. INT'L COMM., *supra* note 30, at 200-01.

274. Dispatch 1994, *supra* note 217, at 4. See *supra* notes 212-13 and accompanying text.

275. Dispatch 1994, *supra* note 217, at 5.

276. *Prosecution Barred in U.N. Official's Death*, L.A. TIMES, Jan. 1, 1994, at A6. The request was motivated by the Spanish government's displeasure at a 1991 Appeals Court investigation which resulted in the transferral of jurisdiction to military tribunals. Dispatch 1994, *supra* note 217, at 5. The Spanish government recalled its ambassador to Chile in protest. *Id.*

after continued governmental pressure, the Court subsequently reversed itself and reopened the investigation.²⁷⁷

In December 1993, Eduardo Frei became the second democratically elected president of Chile since the military regime. Assuming office in March 1994 after winning the largest majority in modern Chilean history,²⁷⁸ President Frei was immediately confronted with the limitations of his power. When the new President asked for the resignation of General Rudolfo Stange, the commander of the *Carabineros*, because of allegations of the latter's complicity in the cover-up of the "*Degollados*" murders, the General refused, supported by the constitutional clauses which prevent the president from removing commanders of the Armed Forces.²⁷⁹ Although government pressure prompted the General to take a "vacation," he insisted it would only be temporary, thus further aggravating the tense situation.²⁸⁰ Charges against General Stange were eventually dropped, and the General remains at his post.²⁸¹

There are recent signs that the Chilean judiciary is emerging as the only branch of government willing to stand up to military-style justice. In September 1994, two judges of the Santiago Court of Appeals applied strict principles of international law and struck down the 1978 Amnesty Law.²⁸² The judges based their decision on Chile's adoption of the Geneva Convention and International Covenant on Civil and Political Rights, and argued that these international obligations superseded domestic statutes like the Amnesty Law.²⁸³ This stunning decision completely contradicted the Supreme Court's 1991 ruling upholding the Amnesty Law. The decision by the Appeals Court could reopen scores of human rights cases that had been foreclosed by the Amnesty Law, unless it is overruled by the Chilean Supreme Court which now must ultimately revisit the issue.

VIII. CONCLUSION

During the seventeen year military reign in Chile, the rule of law ceased to exist. A highly politicized judiciary willingly yielded its independence and became completely subservient to the Executive power. The judiciary, especially the Supreme Court, preferred inaction and acquiescence and allowed the military regime to infiltrate the juridical power and usurp its traditional functions. Judicial self-limitation facilitated the transgressions of the Executive and resulted in the loss of life, liberty, and human dignity of those affected. The Chilean

277. *Chile Reopens Probe of Spanish Diplomat's Death*, Reuters, Apr. 7, 1994, available in LEXIS, Nexis Library.

278. Dispatch 1995, *supra* note 130.

279. William R. Long, *Chile Police Chief's "Vacation" Ends Rights Standoff for Now*, L.A. TIMES, Apr. 22, 1994, at A5.

280. *Id.*

281. Dispatch 1995, *supra* note 130.

282. *Court Punches Hole in 1978 Amnesty*, LATIN AM. WKLY. REP., Oct. 13, 1994, at 465.

283. *Id.* See also Jack Epstein, *Unearthing the Secrets of Chile's Dirty War*, S.F. CHRON., Nov. 27, 1994, at S3. This decision was based largely on the Chilean government's 1991 reform of Article 5 of the Constitution that placed international obligations before domestic law.

judiciary is thus indirectly responsible for the carnage of the Pinochet era and should be held accountable.²⁸⁴

Why did the Chilean judiciary surrender its autonomy and constitutionally mandated duty to protect the rights of Chilean citizens? The answer is complex, but lies in part in the organizational structure of the judiciary and in the great ideological war which developed between it and the government of Salvador Allende. In response to the open disregard and contravention of its authority by the Allende regime, as well as the denunciations and harsh criticisms directed at it by Popular Unity government officials, the Supreme Court stolidly entrenched its position on the extreme right and waited for its revenge. It then used its administrative power to force the lower courts to follow its lead. The Chilean Supreme Court's role during the military regime demonstrates the terrible consequences of a highly politicized judiciary which takes sides in an ideological struggle that envelops the nation.²⁸⁵

Confronted with great obstacles, the successive democratic governments of Chile have achieved very limited results in the quest for justice. Instead of bringing the military under control and aggressively prosecuting human rights offenders, the government has at times appeared weak and vacillating, seemingly afraid to risk confrontation with the aging Pinochet who, at seventy-nine years, retains his title as Commander-in-Chief of the Armed Forces until 1997.²⁸⁶ When Argentina emerged from the grip of military rule, its democratic leaders repealed the Argentine version of the Amnesty Law as one of the first acts of government²⁸⁷ and then proceeded to place the former leaders of the ruling military junta on trial for human rights abuses.²⁸⁸ In contrast, neither President Aylwin, nor President Frei, has seriously attempted to challenge the Amnesty Law,²⁸⁹ and placing General Pinochet on trial would be unthinkable in Chile.

The government's attempts at constitutional and judicial reform achieved very limited results. Under the Constitution, the Armed Forces commanders are outside civilian control and not even the President of Chile can remove a military commander, as President Frei, to his chagrin, recently discovered.²⁹⁰ Moreover, the 1991 judicial reforms drafted by the Aylwin administration were only half-measures. The fact that Supreme Court judges will now be subject to

284. The international community shares some of the blame as well. While the numerous reports and U.N. resolutions condemning the situation in Chile educated the world on the abuses taking place, they failed to make a difference. The Inter-American Commission of Human Rights wrote report after report and yet no action was ever taken against the military regime in the Inter-American Court of Human Rights. What is the point of having a system of human rights protection when it is never utilized? Perhaps the time has come for the creation of an international human rights criminal tribunal with powers of U.N. sponsored enforcement.

285. Some would argue that the performance of the judiciary under the Pinochet regime directly resulted from, and is therefore justified by, the judicial malfeasance of the Allende years. However, this position is outrageously flawed. Although the judicial malfeasance of the Allende government may have resulted in the expropriation of property without adequate compensation, the judicial nonfeasance of the Pinochet years resulted in state-sponsored murder.

286. Epstein, *supra* note 283, at S3.

287. See *supra* note 240.

288. See *supra* notes 224-25 and accompanying text.

289. Diego Ribadeneira, *With Rights Abusers' Jail, Chile Revisits Painful Past*, BOSTON GLOBE, Jan. 24, 1995, at 14.

290. Chile Const. (1980), *supra* note 90, amend. 36; see *supra* note 279 and accompanying text.

Senate confirmation does not resolve the problem that arises when the Senate ceases to exist — witness 1973. Perhaps Chile could learn something from Mexico's new President, Ernesto Zedillo, who has undertaken the monumental task of completely overhauling the Mexican judicial system, including the mandatory retiring of all twenty-six justices currently sitting on the Supreme Court, and the abolition of the Mexican system of judicial hierarchy that is very similar to the system present in Chile.²⁹¹

The real problem plaguing Chile is the ubiquitous power of the Armed Forces. After all, even with an independent judiciary, when will a judge say "no" to a squadron of heavily armed soldiers? Unlike the situation in neighboring Argentina, the Chilean military emerged from the ashes of its rule virtually unscathed. It enjoys today a greater level of autonomy than before the coup. General Pinochet is constantly blustering and rattling his sabre against the democratic government. In 1989, responding to a Congressional investigation of military corruption that implicated Pinochet's own son, the General placed the Armed Forces on full alert for twelve hours.²⁹² More recently, in 1993, Pinochet sent heavily armed troops into the streets of Santiago to signal his displeasure at the evolution of human rights trials.²⁹³ One only has to listen to Pinochet himself to understand the difficulties facing Chile in coming to terms with its frightful past:

No one is going to touch my people. The day they do, the rule of law will come to an end.

With fearless bravado, the military will remain above the law for years to come.

The United States must not ignore the issue of human rights and the rule of law as it embarks on negotiations to include Chile in the NAFTA. Lacking civilian control, the Chilean military could easily emerge from its barracks again to reimpose its version of "social order" on the Chilean populace. The United States largely ignored political realities in Mexico and negotiated a free trade agreement with a single-party dictatorship that is now beginning to unravel. While Chile's economy is arguably much more developed than Mexico's was when the NAFTA was formulated,²⁹⁴ the political situation in Chile is at least as precarious as that existing in Mexico, if not more so. The United States should utilize the leverage it enjoys in the negotiations with Chile for NAFTA accession to exact a commitment to the rule of law from Chile. Chile must reform the Constitution to allow for civilian control of the military, and Chile should repeal the Amnesty Law. Above all, the United States must attempt to strengthen the hand of the Chilean judiciary, which has, with the exception of the Supreme Court, at long last resumed its natural function as the principal guarantor of constitutional rights and the rule of law in Chile.

291. See Sam Quinones, *And Justice for All?*, MEXICO INSIGHT, Jan. 8, 1995, at 5.

292. POLITICS OF AGREEMENTS, *supra* note 60, at 49.

293. Epstein, *supra* note 283, at S3. This incident has been dubbed the "Boinazo," in reference to the black berets, or "boinas," worn by the Army Special Forces.

294. It is generally acknowledged that Chile inspired the more recent economic reforms of both Mexico and Argentina. See, e.g., Edward C. Snyder, *The Menem Revolution in Argentina: Progress Toward a Hemispheric Free Trade Area*, 29 TEX. INT'L L.J. 95, 97-98 (1994).

