

# Can domestic courts adequately address past torture? The García-Lucero case and the meeting of justice and reparations obligations for Chilean torture survivors

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# Can domestic courts adequately address past torture? The García-Lucero case and the meeting of justice and reparations obligations for Chilean torture survivors

## **Cover Page Footnote**

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**Can domestic courts adequately address past torture?  
The García Lucero case and the meeting of justice and  
reparations obligations for Chilean torture survivors<sup>1</sup>**

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**Introduction**

The Inter-American Court of Human Rights (IACtHR) case of *García Lucero et al. vs Chile* deals with claims over insufficiency of reparations and denial of justice made by a Chilean survivor of dictatorship-era torture, now resident in the UK. The IACtHR's 2013 judgment in the case suggests that the Chilean state ought to have initiated an *ex officio* investigation of crimes committed against Mr. García Lucero as soon as it was apprised, via his application to an administrative reparations programme, of his alleged torture by state agents during the illegal detention that preceded his forcible exile in the early 1970s.<sup>2</sup> In this finding, the Court reiterates the putative active duty to prosecute to which it first alluded in the *Velásquez Rodríguez* case of 1988 when it found that investigation “must... be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family.”<sup>3</sup> The *García Lucero* case however intersects with particular force

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<sup>1</sup> Final editing of this paper was completed during the author's Logan NonFiction Fellowship at the Carey Institute for Global Good.

<sup>2</sup> IACtHR, *Caso García Lucero y otras vs. Chile*, Sentencia de 28 de agosto de 2013, Excepción Preliminar, Fondo y Reparaciones.

<sup>3</sup> IACtHR, *Velásquez Rodríguez vs. Honduras*, Judgment of July 29, 1988 (Merits). The case was over a forced disappearance.

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with debates about whether, how and by whom justice can be delivered at the domestic level for, in particular, survivors of systematic state-sponsored torture committed in the past.

The García Lucero verdict is potentially key to future efforts to stimulate or to contain the judicialization of past crimes of torture, since it is part of a growing body of regional jurisprudence on present-day accountability for past crimes. This jurisprudence is increasingly consulted, taken up and utilized by individual case-bringers, judges and prosecutors litigating domestically in Inter-American system countries other than those about which rulings were made, opening up multiple pathways of exchange between individual country situations and the regional system.<sup>4</sup> The particular characteristics of the García Lucero case make the verdict moreover additionally relevant to the equally weighty question of the status of testimony given to administrative bodies, since the plaintiff had previously given full accounts of his torture to both a truth commission and an earlier administrative reparations programme.

This paper argues that the García Lucero judgment may lead to further questioning of and challenges to state practice in the process of dealing with past gross human rights violations, a process discussed here under the rubric of transitional justice,<sup>5</sup>

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<sup>4</sup> The IACtHR case *Barrios Altos vs. Peru* (2001) is, for example, often cited to argue a prohibition on blanket amnesties. Prior to *García Lucero vs. Chile*, *Almonacid-Arellano vs. Chile* (2006), had constituted the only case seen by the Court regarding Chile's recent treatment of dictatorship-era crimes. *Almonacid-Arellano* has been taken up by various Brazilian public prosecutors attempting to make inroads into Brazil's continuing broad amnesty law. Marlon Weichert, "Remarks by prosecutor," to the conference '50 anos do Golpe: a nova agenda da justiça de transição no Brasil,' Recife, Brazil, 10-14 March 2014. Also drawn from discussions amongst case actors at regular meetings of the Latin American transitional justice network, [www.rljt.com](http://www.rljt.com), since 2013.

<sup>5</sup> For the purposes of this paper, the UN's broad definition of transitional justice is adopted as a working definition: "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation." See United Nations Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (March 2010).

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and whose constitutive dimensions are taken to be truth, justice, reparation and guarantees of non-recurrence.<sup>6</sup> The first of these challenges is to the widespread current practice of requiring victims to bear the burden of triggering compliance with what may in fact be understood as *ex officio* state obligations to investigate, prosecute and punish. The second challenge is to efforts to insulate administrative reparations programmes and/or truth commissions from criminal justice implications. The paper will use Chile as an illustrative case study for two main reasons. First, in its capacity as the setting for the García Lucero verdict. Second, as a country which is currently addressing many of the practical and jurisprudential issues arising in present judicialization of past torture.<sup>7</sup> This makes it a useful empirical stage on which to observe the playing out of tensions between domestic and international law, survivors' and defendants' rights, and competing claims about the correct prioritization of past over current criminal cases. While other countries may resolve this empirical puzzle in different ways, the relatively similar historical and legal contexts, and set of unitary regional human rights institutions, that prevail in the Americas mean such case studies are particularly likely to illustrate certain common dilemmas and dynamics.

#### **Structure**

Following the introduction, and these remarks on structure and scope, the paper is structured in six thematic sections. The first discusses justice entitlements of torture survivors, in general terms, and in Chile. The second discusses in more depth the relationship of the García Lucero verdict to the justice situation of survivors in Chile. The third addresses the question of

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<sup>6</sup> This follows the usage favoured by the recently-established UN Special Rapporteurship on transitional justice questions. See United Nations Human Rights Council, Resolution 18/7 (29 September 2011), A/HRC/18/L.22.

<sup>7</sup> Criminal claim-bringing for survived torture began to become noticeable, albeit in small numbers, from 2009. By December 2014 it represented over 10% of the total acknowledged court caseload of open accountability cases, and by mid-2016, had risen in proportion to 25% (see below).

whether and how judicialization of torture, and specifically of past torture, poses a distinctive justice challenge in the context of ‘victim hierarchies’. Sections four and five discuss the relationship of justice to reparations, and, in general, the interrelatedness of these and other dimensions of transitional justice entitlements as signalled in the García Lucero verdict. Finally, the paper mentions some considerations likely to affect the prospects for the García Lucero verdict and similar initiatives to have a discernible impact in the short and medium term in their ‘host’ states, at the grassroots level and at the level of state authorities.

### **Sources and Scope**

The paper draws on extensive original empirical research, including continuous tracking of judicial outcomes and periodic interviews with key actors, carried out and/or published by the present author and team members since 2009 under the auspices of the Observatorio de Justicia Transicional of the Universidad Diego Portales, Santiago de Chile (formerly Observatorio DDHH, henceforth ‘Observatorio’); on an expert witness affidavit prepared by the author for the Inter-American Court in the García Lucero case, and on original research carried out by this author and the Observatorio team for an unpublished report on reparations policy commissioned in 2011 by Chile’s official National Human Rights Institute (Instituto Nacional de Derechos Humanos, INDH). All documents cited in the paper as publications of the Observatorio DDHH or Observatorio de Justicia Transicional can be accessed free of charge via the dedicated ‘Observatorio JT’ web space of the Universidad Diego Portales human rights centre webpage at [www.derechoshumanos.udp.cl](http://www.derechoshumanos.udp.cl). All unpublished sources, including interview material and case verdicts, are on file with the author and/or in the databases and archive of the Observatorio de Justicia Transicional. Further detail can be supplied on request, except where interview subjects requested reserve or anonymity. Although the paper adopts the premise that the truth, justice, reparations and guarantees of non-

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recurrence dimensions of transitional justice are increasingly seen as an indivisible set of interrelated rights, and corresponding state responsibilities, empirical discussion is limited primarily to the justice and reparations issues foregrounded by the García Lucero case. Principally for reasons of space, the Valech truth commission and other truth measures are not explored in depth. These and reforms related to guarantees of non-recurrence are however discussed in forthcoming work by this author, in *Observatorio de Justicia Transicional* annual report chapters for 2014, 2015, and 2016, and in Accatino and Collins “Truth, Evidence, Truth: The Deployment of Testimony, Archives and Technical Data in Domestic Human Rights Trials” *Journal of Human Rights Practice* 8.1 (2016): 81-100.

### **Justice Entitlements of Torture Survivors**

Across Latin America, which is currently experiencing a wave of domestic accountability cases for past human rights violations or serious political violence, cases are concentrated in countries where fatal violence was particularly prevalent. They are much less numerous, indeed virtually absent, in states where torture seems to have been the most widespread terror tactic.<sup>8</sup> Moreover, where domestic accountability cases for past violations exist at all, they tend to focus on absent victims—the dead or disappeared.<sup>9</sup> Torture survivors often appear to be

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<sup>8</sup> The latter include Brazil and Paraguay, where cases have been virtually absent, and Uruguay, where they are incipient. The former include Chile and Argentina, undoubtedly regional leaders in the current formal prosecution of past crimes. See Elin Skaar, Jemima García-Godos, and Cath Collins, eds. *Transitional Justice in Latin America: The Long Road from Impunity toward Accountability* (New York: Routledge, 2016 or [www.rljt.com](http://www.rljt.com)).

<sup>9</sup> Here and throughout, this paper will use the term ‘absent victim’ to refer to the dead and forcibly disappeared. For Chile, this encompasses the 3,216 individuals who the Chilean state currently recognizes as having been subjected to forced disappearance or politically-motivated extrajudicial execution, by state agents, persons acting at their service, or unidentified assailants between 11 September 1973 and March 1990. The term ‘survivor’ will be used principally, in context, to refer to individuals who were subjected

relatively invisible, even where they are often demonstrably more numerous and potentially active and vocal on their own behalf. This despite the fact that torture is generally (though not invariably) now accepted to fall under the categories of war crimes, crimes against humanity and other gross violations adduced in recent times in the region's domestic courts in order to 'unlock' cases from the reach of domestic amnesty laws and/or statutes of limitation.<sup>10</sup> In concordance with this apparent de-emphasis on justice for survivors, a recent Chilean truth commission for survivors of dictatorship-era political imprisonment and torture was actively shorn of direct judicial consequences by a secrecy law, preventing even judicial authorities from accessing survivor testimony or commission archives. The Valech truth commission was therefore only able to deliver on survivors' truth and reparations entitlements, with rights to justice kept out of the mix.<sup>11</sup> It was argued that the

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to torture and political imprisonment during the same period. While either term ('victim' or 'survivor') might also be correctly applied to persons subjected to a range of other harms and violations, these situations are not considered in this particular work. For empirical grounding of claims about the relative distribution of extant criminal cases between survived and presumably fatal violations, see Skaar, García-Godos, and Collins, *Transitional Justice in Latin America*".

<sup>10</sup> See Due Process of Law Foundation (DPLF), *Digest of Latin American Jurisprudence on International Crimes*, vol. I (Washington, DC: DPLF, 2010); idem., *Digest of Latin American Jurisprudence on International Crimes*, vol. II1 (Washington, DC: DPLF 2013); and idem., *Digesto de jurisprudencia latinoamericana sobre derechos de las víctimas*. (Washington, DC: DPLF, 2015) for compendia of domestic jurisprudence from these cases, drawn from around Latin America.

<sup>11</sup> The commission was so-called after its eponymous chairman, Monsignor Sergio Valech, although its official title was the National Commission on Political Imprisonment and Torture or *Comisión Nacional sobre Prisión Política y Tortura* (CNPPIT). Operating in 2003-2004, it published an initial report in 2004 and an addendum of additional names in 2005. At the time, the list was supposed to be definitive, but the commission was effectively re-opened in 2011, when a further 10,000 names were added. See Alexander Wilde, "A Season of Memory," in *The Politics of Memory in Chile: from Pinochet to Bachelet*, eds. Cath Collins, Katherine Hite, and Alfredo Joignant (Boulder: Lynne Rienner, 2013) or Elizabeth Lira and Brian Loveman, "Torture as Public



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terms of the secrecy law did not prevent individual survivors from separately pursuing criminal or civil complaints in the courts.<sup>12</sup> The García Lucero verdict however places the onus on the state, rather than individual survivors, to initiate legal proceedings. The verdict moreover suggests that the state has a duty to act immediately it is notified, by whatever route, of a credible allegation of a core atrocity crime. The case thereby raises serious questions as to whether ad hoc bodies should or will in the future be permitted to isolate themselves from justice implications in this way.

Even if a general duty to actively prosecute is accepted, however, specific obstacles obtain where survived torture is at issue. These include considerations related to legality, laxity of prevailing domestic law, proportionality of sentencing, availability of physical evidence, and the possibility of secondary victimization. Where torture was a particularly widespread and systematic practice, the question of necessary selectivity and prioritization in case selection also obtains.<sup>13</sup> Some of these dilemmas are common to the prosecution of deaths and disappearances. Others, particularly sentence proportionality and the invasive nature of physical examination and questioning of direct survivors, are specific to survived torture, or have particular manifestations in relation to torture, as we will see below. Judges, for their part, tend to be reluctant to countenance taking on additional investigations, this time for torture, in countries where they have only recently been persuaded to give a

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Policy, 1810-2011,” in *The Politics of Memory in Chile: from Pinochet to Bachelet*, eds. Cath Collins, Katherine Hite, and Alfredo Joignant (Boulder: Lynne Rienner, 2013).

<sup>12</sup> For more on how cases currently come into being under the old Chilean investigative magistrate system, applicable to these cases, see Cath Collins, “Human Rights Trials in Chile During and After the ‘Pinochet Years,’” *International Journal of Transitional Justice* 4.1 (2010): 67-86.

<sup>13</sup> See UN Special Rapporteur for the Promotion of Truth, Justice, Reparations and Guarantees of Non-Repetition, *Report to the Human Rights Council on prosecutorial prioritization strategies in the aftermath of gross human rights violations and serious violations of international humanitarian law* (2014), 27 August 2014, A/HRC/27/56, para.23.

more robust judicial answer to past deaths and disappearances. The sheer volume of case numbers that would result is sometimes cited as a concern, although this apprehension may proceed from an unexamined assumption that torture must or will be investigated on a victim-by-victim basis. In practice, it is likely that a perpetrator-focused approach based on episodes, detention centres or even geographical regions would have to be adopted, or would naturally evolve through case accumulation, as has occurred to date with disappearance and execution cases in Chile, Argentina, and elsewhere. If anything, therefore, concerns based on the sheer volume of victims of torture point not so much to the impossibility of any justice endeavour as toward the advantages of a once-and-for-all, *ex officio* initiation of investigations, which can be organized from the beginning so as to provide maximum investigative efficiency. An accumulation of case by case individual complaints is less likely to lend itself to post hoc structuring along the same lines.

### **García Lucero and Justice Entitlements in Chile**

The reaction of the Chilean state to mention of justice obligations in the initial García Lucero petition is revealing. The Inter-American Commission on Human Rights (hereinafter IACHR) Report No. 23/11 suggests that, at the same time as the Chilean state resented challenges to the reparations policy of which it seems quite proud, it sought to actively restrict the terms of the García Lucero case to the matter of reparations alone.<sup>14</sup> Thus the state argued, at paras. 26 and 27 of the report (op. cit.), that neither torture itself nor the implementation and status of Chile's 1978 amnesty decree law<sup>15</sup> should be at issue. Any such silo-ing of reparations and justice questions would undoubtedly have been convenient, since it would have prevented the García Lucero verdict from adding extra weight to

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<sup>14</sup> Inter-American Commission on Human Rights, *Report 23/11* (23 March 2011), by which case 12.519 (*García Lucero et al vs. Chile*) was submitted to the jurisdiction of the IACtHR. The State's position, as summed up by the IACHR, is reproduced at paras. 26 to 33.

<sup>15</sup> Decree Law 2.191 of 1978.

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existing pressure on the Chilean government to comply with the terms of a previous adverse ruling, in the 2006 Almonacid case. This ruling emphasized justice rights and duties and required the state to legislate around the politically sensitive subject of the amnesty law.<sup>16</sup>

In this context, one of the major strengths of the García Lucero case submission and attendant judgment is that they refuse to de-couple the various dimensions of transitional justice. Reparations are discussed, variously, as an obligation and as a right, rather than as a benefit, and are clearly and repeatedly linked throughout to questions of truth, justice and guarantees of non-repetition.<sup>17</sup> A logical corollary of this recognition is that official delivery of truth is to all intents and purposes meaningless if justice matters are not also addressed; or that reparations cannot and should not be conditioned upon the premise that no action will be taken against perpetrators. To paraphrase the words of UN Special Rapporteur Pablo de Greiff, reparations without justice, truth-telling or reform may constitute, or may appear to constitute, an attempt to buy victims' acquiescence.<sup>18</sup>

A second notable point of the verdict is what it says about the correct attribution and distribution of responsibilities for instigating criminal justice proceedings. This question is particularly sensitive because the early Chilean state position

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<sup>16</sup> See Universidad Diego Portales, *Informe Anual de Derechos Humanos en Chile 2007*. (Santiago: Universidad Diego Portales, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015 and 2016 for discussion of the (lack of) implementation of the 2006 IACtHR verdict in the Almonacid case (IACtHR, Almonacid Arellano vs. Chile, Sentence 26 September 2006). A draft bill was finally introduced in September 2014, but remains pending at time of final editing (March 2017). Government sponsorship of the bill was moreover downgraded in July 2015, significantly reducing its chances of ever becoming law.

<sup>17</sup> See IACtHR, *Caso García Lucero y Otras vs. Chile*, Sentencia de 28 de agosto de 2013, Excepción Preliminar, Fondo y Reparaciones.

<sup>18</sup> UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Annual Report 2012, ref. A/HRC/21/46, para. 23.

regarding the case, as represented for example in Report 23/11 can be and has been read—correctly or otherwise—as encouraging the plaintiff, Mr. García Lucero, to return to live in Chile should he wish to avail himself further of some of the state’s flagship reparations packages; and/or to resort to civil or criminal claim making should he wish to further pursue the question of liability. By way of reply, the IACtHR can be understood as pointing out that a person forcibly expelled from a member state, their life irrevocably damaged by criminal acts perpetrated against them by state agents, can hardly be reasonably exhorted by that state to uproot themselves once again in order to avail themselves of measures made available only within its frontiers. Administrative convenience should not, in other words, trump personal need: once the principle that justice and reparations are due has been recognized, these ought where necessary to travel to the person, rather than vice versa. This principle has indeed been tacitly recognized in regard to truth and, in part, to reparations: all official Chilean truth-telling instances were opened to former exiles or other overseas resident Chileans via embassy-based outreach. Resulting pension entitlements can be and are transferred to survivors in their present country of residence.<sup>19</sup>

As regards criminal investigation, in paragraphs 124 to 141 of its final judgment the IACtHR concludes that the Chilean state was notified in December 1993 of the possible existence of a crime of sufficient seriousness as to trigger its international responsibilities to open an immediate investigation. Accordingly, it found that the lack of initiation of any such investigation until 18 years later, in October 2011, constituted “undue delay.”<sup>20</sup> There is a clear and strong implication that the State’s contention that Mr. García Lucero would have been free at any time—including during the dictatorship period—to attempt to

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<sup>19</sup> Mr. García Lucero was receiving this pension entitlement at the time of his claim, which was related, therefore, specifically to in-kind entitlements such as specialized healthcare, not presently available to non-residents.

<sup>20</sup> IACtHR, *Caso García Lucero y otras vs. Chile*, final verdict, 28 August 2013, para. 138, *author’s translation*.

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trigger such an investigation by his own efforts, through private legal representation, was treated by the Court with the scepticism it deserves. Given the Chilean state's pre-existing *ius cogens* obligations regarding the prevention, investigation and punishment of torture, together with those positive obligations that it freely contracted in 1988 upon ratifying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the obligation to prosecute and punish torture clearly moreover inheres in the state, rather than in individual victims. Merely keeping the court system open to private actions cannot, in this reading, be considered to constitute positive compliance by the state with its obligations under international human rights law.<sup>21</sup>

The Court additionally identifies the latest date by which the post-dictatorship Chilean state ought to have considered itself notified of an alleged egregious crime requiring immediate investigation as 23 December 1993. On this date, Mr. García Lucero sent a letter to an official administrative reparations body—the Oficina de Exonerados Políticos—detailing the treatment to which he had been subjected in the country's National Stadium and other improvised concentration camps in the early years of the dictatorship. This choice of date is deeply significant: Mr. García Lucero was also acknowledged by the later (2004-2005) Valech truth commission as a torture survivor, and yet the Court chose to signal the earlier date, on which Mr. García Lucero was applying for recognition of his usurped pension rights not as a survivor of torture per se but as a person blacklisted and/or sacked for political motives. The application process for that programme nonetheless required each applicant to submit a personal account of the circumstances surrounding their sacking or blacklisting. Mr. García Lucero's account

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<sup>21</sup> It is worth emphasizing that almost all current accountability activity in the region has its origins in private (civil society) claim-making. See previous work by this author, and see Geoff Dancy and Verónica Michel, "Human Rights Prosecutions from Below: Private Actors and Prosecutorial Momentum in Latin America and Europe," *International Studies Quarterly* 60.1 (2015): 1-16.

detailed his illegal detention, severe ill-treatment and torture, and eventual expulsion from the country. The Court's decision highlights the essential contradiction inherent in having a state entity solicit, and receive, an account alleging torture; then go on to make an award of reparations on the basis of that account—thereby implicitly accepting its essential veracity—without also reporting it to the relevant criminal justice authorities. Why, if a reparations entitlement was accepted, was nothing done about justice?

If it is going to become commonplace for the Court to require or presuppose in this way 'joined up' transitional justice, whereby measures are connected to one another, and entities set up to deliver along one dimension are expected to also address or at least consider others, then all official reparations and truth instances may potentially be considered conduits for the notification of serious criminal offences. At least some of these may in turn give rise to non-derogable obligations to investigate, prosecute and/or punish under international law. In the case at hand, if the Chilean state is going to be pushed by this judgment to finally activate its *de officio* investigative responsibilities over the crime of torture, the potential case universe stretches even beyond the close to 40,000 survivors of torture and/or political imprisonment who were recognized in 2004-2005 and 2011 in two iterations of the Valech commission. It includes over 29,000 additional applications which were received but not certified by that commission, and also reaches, potentially, to the more than 100,000 applications made to the Exonerados Políticos programme over its 11-year application period. Many of the latter have still not been resolved administratively – let alone assessed for potential criminal justice implications – almost a decade and a half after the application deadline finally expired, in 2004. If one also considers the various other categories of administrative reparations programmes which have explicitly or by implication recognized the status of their users as survivors of torture, the total number of separate individuals involved climbs steeply even when it is taken into account that a single individual may feature in more than one programme.

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In this way, the García Lucero case draws attention to a fact that Chilean domestic courts have increasingly been acknowledging tacitly in recent years, but whose full implications are yet to be addressed: once torture is classed as a gross violation alongside or within categories such as crimes against humanity and war crimes, it cannot legitimately be ignored, downplayed, amnestied or subjected to statutes of limitation, any more than can crimes of forced disappearance or extrajudicial execution.<sup>22</sup> The principle of a duty to investigate or prosecute with regard to the latter two categories has been acknowledged in Chilean domestic courts since 1998, and in a settled manner by its highest court since approximately 2004.<sup>23</sup> Since at least 2009, torture has at least occasionally been acknowledged to have analogous levels of seriousness, and in 2010 criminal cases for torture were finally admitted by the judicial branch to the category of ‘human rights cases’ which are investigated separately from ordinary crimes. Mr. García Lucero’s case has however given rise to one of the very few—torture cases to date initiated *ex officio* by Chilean state authorities rather than proactively by survivors.<sup>24</sup>

For all that, the IACtHR García Lucero case is not a class action, neither is it a purely isolated case. While its discussion of sufficiency of reparations is largely specific to the circumstances of overseas-resident survivors, this is not true of

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<sup>22</sup> This has occurred explicitly since the 1990s, with international and *ad hoc* tribunals including the International Criminal Court drafting the first on-paper definitions of such categories of crime, in the absence of specific positive treaty law. Torture is, however, almost invariably held to have been prohibited by international custom long predating, even, the post-Nuremberg period in which other international law prohibitions, e.g. of genocide, were formulated for the first time.

<sup>23</sup> See Observatorio DDHH, “Jurisprudential milestones in human rights cases: Chile 1990-2013” available from [www.derechoshumanos.udp.cl](http://www.derechoshumanos.udp.cl), section Observatorio JT.

<sup>24</sup> The State chose to initiate an investigation in 2011, an unusual step clearly triggered by the imminent referral of the Inter-American case from Commission to Court and the related desire to render one of the plaintiff’s contentions—that of denial of justice—redundant.

what is said with regard to judicialization. As seen above, barriers to judicial investigation of the tens of thousands of allegations of torture that have already made their way into the Chilean state's administrative systems seem to be practical and logistical, rather than juridical or conceptual. It is generally acknowledged, for example, that the two dozen special magistrates who currently oversee dictatorship-era human rights violations cases are under pressure to speed up the resolution of existing complex cases, some ongoing for well over a decade. Mario Carroza, the judge who currently fields all newly-brought complaints, initially simply refused to add torture cases to his caseload. He declared them to be 'ordinary' criminal cases outside his purview, until plaintiffs and their lawyers forced the reversal of this practice.<sup>25</sup> These attitudinal and ideational specificities in the treatment of torture are undoubtedly connected to the existence and persistence of victim hierarchies, addressed further below.

The proportionality problem, mentioned above, consists in essence of the challenge of establishing penalties for grave human rights violations which, when set alongside penalties imposed simultaneously for ordinary crimes, signal recognition of the particular seriousness of the former. While any such proportionality must always be relational, and therefore contextual, the contextual calculus is skewed in regard to past violations when these must be prosecuted in the present day, but using domestic criminal codes at the time of the offence. The criminal code that was in force in Chile at the time of the offences at issue establishes robust penalties for homicide and kidnapping. It however contains an inadequate conceptualization of torture, failing even to term it as such and making reference instead to 'illegitimate duress' (*apremios ilegítimos*).<sup>26</sup> It is impossible, or at least unwise, to contemplate altering this state of affairs: the prohibition on retroactive alteration of even clearly inadequate or perverse criminal norms is a widely

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<sup>25</sup> See Observatorio DDHH, "Jurisprudential milestones."

<sup>26</sup> Código Penal art. 150, in its pre-reform (pre-1997) version.



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respected and well-founded component of the principle of legality.<sup>27</sup> This problem is not unique to torture: it also affects treatment of forced disappearance and extrajudicial execution, neither of which typically feature as such in contemporaneous (1970s and 1980s) criminal codes in Latin American states.<sup>28</sup> It is now common practice to see international norms invoked to suspend amnesty and statutes of limitation, followed by the use of relevant domestic code norms to establish exact charges and penalties.

This practice does not however eliminate a proportionality problem specific to torture: although penalties for homicide and kidnapping were historically high, and have varied little, previous penalties for ‘duress’ tended to be extremely low, often non-custodial. Notwithstanding, the likelihood of low penalties does not in itself affect, much less dissolve, the duty to prosecute. In the context of egregious crimes under international law it would moreover seem particularly inappropriate to invoke a public interest justification for not proceeding. Lack of available or suitable law would therefore presumably not stand up to scrutiny if formally adduced as a reason for state non-compliance with a recognisable duty. This may be one of the reasons that current Chilean Supreme Court judge Sergio Muñoz—concurrently,

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<sup>27</sup> Although a handful of cases do exist wherein domestic courts in Latin America have chosen to directly apply later versions of criminal codes to authoritarian-era violations, this has happened only in cases of disappearance to which the so-called ‘ongoing crime’ thesis can be applied (i.e. the argument can be made that the crime was still in the process of being committed at the later date). See cases in Peru, Argentina and Venezuela, cited in Due Process of Law Foundation (DPLF), *Digest of Latin American Jurisprudence*, vol.I, 168-170.

<sup>28</sup> In what may be considered a guarantees of non-repetition measure, various countries have now codified these offences. Examples include criminal code modifications carried out by Argentina and other Latin American states involved in developing a regional, then international, Convention for the Protection of All Persons from Enforced Disappearance, or the war crimes and crimes against humanity law passed in Chile in 2009 during ratification of the Rome Statute of the International Criminal Court.

Court-designated co-ordinator for human rights cases—is careful to point out that, while he anticipates many difficulties in being asked to take on large numbers of additional cases for torture, “if it has to be done, we will do it.”<sup>29</sup> During the same interview, he enumerated the many practical advantages that a single, large-scale, systematic investigation would offer if torture were, in the future, to be judicialized. Other justice system professionals express misgivings, off the record, about how they, or the system as a whole, would manage were there to be a deluge of new, case by case, investigations. Some acknowledge that the current practice of responding only to complaints presented by the handful of survivors prepared and able to bring them is a useful artifice which serves to keep present caseloads relatively manageable.

We have, however, been here before. In 2010, this same tension between *ex officio* versus voluntaristic approaches to judicialization was being newly acknowledged in Chile in regard to the disappearance and execution cases which at the time constituted the only designated ‘human rights cases’. Judge Muñoz, then, as now, in charge of human rights case coordination,<sup>30</sup> pointed out in an interview that the judicial system certainly could proceed on its own authority. Indicating a copy of the Rettig report, on his desk, he stated that “I or any other judge could take this list of names and order investigations opened tomorrow into every last one of them...but we’ve preferred to leave it to relatives [to bring complaints].”<sup>31</sup> Some months later, an in-house Court prosecutor however initiated proceedings in respect of 726 disappeared or executed individuals, in tacit acceptance of the principles of *ex officio* investigation and ‘one person, one case’ in regard to these ‘first tiers’ of victims. The onus was thereby taken off relatives’ associations, who had been working flat out over a period of

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<sup>29</sup> Judge Sergio Muñoz, interview by author, Santiago, Chile, 30 December 2014.

<sup>30</sup> This role rotates among Supreme Court judges, with Judge Muñoz having been appointed on two separate occasions, rather than continually.

<sup>31</sup> Judge Sergio Muñoz, interview by author, Santiago, Chile, mid-2010.

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months and years to generate batches of criminal complaints to achieve the same effect. For one such association, the Association of Relatives of Victims of Political Execution, Agrupación de Familiares de Ejecutados Políticos, AFEP, the García Lucero verdict of 2013 provoked a similar conversation regarding the principle of claim-bringing over survived torture. The AFEP's legal team, consisting in large part of unpaid student volunteers, had been desperately trying to work out how it could spare time and resources to assist survivors to bring criminal and/ or civil complaints. The verdict, in particular, its reference to the state's responsibility to take action independently of survivor's decisions, offered another possible and more viable route to opening up this hitherto neglected domain of the justice endeavour.<sup>32</sup>

### **Victim Hierarchies and Particular Disincentives to the Judicialization of Torture**

Full recognition – let alone active delivery - of the justice entitlements of survivors has still not been forthcoming two years after the García Lucero verdict. Indeed, as we will see, there has been no change to the radical discrepancy by which state-sponsored legal support, available to relatives of absent victims, is denied to survivors. There are, however, other signs of both demand and supply side change, that is, increasingly visible legally-framed activism by individual torture survivors – rising demand – and improved receptivity to such cases by the justice system. The former is visible, inter alia, in a gradual accumulation of cases begun the 'old' way, i.e. by individual survivors organizing their own legal representation to generate private criminal and/or civil complaints for torture. Whereas in 2009, the proportion of survivor cases to death and disappearance cases did not reach 1 in every 100,<sup>33</sup> the judicial branch's own figures at July 2016 showed a ratio of 1 in 4, with

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<sup>32</sup> These were discussed at AFEP legal team weekly meetings, attended by Observatory team members and held in September and December 2013.

<sup>33</sup> Source: Observatorio in-house case database, kept continuously since 2009.

almost 300 of a total of 1, 184 open cases falling into this category.<sup>34</sup>

The fact that this change has been so gradual has various explanations. One is the low sentences disincentive already alluded to. Survivors may understandably be more reluctant even than relatives to put themselves through the emotional and personal cost of bringing and seeing through a complaint.<sup>35</sup> They also include the fact that survivors were for a long time regarded, and some also regarded themselves, as second-order victims whose principal role in the transitional justice morality play was to bear witness to what had happened to others. It was not until around the time of the 1998 UK arrest of former Chilean dictator Augusto Pinochet that organized groups of survivors began to emerge alongside the better-known, and iconic, associations of relatives of the dead and disappeared. Before that time, truth commissions, individual relatives, and such judges as were active over death and disappearance cases, would take it in turns to ask survivors not “What happened to you?” but “Did you see him? Did you see her? Were you in the next cell? Can you remember where they took her?” Dialogue with survivors perhaps too often revolved principally or exclusively around the absent victim, the person never seen again. The sense was of a moral embargo, partly self-imposed, that prevented survivors from saying too loudly or too overtly ‘what about us?’. In this way victim hierarchies, and also the question of survivor guilt, are present features of the landscape of judicialization of past atrocity crimes, in Chile as elsewhere. The habit of self-effacement, or of feeling one should be at least grateful to have survived at all, became engrained for some. Disappearance, perhaps after all the central trope of Latin

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<sup>34</sup> Figures supplied by the judicial branch, and see Observatorio de Justicia Transicional, “Verdad, Justicia, Reparación y Memoria” *Informe Anual DDHH en Chile 2016*. Santiago: Universidad Diego Portales (2016): 21-79.

<sup>35</sup> While low final sentence outcomes are not exclusive to torture cases, they provide a particular disincentive to those cases in the present climate, given that cases for absent victims are now brought *ex officio* whereas survived torture cases are still exclusively victim-driven.

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American violence of the period, stood at the heart of the concentric circle of visible victimhoods. Politically motivated executions came next, with ‘everyone else’—including survivors of torture—following behind.

In Chile, this prioritization was visible in social discourse, in human rights organizations’ strategizing and activism, in testimonial literature, and in the awarding of financial reparations solely to relatives after the first, Rettig, truth commission.<sup>36</sup> During the greater part of the 1990s there were few meaningful judicial cases for anything at all. One of the early survivor cases for torture that did manage to gain admission to the system, co-ordinated through the historic human rights organization, the Comité para los Derechos del Pueblo (CODEPU),<sup>37</sup> involved a group of political prisoners who had been held at the same notorious detention centre. The group would periodically ask for a progress report from the judge in charge of their case. At one such encounter, the judge pointed out “I’ve got all these disappearance cases as well, and obviously I have to deal with those first.”<sup>38</sup> There was no apparent dissent, and indeed every sign of acquiescence, from the group. This dynamic has now changed, at least a little. Recent developments have for example included women survivors taking the very deliberate and public step of specifically denouncing sexual violence committed against them,

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<sup>36</sup> The National Commission for Truth and Reconciliation, Comisión Nacional de Verdad y Reconciliación, CNVR, known as the ‘Rettig Commission’ after its chairman, Raúl Rettig, operated in 1990 and published its report in 1991.

<sup>37</sup> With a reputation as one of the more combative 1980s human rights organizations, CODEPU had a track record in community-based mental health work and made an early decision to support groups, rather than individuals, to take legal actions over torture as part of its campaign to press for a second truth commission and other dedicated measures. Dr. Paz Rojas, interview by author, Santiago, Chile, 7 January 2013.

<sup>38</sup> Meeting of San Antonio former political prisoners at the CODEPU offices in Santiago, Chile 13 December 2008, at which the author was present.

insisting on categorizing it as torture.<sup>39</sup> At least one investigative magistrate has recently begun to generate new torture cases *ex officio*, where survivor testimony in an ongoing disappearance case reveals that the witness was himself or herself subjected to torture.<sup>40</sup> Charges for torture have also begun to be preferred alongside homicide or kidnap charges in cases of death and disappearance.

Disincentives proceeding from insensitive justice system treatment of survivors demonstrably can be, and have been, overcome or at least ameliorated. When torture cases began, judges were manifestly unprepared to treat survivors in ways that respected defendants' due process rights at the same time as minimizing the potential for secondary victimization or revictimization. This was evidenced, for example, in judges sending torture survivors to be assessed by the same court services which routinely prepare pre-sentencing reports on offenders, or requiring unambiguous diagnoses of post-traumatic stress disorder as 'proof' of plaintiffs' veracity whether in civil or criminal cases. These are further examples of the special characteristics of torture cases which require survivors to submit themselves to potentially humiliating procedures from which relatives of absent victims are exempt. Such problems, while ongoing, have however proved malleable as judicial learning has taken place 'on the job.'

Here the role of auxiliary justice system agencies, often overlooked in accounts of judicial behaviour in general, and accountability case change in particular, come to the fore. One very practical example from Chile involved the appointment of a new national director to the state forensic service in 2006. This man, himself a survivor, made it his business to cultivate more

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<sup>39</sup> See Observatorio de Justicia Transicional, "¿Una nueva medida de lo posible? Verdad, justicia, memoria y reparaciones pos-dictadura," in *Informe Anual sobre los DDHH en Chile 2014*. Santiago: Universidad Diego Portales. 2014), and idem., Observatorio de Justicia Transicional, "Silencios e Irrupciones."

<sup>40</sup> AFEP case lawyers, interview by author, Santiago, Chile April 2014; and judge Marianela Cifuentes. Interview, Santiago, Chile, January 2017.

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positive relationships with survivors' associations in order to better explain the need for certain apparently hostile or insensitive procedures to be carried out if physical and psychological evaluations of survivors involved in torture cases were to be admissible in court. Such requirements extend for instance to not allowing pre-existing evidence of injury or harm, provided by doctors or psychologists from the state health reparations programme, to stand uncorroborated in court cases. This practice, much-resented by survivors, is nonetheless seen as integral to delivering due process guarantees to defendants, suggesting that a certain amount of mutual insulation between justice and reparations instances may be inevitable or at least likely to persist. At the same time, the state forensic service has demonstrably improved its own and judges' treatment of torture survivors over time. The service has also introduced protocols and training for its personnel in relevant international standards, which are now also routinely applied to present day allegations of torture or ill treatment by police or prison guards.<sup>41</sup> Such innovation stands as an example of 'paying forward' past accountability case progress into improved present-day rights protection, a potential benefit which those sceptical of retributive justice often downplay or ignore.

**Justice and Reparations: Legal Representation and the Treatment of Civil Claims**

Assessment of the adequacy or otherwise of states' meeting of their duties surrounding past incidence of torture cannot be limited exclusively to discussion of judges or judicial system behaviour. This is due in part to the essentially interrelated nature of transitional justice entitlements: performance over truth, reparations and guarantees of non-repetition ought also to

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<sup>41</sup> The relevant standards are the Istanbul Protocols. They were introduced by the Chilean state forensic service, under the direction of Dr. Patricio Bustos, by psychologist Francisca Pesse. See Observatorio DDHH 2013. Present day torture, while significantly less widespread and arguably no longer systematic, is still an issue in regard to prison inmates and treatment of protesters during public demonstrations.

be considered. However, it also relates to the fact that even within the justice dimension, obligations are held across all three branches of the state and cannot be adequately delivered only by one acting in isolation. Improvement of criminal code definitions of torture, or correct (re)definition of the ambit of application of amnesty, for example, may both require action by the legislature. Even the *ex officio* bringing of cases, if it is to be done with due attention to the participation rights and support needs of survivors, calls for a range of actions, including consideration of access to justice issues and provision of legal support and advice. In Chile, however, the principal state body tasked with initiating criminal prosecution of past atrocity crimes is prohibited by mandate from extending services to survivors. The Human Rights Programme (Programa de Derechos Humanos or Programa), is an administrative body set up in 1997 to oversee completion of the reparations and fact-finding tasks of the Rettig truth commission. It has evolved into a de facto special prosecutors' office which brings cases both on behalf of relatives and, since 2009, in its own right.

The Programa has a legal department, welfare arm (social work department), and a reparations brief in the specific area of memorials. The Programa's piecemeal attributes, and anomalous structural location,<sup>42</sup> owe much to historical accident and improvisation. The limitation of its legal and welfare activities to relatives, to the exclusion of survivors, however responds clearly to the same calculation by which the first truth commission, and first specific economic reparations, were also targeted exclusively to that group. No functional equivalent exists anywhere in the system to advise on the legal or welfare needs of survivors. Accordingly, the lack of state support for survivors in understanding how to activate welfare services or reparations entitlements is striking, while the lack of state support for their justice entitlements is total. The judicial

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<sup>42</sup> The Programa operated as part of the Ministry of the Interior until January 2017, when it was transferred to a newly-created Subsecretariat of Human Rights within the Ministry of Justice.



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branch's performance—improving in its treatment of survivors after an admittedly shaky start—begins to look quite praiseworthy when compared to the performance of the other branches. In other words, some or even many unresolved questions about truth, justice and reparations configurations in Chile lie outside the sole purview of the judicial branch to resolve.

The example of civil claims illustrates perfectly how justice and reparations issues have proved equally impossible to address in isolation. Under the Chilean criminal justice system applicable to dictatorship-era crimes, relatives or survivors can either include or append a civil claim component to a criminal complaint, or can bring a separate civil action. Both the state and individual perpetrators have been named as objects in each kind of civil claim. Until quite recently, the higher courts however refused to uphold civil claims even for cases where criminal responsibilities were found proven. The argument was that the statute of limitations, ruled out in the criminal aspect of the cases because they constituted crimes against humanity, did still apply to civil action, making the claims too late to be admissible. This argument was not only advanced by defence lawyers attempting to protect alleged perpetrators from findings of individual liability: it was also put forward by a state legal agency, the Consejo de Defensa del Estado (CDE). Therefore, in cases for deaths and disappearances, state-paid lawyers appear on opposite sides in the distinct aspects of a case. A Programa lawyer argues for the preferment of criminal charges—an argument which his or her CDE colleague may support—while the CDE lawyer opposes civil liability, an issue in which the Programa is not permitted to act. In cases for survived torture, no state-paid lawyer supports the plaintiff at all, since the Programa is also forbidden to act for survivors in any type of case. Thus, the only state-sponsored action is to oppose the awarding of damages. Such a state of affairs surely represents, and is certainly interpreted by victims as, the state disavowing its own previous recognition of responsibility for the crimes at issue.

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Moreover, for over a decade the judicial branch also set its face against these claimants by ruling the civil aspect of cases to be lapsed. This latter position however began to change from around 2013. The criminal bench of the Supreme Court, which sees those civil claims that accompany a criminal case, shifted its position first and began to uphold claims. The Constitutional bench, which sees purely civil claims, did not follow suit. The resulting contradiction was however eliminated in late 2014 in a manner favourable to plaintiffs. Civil claims of both types were assigned to the criminal bench, more inclined to grant them. This change in judicial criteria however only makes the state's position as represented by the CDE a starker contrast: the CDE is now the only entity actively opposing such awards in the Supreme Court. Whether civil claim-making is conceptualized as integral to justice and/or as a judicial route to reparations, the active opposition by one part of the state to liability for harm that other state entities clearly acknowledge cannot but weaken the overall force of that state's commitment to underwriting the full set of transitional justice rights and entitlements. The compatibility of administrative reparations, paid as pensions or lump sums, with civil claims has also been a bone of contention between the CDE and the courts. In addition to arguing in favour of the statute of limitations, the CDE also alleges '*excepción de pago*'—the contention that any civil liability the state might have had has already been discharged to relatives or survivors who have received any sort of cash transfer or services in kind through administrative reparations programmes. The Supreme Court's criminal bench has to date rejected this contention, usually by a majority vote, arguing that any such interpretation would allow the state to unilaterally determine the appropriate mode of reparation; that civil claims are for moral damages not only material restitution—which may have already partly been made through pensions and so on—and that international law establishes a duty of reparation and liability which must prevail over any internal norm.<sup>43</sup>

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<sup>43</sup> These arguments are variously and consistently made—often in the same

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### **García Lucero and Reparations Entitlements in Chile**

It should be acknowledged that the state of play regarding reparations for dictatorship-era human rights violations in Chile is reasonably positive in both regionally and domestically comparative perspectives. That is, when we take into account what has been promised and delivered – and the gap between promise and delivery—in reparations measures offered around the Latin American region in regard to past human rights violations in contexts of authoritarian rule or widespread political conflict, Chilean administrative reparations programmes appear reasonably well developed and robust.<sup>44</sup> Or, if we juxtapose the reparations dimension of Chilean transitional justice practice and policy with its justice, truth and guarantees of non-recurrence dimensions, we see that reparations began relatively early, have been continuous in at least some provisions, have gradually expanded in reach, and have been deepened or updated in content over time. In Chile, reparations

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form of words—in Supreme Court verdicts in, inter alia, the *Tejas Verdes* torture case (1 April 2014), the *Agustin Reyes* case (31 March 2015), the *‘Valparaíso Eight’* case (13 April 2015), and the case for the disappearance of Alfonso Chanfreau (29 April 2015). Categorical restatement of compatibility between pensions and indemnization, and of the inapplicability of statutes of limitation to civil as well as criminal liability, can be found in the 23 April 2015 verdict in the homicide of Carlos Sepúlveda Palavecino.

<sup>44</sup> For a country by country overview, see Skaar, García-Godos and Collins, *Reconceptualising Justice*; see also Cristián Correa, “Reparation Programs for Mass Violations of Human Rights: Lessons from Experiences in Argentina, Chile and Peru,” in *Transitional Justice Handbook for Latin America*, ed. Félix Reategui (Brasília : Brazilian Amnesty Commission, Ministry of Justice, 2011) and idem., *Reparations in Peru: From Recommendations to Implementation* (New York: International Center for Transitional Justice, 2013); Alex Segovia, “The Reparations Proposals of the Truth Commissions in El Salvador and Haiti: A History of Non-Compliance (New York: Oxford University Press, 2006); and Marcelo Torelly and Paulo Abrão, “The Reparations Program as the Lynchpin of Transitional Justice in Brazil,” in *Transitional Justice Handbook for Latin America*, ed. Félix Reategui (Brasília : Brazilian Amnesty Commission, Ministry of Justice, 2011) set out individual country programmes and/or consider subsets of them.

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constituted chronologically the first of all the dimensions to take individual account of the situation of survivors as such, and reparations are still the only dimension within which any special consideration is offered to certain categories of affected person, including victims of enforced exile, or human rights defenders.<sup>45</sup> Indeed on some readings reparations may be perhaps the most fully developed dimension of transitional justice measures within Chile, although certain cogent criticisms in regard to delivery, coherence and treatment of rights holders can be made. Reparations have also been less prone than have other dimensions to blockages, reversals and/or periodic truncation.

In the truth dimension, Chile's first official truth commission, the Rettig Commission, limited its consideration and classification of individual victimization to victims of forcible disappearance and political execution, although it did also provide a general account of broader patterns of violence and violations. A subsequent truth initiative, not amounting to a full commission, was even more narrowly focused, dealing only with disappearances.<sup>46</sup> It was not until 2004, over a decade after the beginning of transition, that actions along the truth dimension were diversified to include Valech, specifically addressing violations committed against survivors of politically-motivated imprisonment and torture. However, the expansive nature of Valech—its potential for adding to the sum total of 'available truths' both known and knowable—was limited, as we have seen, by the introduction of a 50-year secrecy law preventing public or judicial access.<sup>47</sup>

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<sup>45</sup> While the first truth commission discussed issues that affected these groups in general terms, concrete measures and specific individual provisions for the mentioned categories appear for the first time in the PRAIS health programme and subsequent reparations entitlements.

<sup>46</sup> This is the Mesa de Diálogo of 2000/01. See, inter alia, Cath Collins, "Human Rights Trials in Chile During and after the 'Pinochet Years,'" *International Journal of Transitional Justice* 4.1 (2010): 67-86 or Cath Collins, Katherine Hite and Alfredo Joignant, eds., *The Politics of Memory in Chile: from Pinochet to Bachelet* (Boulder: Lynne Rienner, 2013).

<sup>47</sup> This provision came under increasing public and judicial pressure over time, and was partially reversed in June 2014 with regard to judicial access.

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Guarantees of non-repetition—a category encompassing institutional reform and measures to better promote and protect human rights into the future—have been similarly limited or protracted. Chile’s highly controlled transition severely restricted early change, and institutions commonplace elsewhere in the region, such as a dedicated Human Rights Ombudsman’s office, have never materialized. A National Human Rights Institute, first mooted in the Rettig report conclusions of 1991, did not become fully operational until 2010. Ratification of the Rome Statute of the International Criminal Court took over a decade, and necessitated a constitutional reform, due to opposition from the political right. In the specific area of prevention of torture by state agents, while the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment was ratified in 2008, the attendant independent monitoring mechanisms, and a mooted Human Rights Subsecretariat to oversee them, were still pending as of August 2015.<sup>48</sup>

Reparations policies or packages have not of course been completely exempt from misstep, delay, and controversy. Some measures have lapsed, leaving their rights holders unsupported, even as others have come on stream. It is moreover almost universal in public policy actions and popular parlance to see reparations referred to as ‘benefits’ rather than rights, something which undoubtedly dilutes the symbolic force of reparations as acknowledging both state harm and survivor entitlement. Nonetheless on the whole it is fair to conclude, as per this author’s affidavit to the García Lucero case, that “the

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See Observatorio de Justicia Transicional, “¿Una nueva medida de lo posible?” and idem., “Silencios, e Irrupciones.”

<sup>48</sup> See Observatorio DDHH 2013 and Observatorio de Justicia Transicional, “¿Una nueva medida de lo posible?” for background on these and related initiatives. See Cath Collins, “Human Rights Policy under Concertación,” in *Democratic Chile: The Politics and Policies of A Historic Coalition, 1990-2010*, eds. Peter Siavelis and Kirsten Sehnbruch (Boulder: Lynne Rienner, 2014) for a general evaluation of human rights policy in the transitional justice arena in the 20 years from 1990.

reparations measures implemented in Chile from 1990 onward should be considered among the most complete dimensions of its transitional justice process.”<sup>49</sup> This state of affairs can itself give rise to a certain sensitivity on the part of authorities in Chile as regards the *García Lucero* case, given that this case, at its heart, homes in on the alleged insufficiency of reparations policy and practice. Why, after all, would any petitioner choose to pursue the Chilean state in regard to that dimension of transitional justice in which they are generally regarded to have performed best?<sup>50</sup> In fact, the case does not so much take aim at the general adequacy of reparations so much as the lack of reach of some measures to former forced exiles who still reside outside Chile, as is the situation of the petitioner.

The overseas residence status of the plaintiff in turn gives rise to a certain perceived distance from it on the part of some of Chile’s range of grassroots organizations and human rights groups that are concerned with, or composed of, survivors or relatives of absent victims of the dictatorship. Many of these are appreciative of the role of the Inter-American human rights system, and by implication of any action or institution which helps to keep the issue of dictatorship-era violations on the diplomatic agenda of the Chilean state. Nonetheless, some understandably find other cases seen by, or currently before, that system as more obviously intersecting with their own national priorities and preoccupations.<sup>51</sup> Individuals

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<sup>49</sup> Cath Collins cited in IACtHR, *Caso García Lucero y otras vs. Chile*, Sentencia de 28 de agosto de 2013, Excepción Preliminar, Fondo y Reparaciones n.199, *author’s translation*.

<sup>50</sup> See for example the general tenor of the State’s response to Inter-American Commission on Human Rights (IACHR) Report No. 58/05, adopted on 12 October 2005, as represented in IACHR Report No. 23/11. The State’s position, as summed up by the IACHR, closes by exhorting the IACHR to “acknowledge the responsible and concrete effort” exerted by Chile in the field of reparations. See IACHR, Report 23/11, para.33.

<sup>51</sup> These include cases such as the *Almonacid-Arellano* execution case of 2006; and the *Maldonado y otros* case, resolved in September 2015. Both cases were brought by plaintiffs residing in Chile and, at least in the second case, well known to many members of the human rights community. This is based on

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and groups with specific concerns or grievances about how reparations are designed or delivered at the national level perhaps naturally find the situation of a survivor resident in Western Europe to be beyond their frame of reference. Some also have a sense, whether founded or not, that welfare state provisions in Western Europe place such survivors already in a relatively adequate or comfortable material position when compared to their counterparts in Chile.

Both reactions—that of officialdom and that found in certain grassroots circles—encompass various assumptions and dynamics which bear further examination. At the grassroots level, these include a historical and still visible ambivalence toward the whole notion of reparations, seen as essentially reducible to a monetary transaction, and for this reason alone regarded by some as morally suspect. Reparations have long been the poor relation of transitional justice, and Chile is no exception. The making of reparations claims has been understood by some survivors or relatives to connote the taking on of a narrative of victimhood emphasizing passivity and harm over resilience and protagonism, and has been resisted on that basis. An additional factor for Chile and certain of its neighbours in the Southern Cone of Latin America is the persistent influence of a deliberate propaganda exercise by dictatorship-era regimes, which sought to create a myth of *'exilio dorado'*—golden exile—in order to discredit criticism from regime opponents who had fled or been expelled to Europe or the US during the 1970s and 1980s.<sup>52</sup> In official circles, on the other hand, negative reactions to critiques of reparations can proceed from the view that something is better than nothing, and/or that effort, as well as performance, ought to be recognized and rewarded. They may also betray the somewhat outmoded assumption that the four dimensions of transitional justice are somehow fungible, or

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author interviews, conversations and exchanges with a range of Chilean relatives' and survivors' organizations since 2011.

<sup>52</sup> See Mark Ensalaco, *Chile under Pinochet: Recovering the Truth* (Philadelphia: University of Pennsylvania Press, 2000).

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mutually interchangeable. Were this to be so, a high ‘total score’ would be acceptable and it would not matter greatly whether such a score were obtained through consistent, solid performance across all four dimensions or through advances in only one. In such a scenario, it might be considered perfectly acceptable for state authorities or a particular administration to cherry-pick the transitional measure perceived of as most congenial, least politically costly, or easiest to achieve, while neglecting or even abandoning others. Thus, for example, such a state might create a truth commission with no justice implications, or encourage relatives and survivors to believe that reception of an administrative reparations measure such as a pension left them legally or ethically inhibited from also bringing a criminal case or civil claim against the state and/or individual perpetrator.<sup>53</sup>

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<sup>53</sup> The current UN rapporteur on transitional justice matters anticipates, and critiques, such an approach when he states: “Rather than being alternatives among which States can pick and choose, those measures are parts of a whole, each with corresponding legal obligations.” United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* (27 August 2014) A/HRC/27/56, sec.III, para.19. An earlier report, A/HRC/21/46, exhorts authorities to “...resist the temptation to expect victims to ignore lack of action in one of these areas because action is being taken in others.” United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff* (9 August 2012), A/HRC/21/46, para.27.



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### **Conclusions and Potential for Case Impact**

The Chilean experience suggests that, problems and contradictions notwithstanding, domestic courts can adequately address past torture cases, or at least can learn to do so better over time. Certain limits obtain, with non-retroactivity being an obvious, and probably immovable one even for egregious crimes. Adequate state action from a transitional justice, rather than solely a criminal justice, perspective however also requires an understanding on the part of the state that all aspects of transitional justice entitlements must move in the same direction, or at least must not pull against one another. These points of friction between truth and justice, or justice and reparations, may therefore increasingly be resolved through judicialization, once survivors and relatives begin to see the courts as a possible avenue for effecting favourable immediate outcomes and/or overall policy or attitudinal shifts. Domestic and external (regional) cases can both have a part to play in promoting improved responsiveness, of the judiciary as of other branches of state, but ideally states should not place the onus on survivors to be a vehicle of institutional learning in this area. An improved design process and preventive audit of individual policy measures, to predict their implications across all four dimensions and where possible eliminate evident contradictions, could do much to avoid challenges in domestic or regional courts. Instituting a strategy of *ex officio* prosecution within the judicial dimension *per se*, while it may appear daunting, can offer authorities the advantages of being able to consciously plan and prioritize cases rather than be stuck in an endless cycle of instant response to unexpected externalities.<sup>54</sup>

The perils of last minute improvisation and piecemeal design of transitional justice measures have progressively been exposed in Chile as reparations, truth, and justice demands have

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<sup>54</sup> See United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, sec.V-VII, which deal with recommendations and alternatives for precisely such a strategy.

become more explicit, and as torture and other egregious but non-fatal violations have been added to the mix. The García Lucero case now adds the matter of survivors outside the country, who were able to take part in the respective truth-telling process and can thereby receive some economic entitlements, but cannot access certain benefits in kind (such as healthcare and a housing subsidy). Increased resort to domestic judicialization, first by relatives and now by survivors, has been further fuelled by an increasingly accommodating judicial attitude over time. What, if anything, can the specific resort to regional mechanisms, as in the García Lucero case, and the more recent case of Maldonado et al., contribute to this scenario?<sup>55</sup>

We might consider, separately, prospects for a ‘demand side’ impact of the case and for a ‘supply side’ impact on authorities, including but not limited to the judiciary. On the supply side, the judicial branch may already be as onside as it can reasonably be expected to become. The issue is one of whether the executive and legislature can be persuaded to comply in meaningful and expansive ways. Here, both the substantive content of the verdict and general attitudes to the Inter-American system come into play. States vary quite widely in their attitude to the Inter-American system in general and to negative rulings over their transitional justice performance in particular.<sup>56</sup> Recent work by Marcelo Torelly, for example, distinguishes the ‘engaged’, compliant, attitude of Argentina—at least where past crimes are concerned—from the distant, sceptical attitude of Brazil as evidenced in lack of movement over the 2010 IACtHR

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<sup>55</sup> IACtHR, *Caso Maldonado Vargas y Otros vs. Chile*, Sentencia de 2 de septiembre de 2015, Fondo, Reparaciones y Costas.

<sup>56</sup> See, inter alia, the work of the Inter-American Human Rights Network, at [interamerican.humanrights.org](http://interamerican.humanrights.org), and Alexandra Huneeus, “Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights,” in *Cultures of Legality: Judicialization and Political Activism in Latin America*, eds. Javier Couso, Alexandra Huneeus, and Rachel Sieder (New York: Cambridge University Press, 2010), and idem., “Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights,” *Cornell International Law Journal* 44 (2011): 493-549.

## 33 Can domestic courts adequately address past torture?

Araguaia case verdict. Chile lies somewhere between these two extremes, although it has never been a particularly committed regionalist in this or any other sphere. Moreover, the precedent set by the adverse Almonacid ruling of 2006 is not encouraging: promised legislation to ‘bring the amnesty law into line with’ Chile’s regional obligations (not, it should be noted, to annul or revoke it) is still pending nine years after the verdict. Change regarding reparations may however be slightly less politically costly to achieve, since it may not require a full confrontation with the right wing political forces which still defend some version of amnesty. The combined weight of the García Lucero case and recent, parallel, domestic mobilization by survivors pressing for reform to reparations may conspire to produce movement rather sooner in regard to this second verdict.

As regards ‘demand side’ impact, the external—third country or regional—cases that seem to produce most echo on grassroots actors and human rights organizations tend, as one might imagine, to be those where case dynamics look most classically like some version of Keck and Sikkink’s ‘boomerang’ model.<sup>57</sup> If the domestic actor field is populated, active, and legally-literate, it is better able to capitalize on and amplify any pressure generated on the state by external court action. It helps, in other words, if external case-bringers are also present and visible on the domestic scene, or have ongoing contacts there. Under these conditions, the external action is, effectively, a ‘reaching around’ that emanates from the domestic situation rather than being completely external to it. That is less acutely so in the particular case at hand, precisely because some of the very characteristics of the harm done to Mr. García Lucero and his family have left them relatively isolated from national life. The subsequent Inter-American case against Chile referred to

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<sup>57</sup> See Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Transnational Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998). See Collins, “Human Rights Trials in Chile,” for discussion of the demand-side impact of external and third country cases in Chile, El Salvador, and Argentina. See also Dancy and Michel, “Human Rights Prosecutions from Below.”

above (Maldonado et al.) involves plaintiffs well-known on the national grassroots scene, and represented by a domestic human rights organization (CODEPU). While these aspects increase its potential for follow-through, the main substance of the case, which requires the state to provide an avenue for overturning spurious convictions imposed by military tribunals, is relatively less central to survivor concerns or the debate over disappearance and execution.

Survivors' groups on the ground could certainly, however, already intelligently and strategically deploy some of what the García Lucero verdict says about reparations responsibilities and related justice entitlements. Some demands are relatively simple: for the CDE to be stood down from its current strong anti-liability discourse would, for example, go a long way toward assuaging resentment about this aspect of the present situation. Pressure for *ex officio* prosecutions to be initiated might meet with more inertia or resistance even from relatively well-disposed justice system actors who would need to carry these out. However, the Chilean state, like others embarked on similar processes of revisiting of transitional-era compromises, does by now contain a critical mass of rights-friendly, transitional justice-aware professionals. 'Joining up' this expertise to create a coherent transitional justice strategy or field would almost certainly produce more significant results than would a continued pursuit of separate tracks in justice, truth, reparations, and future-oriented reform. A certain Chilean state fondness for instead 'managing' critical junctures in transitional justice, including adverse regional rulings, through ad hoc responses in which those with most expertise are not always allowed to prevail, would however need to be overcome.