

**DISCREET PATH TO JUSTICE?:
CHILE, THIRTY YEARS AFTER THE MILITARY COUP**

A Human Rights Watch Briefing, September 2003

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I. SUMMARY

September 11, 2003, marks the thirtieth anniversary of the military coup that overthrew the elected government of Chilean President Salvador Allende. For seventeen years after the coup, a military junta led by Gen. Augusto Pinochet governed the country. There were no elections or legislature, and the press was strictly controlled. Between September 11, 1973, and March 1990, when Pinochet finally handed over power to the elected government of President Patricio Aylwin, 2,603 people were executed, died under torture, or “disappeared.”¹

After Chile’s return to democracy, these crimes were not prosecuted. Before leaving power, the military government had established an imposing set of political, legal and institutional protections meant to shield officials from justice. These protections included an amnesty decree that barred the prosecution of human rights crimes committed from 1973 to 1978, the period in which the worst political repression took place.

The decree was imposed after four-and-a-half-years during which Chile was governed under a state of siege. It has never been submitted to a vote. U.N. treaty bodies and the Inter-American Commission on Human Rights have found it to be incompatible with Chile’s international obligation to try and punish those responsible for the grave human rights violations committed under military rule.

It has only been in the past few years, since Pinochet’s landmark 1998 arrest in London, that Chile has made substantial progress in holding accountable those responsible for crimes committed under military rule. Most significantly, the courts have recently convicted several former military officers of heinous crimes committed during the period covered by the amnesty decree. Ruling that enforced disappearance is an ongoing crime, the courts have held the amnesty to be inapplicable. As a result, hundreds of former members of the armed forces now face trial. But

¹ The National Commission of Truth and Reconciliation, and its successor, the National Corporation for Reparation and Reconciliation, documented a total of 3,129 victims. This figure includes 423 “victims of political violence” (people killed during demonstrations and protests, in crossfire, and other circumstances), and 103 victims of political assassination by armed opposition groups. See *Informe de la Comisión Nacional de Verdad y Reconciliación* (Santiago: Comisión Nacional de Verdad y Reconciliación, 1991), Vol. II, Anexo II, p. 883; *Informe sobre Calificación de Víctimas de Violaciones de Derechos Humanos y de la Violencia Política* (Santiago: Corporación Nacional de Reparación y Reconciliación, 1996), p. 580.

because the convictions of former military officers have yet to be affirmed on appeal, the future of such prosecutions hinges on the views of Chile's appellate courts, including, ultimately, the Supreme Court.

While Chile has taken impressive steps forward on justice and accountability since 1998, the underpinnings of accountability remain fragile. This briefing provides an overview of recent developments. After a brief discussion of the Pinochet case, it analyzes the status of dozens of other court cases addressing past human rights crimes, highlighting prosecutions that resulted in convictions notwithstanding the amnesty decree. It concludes with an examination of justice proposals put forward by the government of President Ricardo Lagos and the state of civil-military relations in Chile today.

The question of how best to address past human rights abuses is once again a matter of public debate in Chile. On August 12, 2003, a month before the anniversary of the coup, Chilean President Ricardo Lagos announced an array of new measures relating to the criminal prosecution of former members of the military and to reparations for the relatives of victims of past human rights crimes.

Since President Lagos took office in March 2000 his government has maintained a discreet distance from developments in the courts. While taking a hands-off approach it has, nonetheless, tacitly supported the progress toward accountability. Notably, the government has rejected calls from pro-military political sectors to intervene in criminal prosecutions and enforce the application of the amnesty decree. It has insisted, instead, that interpretation of the decree is within the courts' legitimate and exclusive competence. It has also disregarded pressure from opposition politicians and sectors of the military to impose a time limit on judicial investigations. Finally, the government has contributed to the scope and effectiveness of these investigations by urging the higher courts to appoint special judges to devote themselves full time to human rights cases.

At present the Lagos government is seeking to play a more active role in the effort to address past human rights abuses. The measures that President Lagos announced on August 12 include welcome innovations for extending compensation to the victims of abuses, such as the creation of a commission to draw up a list of victims of torture. After thirteen years of democratic rule, this is the first time that an official proposal has been made to help those suffering the long-term consequences of torture. Another positive measure is the proposal to transfer human rights cases currently under review in military courts to the jurisdiction of the civilian court system.

Lagos has also advanced a more controversial proposal to provide immunity from prosecution to persons who come forward of their own accord to provide information to the courts. Government representatives have assured Human Rights Watch that immunity would not be offered to anyone who had participated directly in crimes against humanity. The language of the proposal does not reflect this. Human Rights Watch has urged the government to ensure that in the draft legislation and the debate on it in Congress this benefit is not provided to those responsible for gross violations of human rights. Providing immunity from prosecution in such cases would be contrary to international standards and could undermine progress to establish accountability for past crimes.

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government to ensure that in the draft legislation and the debate on it in Congress this benefit is not provided to those responsible for gross violations of human rights. Providing immunity from prosecution in such cases would be contrary to international standards and could undermine progress to establish accountability for past crimes.

Another of the Lagos proposals would offer reduced or commuted sentences to persons charged with involvement in human rights abuses who provide information on the whereabouts or fate of the “disappeared.” Human Rights Watch considers such reductions to be legitimate if they promote the investigation of crimes and help breach the wall of silence that has surrounded such crimes for a quarter of a century. Given that inquiries into the fate of the “disappeared” have so far proceeded at a frustratingly slow pace, the goal of advancing such investigations is a worthy one. We believe, nonetheless, that any law establishing leniency procedures should include strict guidelines to ensure that the option of lesser punishments is not abused.

A third proposal relating to prosecutorial leniency concerns those who followed orders out of fear or ignorance. It is well established that obedience to orders is no defense from prosecution for grave abuses of human rights. Any measure that would grant immunity, therefore, should be narrowly drafted to cover only persons who acted under threat of imminent death or serious bodily harm.

Finally, a government proposal to consider the pardon and release of those people convicted and sentenced for crimes committed during military rule who have already served a long time in prison must be carefully reviewed in the legislature. Individuals who have been convicted of crimes against humanity should serve their sentences in full unless there are urgent humanitarian reasons for their release. In exercising the right to pardon consideration should be given to the seriousness of the offenses that they have committed.

While the question of how to address the military’s gross human rights violations may be the most pressing issue left over from the Pinochet era, it is not the only one for which reform is needed. The country’s 1980 Constitution, another legacy of military rule, badly needs revision. Yet efforts to rid it of its undemocratic aspects have moved at a snail’s pace. After thirteen years of negotiations between the government coalition, the Coalition of Parties for Democracy (*Concertación de Partidos por la Democracia*), and the main opposition bloc, a broad array of constitutional reforms is still bogged down in discussion in a Senate committee.

In deliberations that receive little press attention, the committee appears to have reached consensus on most of the reforms. They include, for example, the elimination of appointed seats in the Senate, restoration of the president’s powers to remove the commanders-in-chief of the armed forces and the uniformed police, and downgrading of the powers of the National Security Council. In the past, however, agreements on these issues have often broken down, and the future of the reforms is still uncertain.

Chile remains deeply divided along left-right lines about the circumstances of and justification for the coup and may remain so for many years to come. Its people are increasingly prepared to accept this as a fact of life; politicians talk much less now of “reconciliation” than they did previously. Nevertheless, only a few still triumphantly commemorate the events of September 1973. Of those who are convinced of the benefits the military regime brought to Chile, only a minority denies or seeks to justify the terrible human rights crimes that it committed.

The army, the branch of the armed forces most implicated in the abuses, has publicly acknowledged human rights violations and, in marked contrast with previous years, now extends at least limited cooperation to judicial investigations seeking to clarify what took place and who was

responsible. The current army commander, Gen. Juan Emilio Cheyre, has made speeches distancing the army from the military government. The same is true of the political parties of the right, many of whose leaders participated in that government as ministers or officials. And most politicians in the opposition, as well as in the government, agree that the courts should determine criminal responsibility without pressure or political interference.

Yet there remain clear limits to Chile's efforts to deal with its abusive past. In Congress, significantly, no proposals have been introduced to repeal or annul the amnesty decree. Indeed, government spokespersons over the years have consistently opposed such an option as politically and legally unviable.

In this respect, the situation in Chile differs significantly from that in Argentina, where the recently elected government of President Nestor Kirchner has taken vigorous steps to bring about the prosecution of "dirty war" crimes. Within days of taking office on May 23, President Kirchner fired senior military officers who had lobbied for officers under prosecution for human right abuses committed during military rule, and repealed a government decree preventing the extradition of such people to third countries. Soon after, he successfully pushed Congress to annul the country's amnesty laws.

While developments in Chile have been less dramatic, their overall trend remains positive. Within the next few years, if not sooner, events will tell whether Chile's quieter approach also leads to justice.

II. THE PINOCHET CASE

To appreciate the dramatic progress made on human rights investigations since 1998, one must remember the situation that existed before Pinochet's arrest in London. The amnesty decree introduced by the former dictator in 1978 effectively blocked human rights prosecutions for crimes committed before that date.² Military courts exercised jurisdiction over officers accused of human rights violations, and an army judge sat on Supreme Court panels dealing with appeals affecting cases under military jurisdiction. Pinochet himself had the extra benefit of immunity as a former president who occupied a lifetime seat in the Senate following his retirement as army commander. And before departing from the presidency, Pinochet had left in place a pliant judiciary by retiring ageing judges and replacing them with younger men he personally selected.

During the 1990s, apart from the notable conviction in 1995 of former DINA chief Manuel Contreras and his deputy Pedro Espinosa, the Supreme Court frequently blocked prosecutions initiated in the lower courts.³ In such cases, it would either invoke the amnesty decree itself or would transfer the cases to military courts, which then did so.

As of October 1998, of the thousands of crimes committed during the period covered by the amnesty decree, only the Letelier-Moffitt murder had been solved.⁴ Although twenty members of

² The decree provided amnesty for criminal acts committed between the day of the coup and March 10, 1978, the day the state of siege was lifted. At least 2,269 (82 per cent) of the junta's victims died or "disappeared" during this period.

³ The National Directorate of Intelligence (Dirección de Inteligencia Nacional, DINA) was a secret police force whose director, Col. Manuel Contreras, answered directly to Pinochet.

⁴ The Letelier-Moffitt case was expressly excluded from the amnesty decree, chiefly as a result of pressure by the U.S. government.

the security forces had been convicted for human rights crimes committed between 1978 and the end of military rule in March 1990, all but four of them were implicated in the same crime.⁵

Pinochet's prosecution abroad changed the legal and political landscape in Chile. A new, more outspoken and challenging debate on human rights began to occupy the Chilean media. The political parties of the right, facing a presidential election in December 1999, distanced themselves from Pinochet's legacy (the former dictator's name was scarcely mentioned by either side in the campaign). Even the army, then under the command of Gen. Ricardo Izurieta, was quite restrained in its support for Pinochet.⁶

As part of their diplomatic strategy to persuade the British government to hand Pinochet back, the Chilean authorities promised to bring Pinochet to justice in Chile.⁷ This commitment, which had been so notably lacking before Pinochet's arrest, gave fresh hope to the victims and spurred on the courts to take their duty to protect human rights more seriously.

One by one, each of the layers of immunity Pinochet had created for himself was pierced. Application of the amnesty law fell in 1999 to the doctrine of "disappearance" as an ongoing crime.⁸ By the time of Pinochet's return to Chile in March 2000, the former dictator's appointees on the bench were in a minority. Basing its decision on the seriousness of the evidence against him, the Supreme Court lifted Pinochet's parliamentary immunity, obliging him to face trial. In the new political climate, transfer of the case to a military court composed of his former subordinates was never seriously contemplated.

Finally, with his immunity in tatters, only humanitarian considerations saved the former tyrant from prosecution and probable conviction. On July 9, 2001, the Sixth Chamber of the Santiago Appeals Court suspended the criminal proceedings against Pinochet, ruling by two votes to one that "moderate vascular dementia" disqualified him from trial. Within days, he had announced his retirement from the Senate and from public life. When the Supreme Court confirmed the appellate decision one year later, it was already clear that the former dictator would never have to face prosecution.⁹ But it was equally clear that his political career was over and his legacy seriously tarnished.

⁵ The case was the abduction and murder in 1985 of José Manuel Parada, an archivist at the Catholic Church's human rights organization; Manuel Guerrero, a teacher; and Santiago Nattino, a graphic artist. The case was called *Caso Degollados* (slit-throats case), because of the gruesome way in which the victims died.

⁶ Later, General Izurieta played an important role in persuading the general to cooperate with the Chilean courts.

⁷ As President Frei stated: "All our efforts to get Senator Pinochet home have had a sole objective: that it should be the Chilean courts not those of another country that apply the law." Quoted in *Human Rights Watch World Report 2001* (New York: Human Rights Watch, 2000), p.110.

⁸ See discussion below. Relying on this doctrine, the Second Chamber of the Supreme Court in June 1999 unanimously upheld the prosecution on kidnapping charges of former hard-line general Sergio Arellano Stark, and four other army officers in the "Caravan of Death" case. It was a particularly egregious episode of multiple executions and "disappearances" in October 1973 that implicated soldiers allegedly acting with special authority from Pinochet himself. For a detailed discussion of the legal effects of the amnesty, see Human Rights Watch, *When Tyrants Tremble: The Pinochet Case* (New York: Human Rights Watch, October 1999), pp. 38-43.

⁹ Other judicial proceedings followed, however. On October 7, 2002, the Santiago Appeals Court rejected a request for Pinochet's parliamentary immunity to be removed as a prelude to his extradition to Argentina to stand trial for the car-bomb murder of former army commander-in-chief Carlos Prats and his wife Sofía Cuthbert, in September 1974 in Buenos Aires. On August 27, 2003, the same court rejected a similar request

III. PROGRESS IN OTHER HUMAN RIGHTS TRIALS

Since 1998, there has been notable progress in holding to account those responsible for human rights violations under military rule. As of the end of July 2003, an additional twenty-two defendants had been convicted. Even more stunningly, no fewer than 334 individuals were facing charges such as kidnapping, murder, and illegal arrest.¹⁰ Among the defendants were twenty-two generals, and forty colonels and lieutenant colonels.¹¹

The most dramatic increase in prosecutions occurred during the first six months of 2003, when 120 members of the armed forces were charged in thirty-eight separate cases.¹²

These cases include some of the most emblematic ones of the years immediately following the coup. Others from the period between 1978 and 1990 have also been advancing with surprising speed, particularly compared to earlier years.

Nevertheless, due in large part to military intransigence, progress toward clarifying the fate of Chile's 1,102 "disappeared" has been painfully slow. Overall, only about 10 percent of the victims have been accounted for.¹³ Most of those whose bodies have been recovered were abducted and believed killed between 1973 and 1974, when the repression was still decentralized and disorganized. A civilian-military round table set up in August 1999 to discuss the issue of "disappearances" led to an agreement between human rights lawyers and the armed forces that the latter would obtain information from their members who participated in the atrocities. This information was made public in January 2001, with the military acknowledging for the first time that the bodies of some 151 prisoners had been thrown from aircraft in the sea, rivers and lakes of Chile. Yet, although this admission was itself important, the information provided on burial sites was full of inaccuracies. Moreover, the military's report revealed nothing about the fate of the hundreds of victims who "disappeared" at the hands of the DINA between 1974 and 1978.

in connection with the Calle Conferencia case (the abduction and "disappearance" of twenty members of the Communist party in May 1976).

¹⁰ Another thirty-one were under investigation, although not yet charged. 113 of those convicted, charged, or under investigation belonged to the army, seventy-seven to *Carabineros* (the uniformed police), twenty-six to the air force, fourteen to the navy, and nine to *Investigaciones* (the criminal investigations branch of the police).

¹¹ *Nómina de Procesados y Condenados por Violaciones a los Derechos Humanos al 31 de Julio de 2003*. Programa de Derechos Humanos, Ministerio del Interior.

¹² Fundacion Documentación y Archivo de la Vicaría de la Solidaridad, *Informe de Derechos Humanos del Primer Semestre de 2003*, p. 7. Initially, the Supreme Court appointed two *ministros en visita* (judges appointed to dedicate themselves exclusively to a single case) to investigate information provided by the army about six bodies thrown down an abandoned mineshaft on the Cuesta Barriga, a hill outside Santiago, and others buried at the army base of Fort Arteaga. These burial sites were among the few identified by the armed forces in their January 2001 report to the civilian-military roundtable. Of 180 victims listed, the military stated that some 150 had been thrown from planes into the sea, lakes, and rivers of Chile. After compiling a register of all the cases then under court investigation, in June 2001 the Supreme Court announced the assignment of nine judges to work full-time on human rights cases, while fifty-one others were assigned to work on them as a priority. The judges were required to report every month on the progress of their investigations. Fundacion Documentación y Archivo de la Vicaría de la Solidaridad, *Informe de Derechos Humanos del Primer Semestre de 2001*.

¹³ Mireya García, vice president of the AFDD, cited in Vicaría de la Solidaridad, *Informe de Derechos Humanos, Segundo Semestre 2002*, p. 37.

Advances in pre-1978 cases owe much to the conscientious work of special judges—appointed in 2001 and in the years that followed—with a mandate to devote themselves full time to human rights cases.¹⁴ The distress caused to relatives of the victims by the serious errors in the information provided by the armed forces generated wide public sympathy for these measures.¹⁵ In mid-2001 the government approved a budget supplement of 500 million pesos (approximately U.S.\$714,000) to cover the costs of the special judges. Their number has fluctuated, but since 2001 their mandate has been renewed several times. Indicative of the increase in judicial activity, in October 2002, part of the enormous caseload taken on by Judge Juan Guzmán (ninety-nine cases in all) was redistributed to four other special judges.

IV. FIRST CONVICTIONS DESPITE THE AMNESTY DECREE

In a landmark development, the year 2002 saw the first conviction for human rights crimes committed during the period covered by the amnesty decree. On November 15, 2002, two army generals, Héctor Bravo Muñoz and Jerónimo Pantoja, were sentenced to three years in prison for the October 1973 kidnapping of trade union leader Pedro Espinoza Barrientos.

Other such convictions quickly followed. On April 15, 2003, special judge Alejandro Solís sentenced the former chief of the DINA, Manuel Contreras Sepúlveda, to fifteen years imprisonment for the 1975 kidnapping of Miguel Angel Sandoval Rodríguez. Four other senior DINA officials also received prison sentences in the case. Next, on August 6, 2003, Judge Solís sentenced army colonel Hugo Cardemil to seventeen years imprisonment and two Carabinero officers to shorter terms for the disappearance of twenty-seven people from Parral, a town in the south of Chile, during the first six months of the military government.

The legal basis of these convictions is the doctrine that “disappearance” is an ongoing crime. According to this view, which is now widely accepted in the Chilean courts, “disappearance” is a crime that continues until the victims are located, or if found to have been killed, until the estimated date of their deaths. When the fate of the victims remains unknown (as is true in all but about 10 percent of cases) the crime falls outside the time period covered by the amnesty. In other words, the amnesty decree does not prevent the prosecution and conviction of those responsible for the crime.¹⁶

The Supreme Court will soon hear appeals against the first convictions for crimes committed during the period the amnesty covers, and much will hinge on the legal principles the court decides to apply. It has already relied on the doctrine of “disappearance” as an ongoing crime in past cases, including in the 2000 decision in which it affirmed the lifting of Pinochet’s parliamentary immunity. In fact, relying on this doctrine, neither the appeals courts nor the Supreme Court have applied the amnesty decree in any case during the last five years.

¹⁴ According to the Fundación Social de las Iglesias Cristianas (FASIC), which has provided legal assistance to victims of human rights violations for nearly thirty years, “this judicial initiative has constituted the most efficient, appropriate and productive mechanism ever created in our judiciary to tackle a challenge of this nature, and the results are evident.” FASIC, “Derechos Humanos Chile: Un Nuevo Escenario”. <http://www.fasic.org/doc/prop030727a.htm>(retrieved on August 10, 2003).

¹⁵ As an example of the mistakes, the remains of Juan Luis Rivera Matus, said by the military to have been cast into the sea, were found in March 2001 in a grave at Fort Arteaga. Furthermore, forensic investigators at the Cuesta Barriga and Fort Arteaga sites soon realized that bodies had been secretly removed at a later date, leaving only fragments behind. Other cases of the removal of bodies had been discovered in earlier years. Of this the armed forces had said nothing in their report.

¹⁶ “Disappearance” is treated under the rubric of kidnapping (*secuestro*).

In addition, over the past few years, some judges, including a few Supreme Court justices, have cited international humanitarian law as grounds for decisions to order the reopening of cases closed under the amnesty decree.¹⁷ In fact, the argument that, pursuant to Article 5 of the Chilean Constitution, international human rights treaty obligations are binding on the courts even when they conflict with domestic law, was used by two panels of the Santiago Appeals Court as early as 1994.¹⁸ ii Recently, some appellate judges have asserted publicly that their duties include interpreting the laws and ensuring that their decisions are consonant with human rights principles.¹⁹ iii Although statements like this are encouraging, one should also remember that in the past the Supreme Court overruled the application of international humanitarian and human rights law in a string of important cases.²⁰

President Lagos made reference to the ongoing prosecutions when he announced his accountability proposals on August 12. He stated that the interpretation of the amnesty was a job for the courts:

I repeat my conviction that the courts are the only correct arena in which to advance in establishing the truth and applying justice in accordance with the laws in force. Consequently my government does not agree with any proposal that means establishing a full stop to trials, either because such proposals are morally unacceptable or because they are legally ineffective. By the same token, it leaves the courts to decide how to interpret the amnesty decree.²¹

Each side in the controversy found support in this statement. Politicians of the right immediately latched onto Lagos's reference to "the laws in force," calling it an "explicit" ratification of the amnesty decree.²² But Lagos's commitment to "leave it to the courts to decide

¹⁷ The most noted case was that of Enrique Poblete Córdova, which the Supreme Court's Criminal Bench ordered to be reopened in September 1998, on grounds that Common Article 3 of the Geneva Conventions of 1949 was applicable. See Human Rights Watch, *When Tyrants Tremble*, p. 43.

¹⁸ The cases were Lumi Videla (September 27, 1994) and Bárbara Uribe and Edwin Van Yurick (October 3, 1994). Cited in Amnesty International, *Chile: Transition at the Crossroads*, Amnesty International Publications, AMR 22/01/96, March 1996. Article 5(2) of the Constitution, added after negotiations between the opposition and the military government on the eve of the 1989 elections, states: "the exercise of sovereignty recognizes as a limitation respect for the essential rights that emanate from human nature. The duty of the organs of State is to respect and promote those rights, guaranteed by this Constitution, as well as the international treaties ratified by Chile and that remain in force."

¹⁹ For example, in July the President of the Santiago Appeals Court, Carlos Cerda, stated in an article on the human rights debate that "any law that is passed does not necessarily have to be applied by the judges, unless it is framed in a way compatible with the essential rights that the Chilean Constitution orders us to safeguard and that International Law, not yet written, demands as a basic requirement for civilized coexistence." His comments were interpreted by the conservative press, quite wrongly in our view, as undermining the stability of the law. See "Los dichos del ministro," *El Mercurio*, August 20, 2003; "Doctrina Cerda genera áspero debate jurídico," *El Mercurio*, July 18, 2003.

²⁰ Examples are the case of seventy detainees who "disappeared" between 1973 and 1977 (on August 24, 1991, the Supreme Court ruled that the amnesty's application in this case was constitutional) and the case of international civil servant Carmelo Soria, abducted and murdered by the DINA in 1976 (Supreme Court decision of August 23, 1996).

²¹ No Hay Mañana sin Ayer: Propuesta del Presidente Ricardo Lagos en Materia de Derechos Humanos, August 12, 2003, <http://www.presidencia.cl> (retrieved on September 4, 2003).

²² The president of the Union Demócrata Independiente (UDI), Pablo Longueira, said "If there was no proposal to eliminate the amnesty, it's a clear sign that the law is beneficial for social peace." "Longueira: Lagos fue explícito en reconocer la ley de amnistía," *La Segunda*, August 13, 2003. Neither Jose Miguel

how to interpret the law” actually suggests the opposite, given that the courts have been consistently avoiding any application of the decree.²³ The government also explicitly rejected placing a time limit on court investigations, as the main opposition party had proposed in July.²⁴

V. THE LAGOS PROPOSALS

In a televised broadcast on August 12, 2003, President Lagos announced his government’s first major initiative to deal with the legacy of human rights violations committed under military rule. His proposals were broad in scope, covering three main issues: measures to improve the effectiveness and speed of court investigations of past human rights violations; proposals to improve and extend symbolic and economic reparation for victims and their relatives; and institutional and legal reforms to safeguard human rights in the future. At this writing the government was drafting several bills to implement the proposals.

Several of the proposals would be positive steps. Among these is a proposal to transfer all human rights cases currently under review by military courts to civilian courts within a month. The lack of independence and impartiality of military courts in dealing with human rights cases has been amply demonstrated in the past, and this measure is long overdue. Another important proposal is to provide the courts with powers to subpoena classified documents from the armed forces, a necessary counterbalance to military secrecy.

Human Rights Watch also welcomes the Lagos government’s commitment to continue seeking the appointment of special judges to devote themselves full time to human rights cases, and to ensure the continuing cooperation of *Investigaciones*, the criminal investigations police force, with the judges. Another useful proposal is the government’s offer to provide the Medical Legal Service (SML) with an external advisor to improve methods and procedures of identifying victims from bone fragments and other remains found at burial sites. The efficiency of the SML has been seriously questioned in recent years, and the assistance of an independent expert to monitor this vital forensic work is essential.²⁵

The proposal to form a commission to draw up a list of victims of torture is also to be warmly welcomed. Beyond economic compensation, the government should consider ways of symbolically recognizing the legacy of systematic torture. The commission should be mandated not

Insulza, the minister of the Interior, nor Secretary General of Government Francisco Vidal allowed themselves to be drawn by journalists into defining the government’s position on the law. C. Iglesias and C. Rivas, “El misterioso oráculo de Lagos sobre la ley de amnistía,” *El Mostrador*, August 14, 2003 http://www.elmostrador.cl/modulos/noticias/constructor/noticia.asp?id_noticia=95951 (retrieved on August 14, 2003). In the past, some high-level government officials have explicitly argued that the decree should not stand in the way of convictions. In 1991, for example, President Aylwin’s minister of justice stated that he considered the amnesty decree to be “tacitly derogated” in the case of grave human rights crimes. The International Commission of Jurists and the Center for the Independence of Judges and Lawyers, *Chile: A Time of Reckoning* (Geneva: The International Commission of Jurists, 1992), p. 199.

²³ “Discurso de Lagos: Abogados interpretan alusión a ‘ley vigente’,” *El Mercurio*, August 14, 2003;

²⁴ La Paz Ahora: Propuesta de la UDI sobre Derechos Humanos, June 20, 2003

<http://www.udi.cl/prensa/noticias2003/junio/2006DDHH/noticias.htm> (retrieved on June 23, 2003).

²⁵ The Medical Legal Service is attached to the Ministry of Justice, and carries out autopsies and forensic investigations. For recent criticisms of its performance in identifying the remains of victims of human rights violations, see Human Rights Watch, *World Report 2003* (New York: Human Rights Watch, 2003), p. 122. In a letter dated July 15, 2003, Human Rights Watch urged President Lagos to establish a mechanism to monitor its work in this area.

just to investigate and record individual cases, but also to investigate as fully as possible the circumstances in which torture became established as an institutionalized practice following the military coup, and for its findings to be made public. Such a report would help increase public awareness about the scourge of torture, a topic that is still largely taboo in Chilean society.

Three of the government's most controversial proposals are aimed at encouraging those implicated in human rights abuses to cooperate with the courts and to provide information about the fate and whereabouts of the victims of abuses. These proposals have been criticized by Chilean human rights groups as amounting to a veiled form of impunity.^{26 iv}

In general terms, Human Rights Watch recognizes that prosecutors in some circumstances may appropriately offer more lenient sentences to suspects willing to provide information that aids in the clarification of crimes and the identification of those responsible for them. We believe, however, that any offer of prosecutorial immunity to those responsible for gross human rights violations such as torture, "disappearance," or extrajudicial execution would be unacceptable. We are also convinced that offers of sentence reductions should be made only in cases in which genuinely useful cooperation is extended, and that the sentence reduction must be limited and proportionate to the extent of the cooperation.

Human Rights Watch is thus concerned about the first of the leniency proposals, which offers immunity from prosecution to:

Those who without being accused or charged present themselves voluntarily to the courts and provide reliable, effective and verifiable information about the whereabouts of the victim or the circumstances of that person's disappearance or death.^v

According to a high-level government advisor, this measure is intended to apply only to those who had an ancillary role in human rights abuses, have not been identified in criminal proceedings, and might never be traced unless they voluntarily came forward to offer information.²⁷ In response to criticisms by human rights lawyers who fear that the proposal could provide immunity to people responsible for grave abuses, the government has said that those who participated directly in such abuses have already been identified in court proceedings, and therefore would not be eligible.^{28 vi} Yet the concern remains that not all these individuals have already been

²⁶ The Association of Relatives of Disappeared Detainees (Agrupación de Familiares de Detenidos Desaparecidos, AFDD), the main organization representing relatives of the "disappeared," rejected the Lagos measures as a "disgrace." The AFDD found the measures to be a "new form of promoting the most flagrant impunity, in an underhand way." In its view, the proposals were "ambiguous and clearly induced the application of the amnesty decree." "Familiares de Desaparecidos ven 'impunidad solapada'," *El Mercurio*, August 15, 2003.

Several UDI leaders also noted, in their case with approval, that the measures were an explicit endorsement of the amnesty. Paradoxically, however, retired military officers were extremely pessimistic about the benefits that they would derive from the proposals. As Gen. Hernán Núñez explained, "the president spoke of respecting the laws in force in an allusion to the need to respect the strict sense of the Amnesty Law, but not a day had passed before the president of the Supreme Court, Mario Garrido, said that the interpretation of that norm would depend on each judge." "Generales en retiro ponen en duda viabilidad de iniciativa," *El Mercurio*, August 16, 2003.

²⁷ Human Rights Watch interview with José Zalaquett, member of President Lagos's advisory team on human rights, Santiago, Chile, August 27, 2003.

²⁸ In an interview in *El Mercurio*, the minister of the Presidency, Francisco Huenchumilla, pointed out that "after all these long years in which everyone is known in the courts and in the world of human rights its very unlikely that any big fish would be found, so to speak..." "Francisco Huenchumilla: en la propuesta no hay impunidad," *El Mercurio*, August 16, 2003.

accused or charged. If the government wants to limit the offer of immunity to those persons who only had an accessory role in crimes, it would be easy enough to draft the law so that includes such a limitation.

In the congressional discussion of laws to implement this proposal, legislators should ensure that the offer of immunity from prosecution is strictly limited to those situations where it is appropriate. It should never be granted to individuals who were directly responsible for gross human rights violations like torture, “disappearance,” or extrajudicial executions. An individual may be eligible for immunity from prosecution only if he or she was unaware of participating in a grave criminal act, and did not participate knowingly in similar actions before or since. For example, immunity might be appropriate for a truck driver who was ordered on a single occasion to transport prisoners to a spot where they were executed, without foreknowledge of what was to happen. Those who formed part of the firing squad should not, however, be granted immunity, even if mitigating circumstances could be considered in calculating their sentences.

In addition, legislators should make clear that the immunity offered only covers the facts revealed in the confession, or in any accusation that may subsequently arise from it should new criminal proceedings be initiated. Blanket immunity from criminal prosecution would be unacceptable, as it would allow a person to escape prosecution for grave crimes by admitting to participation in minor ones.

A second provision aims to:

Reduce or commute penalties applicable to those already charged with complicity in or covering up crimes but before the court has passed sentence, if they provide information that helps effectively to establish the facts, or to identify the participants or the fate of the disappeared or executed prisoners whose remains have not been handed over.

If the individual concerned does not provide the information within a set period of time, these benefits would not apply.

In principle, this is similar to a plea bargain arrangement, and is a system already used in Chile in dealing with organized crime. In principle, Human Rights Watch has no objection to an arrangement of this sort and indeed recommended it in a letter sent on July 15 to President Lagos.²⁹

We believe, however, that any law establishing this procedure should provide guidelines to the effect that the reduction or commutation of sentences should only apply to less serious crimes, and in no circumstances to gross violations of human rights or crimes against humanity. For example, those responsible for planting evidence at crime sites to disguise extrajudicial executions should not be eligible if such actions form part of the planned elimination of government opponents. Neither should those who do not torture prisoners but assist in torture by taking statements or giving medical examinations to prisoners after torture.

A third provision concerns those who followed orders out of fear or ignorance. They would be given lesser penalties, or even excused altogether once the truth had been established.

The proposal states:

²⁹ The letter is available on the Human Rights Watch website, at <http://www.hrw.org/spanish/cartas/2003/lagos.html>

There are circumstances in which subordinates have operated out of fear of reprisals that could mean placing their lives at risk, or in a state of insuperable ignorance, and have not been in a position to take full cognizance of the consequences of their actions. If these people are prepared to cooperate with truth and justice it would seem logical to consider a lesser sanction or no sanction at all in their case, once the truth is established.^{vii}

It is important to note that under human rights law the mere fact that a member of the military is following the orders of a hierarchical superior is no defense from prosecution for grave abuses of human rights. This principle is clearly enunciated in the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and in the Rome Statute of the International Criminal Court.³⁰ The Rome Statute only provides for immunity from prosecution if the person faced “a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person.”³¹ Any proposal to implement leniency or immunity for those in subordinate positions in the command structure should closely adhere to this principle.

The concept of “insuperable ignorance” is not recognized in international human rights law as a circumstance for which immunity from punishment for the commission of a gross violation of human rights is acceptable. In recent meetings with government officials Human Rights Watch urged that this concept be omitted from the draft legislation to be presented to Congress.³² How much an individual knew or did not know about the consequences of his or her actions is one of the circumstances that the court should take into account when sentencing, as recognized in the Rome Statute. The statute provides: “In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.”³³

As in the case of the other prosecutorial benefits proposed by Lagos, those guilty of crimes against humanity should also be excluded from any future government pardons. Lagos proposes to consider pardons to prisoners convicted of crimes of violence during the military government. As a precondition for acceptance of the pardon request, the prisoner would have to have confessed and repented his or her crime and have already been in prison a long time (how long is not specified). The proposal does not state to which prisoners it refers, but its wording does not expressly exclude the possibility that beneficiaries might include those convicted of crimes against humanity.³⁴

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³⁰ Article 2(3) of the Convention states specifically that “An order from a superior officer or a public authority may not be invoked as a justification of torture.” In its report on Venezuela, the U.N. Committee against Torture called for the “repeal of rules providing for exemption from criminal responsibility on the grounds that the person concerned is acting in due obedience to a superior. Although these rules are contrary to the Constitution, in practice they leave open to judicial interpretation provisions which are incompatible with article 2, paragraph 3, of the Convention.” Concluding Observations of the Committee against Torture: Venezuela 5/5/99, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Committee Against Torture, twenty-second session, 26 April-14 May 1999, para. 148. http://www.unhchr.ch/html/menu3/b/h_cat39.htm (retrieved on August 22, 2003).

³¹ Article 31(1)(d) of the Rome Statute of the International Criminal Court.

³² Human Rights Watch interview with President Lagos’s spokesman, Francisco Vidal, Santiago, Chile, August 27, 2003.

³³ Article 78(1) of the Rome Statute.

³⁴ The proposal states: “The government would examine the situations of other prisoners convicted for crimes of similar gravity in earlier periods [i.e. prior to inauguration of the Aylwin government on March 11, 1990] who request a presidential pardon, provided that they have expressed genuine repentance, have been in prison for a long time and have recognized their crimes, cooperating in establishing the truth and with the courts.”

In principle, unless there are urgent humanitarian reasons, those convicted of crimes against humanity should not be pardoned or released before having served their sentences. In exercising the right to pardon consideration should be given to the seriousness of the offenses that they have committed.

In addition to measures dealing with justice and reparation, the Lagos proposals include important commitments for the future. A proposal to reform the military justice system, ensuring that military courts no longer exercise jurisdiction over civilians or over military personnel accused of human rights abuses, addresses a longstanding concern of human rights organizations, including Human Rights Watch.³⁵ The organization also welcomes the government's commitment to seek congressional approval for a constitutional reform that would enable Chile to ratify the Rome Statute establishing the International Criminal Court.

VI. CIVIL-MILITARY RELATIONS

The relatively smooth relationship that exists today between the elected government and the armed forces should not disguise the fact that Chile's military leaders remain powerful actors in the political process. The relationship in the past has been punctuated by tense standoffs, including two displays of force by the army in 1990 and 1993.³⁶ Chile is still far from being a country in which the military commanders behave like public servants with solely professional functions, subordinate to civilian leaders and answerable to the courts. Indeed, there is little press comment about the fact that high-level military officials persistently opine on political matters.³⁷

President Lagos, a socialist, gained political standing as an outspoken opponent of General Pinochet. The father of the current minister of defense, Michelle Bachelet, Air Force Gen. Alberto Bachelet, died after torture in the public prison of Santiago six months after the military coup. Despite these historical antecedents, the Lagos government has a cordial working relationship with the armed forces, particularly with the army, now under the command of Gen. Juan Emilio Cheyre. The *entente* between Lagos and Cheyre has not been seriously affected even by the *de facto* challenge to the amnesty decree.³⁸

While Cheyre frequently expresses frustration at the "military parade" (*desfile militar*) of former soldiers through the courts, the army under his leadership has taken steps toward greater cooperation with the courts and the police. Nonetheless, the cooperation has been more formal than

³⁵ See Human Rights Watch, Letter to President Ricardo Lagos, July 15, 2003.

³⁶ The first was the so-called liaison exercise (Ejercicio de Enlace), a state of alert called on December 19, 1990, to protest corruption scandals involving Pinochet's family. The second, on May 28, 1993, involved the threatening appearance on the Santiago streets of commandos in full combat gear, the so-called *Boinazo*. There have been minor moments of tension during the Lagos administration, such as a well-publicized lunch of the commanders-in-chief in a fashionable Santiago restaurant on May 15, 2000, organized to protest the legal proceedings against Pinochet. The incident was later dubbed the *Servilletazo*, after the Spanish word for table napkin.

³⁷ An exception was a recent newspaper interview with a former minister in the Frei government, John Biehl, who remarked that he found it "very sad that the army commander makes declarations and afterwards the president congratulates him on them. That's not good in a democracy. It's been too many years for us to be still in the same situation." Juan Andrés Quezada, "Ya está bueno que los jefes de las FFAA dejen de hacer declaraciones políticas," *La Tercera*, August 23, 2003.

³⁸ Cheyre's position has caused tension with most of the retired officers who participated in the coup and its aftermath, gaining him the sympathy of the government. "La soterrada guerra de los generales," *El Mercurio*, July 9, 2003. "¿Como rescatar al soldado Cheyre?" *El Mercurio*, July 13, 2003.

real, in the sense that the army responds to judges' investigative requests, but offers the bare minimum of information.

Significantly, Cheyre chose to open the anniversary year of the military coup with a statement distancing today's army from those events, and from the military government itself. "I am not a political actor and I do not desire to be one. Nor am I, or the institution I command, heir to a particular regime of government. Its defense, if any defense is needed, is up to other people or entities," said Cheyre in a widely commented article in the newspaper *La Tercera* on January 5, 2003.³⁹ ^x There was no triumphal evocation of the "military pronouncement" (the phrase Pinochet and his civilian supporters used to refer to the coup). Instead, Cheyre deplored the "acute civic enmity" of the time. "Those violations of human rights have no justification," the general stated categorically.³⁹ ^x

Cheyre made public comments on June 13 in the northern town of Calama in which he sharply criticized civilians who had encouraged military intervention. "Never again, the [civilian] sectors that incited us and officially backed our intervention in the crisis that they provoked. Never again, excesses, crimes, violence and terrorism."⁴⁰ ^{xi} He also extended his earlier condemnation of human rights abuses: "we are building an army for the 21st century. At the same time we have given proof that our process has committed itself never again to repeat human rights violations."⁴¹ ^{xii} The most striking indicator of the changed civil-military climate was that Cheyre ran his January article by Lagos, and met the President privately before his Calama speech.

Cheyre also obtained support for his position from a number of retired generals. Eight former junta members and ministers of the military government signed a July 3 statement recognizing that violations had been committed that could not be repeated, and expressing their intention to cooperate with the courts.⁴² Most notable about this statement was that it omitted any criticism of the judiciary or any reference to judges' obligation to apply the amnesty decree.⁴³

As can be seen from these examples, the army discourse has changed. However, the institution still has far to go before it fully severs its ties with the military regime. For example, it continues to deduct a percentage of soldiers' pay to cover the legal costs of retired personnel facing criminal charges for torture and "disappearances."⁴⁴

Legal reforms needed to restore the authority of the elected government over the armed forces are still pending after thirteen years of democratic rule. These include constitutional amendments to end the armed forces' official role as guardians of the constitution, and to restore the president's powers to remove the commanders-in-chief. Military courts still have jurisdiction over civilians for a variety of offenses, including assault on a police officer, and over military personnel accused of human rights violations committed while on active duty. The overhaul of the military justice code to limit the jurisdiction of military courts to purely military offenses is a long overdue reform to which Human Rights Watch attaches great importance.

³⁹ "Exclusivo: General Cheyre habla del golpe," *La Tercera*, January 5, 2003.

⁴⁰ "Cheyre critica por primera vez a los que avalaron el golpe militar de 1973," *La Tercera*, June 14, 2003.

⁴¹ *Ibid.*

⁴² "Texto Completo de la Declaración de los ex altos mandos del Ejército," *El Mostrador*, July 4, 2003.

⁴³ Pamela Jiles, "Cheyre y el nuevo Ejército," *El Mostrador*, July 11, 2003.

http://www2.elmostrador.cl/modulos/noticias/constructor/detalle_noticia.asp?id_noticia=91701 (retrieved on August 17, 2003).

⁴⁴ Patricio González, "Exoficiales valoran apoyo de las FFAA," *El Mercurio*, August 23, 2003.

Furthermore, the army must carry out internal investigations into abuses committed by its intelligence agents since 1990, and turn over the results to the courts. A dark shadow still covers the activities of the Army Intelligence Directorate (Dirección de Inteligencia del Ejército, DINE) during the 1990s. This agency is alleged to have spied on politicians, judges, and police, and smuggled former military agents wanted for judicial questioning out of the country.⁴⁵

Even more serious, credible recent testimonies by former secret police agents suggest that DINE agents were responsible for the assassination of police and army personnel who had information on cases under judicial investigation that compromised senior officers.⁴⁶ One of them was Eugenio Berríos, a chemist who had worked for the DINA and was wanted for questioning in the Letelier case. DINE agents escorted him secretly to Uruguay, where he “disappeared” in suspicious circumstances in 1992, and was later found dead.⁴⁷ None of these cases have yet been clarified in the courts, and the government has still not made public the results of any investigation into the DINE’s activities during this period.⁴⁸

ⁱ translation of footnote immediately preceding: Esta iniciativa judicial, ha constituido el mas eficiente, ideoneo y productivo mecanismo jamas creado en nuestra judicatura, para enfrentar una tematica de esta naturaleza y los resultados estan a la vista.

ⁱⁱ translation of footnote immediately preceding: El ejercicio de la soberanía reconoce como limitación el respeto a los derechos esenciales que emanan de la naturaleza humana. Es deber de los órganos del Estado respetar y promover tales derechos, garantizados por esta Constitución, así como los tratados internacionales ratificados por Chile y que se encuentren vigentes .

ⁱⁱⁱ translation of footnote immediately preceding: cualquier ley que se dicte no ha de ser vinculatoria para los jueces, sino en la medida en que ellas mismas sean dictadas conforme a los derechos esenciales que la Constitución chilena ordena resguardar y que el Derecho Internacional, aún no escrito, exige como referente básico para la convivencia civilizada.

^{iv} translation of immediately preceding footnote: “una desverguenza” and “una nueva forma de impulsar la más flagrante impunidad, de manera encubierta.” and “ambigua o claramente inductora de la aplicación del Decreto Ley de Amnistía.”

^v Otorgar inmunidad penal a quienes, sin estar imputados ni procesados, se presenten voluntariamente a los Tribunales de Justicia y proporcionen antecedentes fidedignos, efectivos y comprobables acerca del paradero de la víctima o de las circunstancias de su desaparición o muerte.

^{vi} translation of immediately preceding footnote: después de estos largos años, en que todo el mundo se conoce en los tribunales y en el área de los derechos humanos, es muy difícil encontrar peces gordos, por así decirlo.

^{vii} Hay circunstancias en las cuales personas subordinadas han operado bajo temor a la represalia que podía significar poner en riesgo sus propias vidas, o en estado de ignorancia insuperable, y no han sido capaces de atender cabalmente a las consecuencias de sus actos. Si estas personas están dispuestas a cooperar con la verdad y la justicia, parecería lógico considerar una penalidad menor o incluso nula para ellos, una vez establecida la verdad.

^{viii} Al mismo tiempo, examinará otras situaciones de reos condenados por delitos de similar gravedad en períodos anteriores, que soliciten el indulto presidencial siempre que hayan manifestado genuinamente su arrepentimiento, hayan estado ya en prisión por largo tiempo y hayan reconocido sus crímenes, cooperando con la verdad y los Tribunales de Justicia.

⁴⁵ Jorge Molina Sanhueza “Lo que debiera investigar el Ejército para aclarar hostigamientos de la DINE”, *El Mostrador*, August 5, 2003. http://www2.elmostrador.cl/modulos/noticias/constructor/detalle_noticia.asp?id_noticia=94742 (retrieved on September 1, 2003).

⁴⁶ Mónica González, “Yo sobreviví a la Operación Silencio,” *Siete Más Siete*, No. 76, August 22, 2003.

⁴⁷ Verónica Foxley and Mónica González, “Yo amé a un asesino,” *Siete Más Siete*, No. 73, August 1, 2003.

⁴⁸ See Human Rights Watch, “Unsettled Business: Human Rights in Chile at the Start of the Frei Presidency,” A Human Rights Watch Short Report, Vol. VI, No. 6, May 1994, pp. 19-20.

^{ix} No soy un actor político ni deseo serlo; tampoco soy-ni lo es la institución a mi mando- heredero de un determinado régimen de gobierno. Su defensa, si fuera necesario, compete a otras personas y entidades.

^x gravísima enemistad cívica ... Dichos atropellos a los derechos humanos no tienen justificación.

^{xi} Nunca más a los sectores que nos incitaron y avalaron nuestro actuar en la crisis que provocaron. Nunca más excesos, crímenes, violencia y terrorismo.

^{xii} Estamos construyendo el Ejército del siglo XXI. Junto a ello, hemos dado pruebas que nuestro proceso se ha comprometido a nunca más violaciones a los derechos humanos.