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Wavering Courts: From Impunity to Accountability in Uruguay

ELIN SKAAR*

Abstract. Many Latin American countries are moving towards increased accountability for past human rights violations, and there is a growing global consensus that international law does not allow some crimes simply to be exempted from prosecution. Uruguay has had a deeply split response to these developments. While the Supreme Court and the political elite increasingly pushed to end impunity, the public actually ratified the 1985 amnesty law protecting the military from prosecution in a 2009 plebiscite. The amnesty law was finally abolished by Parliament in 2011. This article traces the winding road from impunity to accountability in Uruguay in the context of substantial public support for impunity. It argues that, while the lack of judicial independence obstructed the quest for justice for many years, the combination of continued civil society demands for justice met by increasingly human-rights-friendly executives and liberal-minded judges (and lately also prosecutors) explains the recent advance in retributive justice.

Keywords: accountability, human rights, impunity, transitional justice, Uruguay

Introduction

On 21 March 2012, President José 'Pepe' Mujica officially acknowledged the Uruguayan state's responsibility in the events surrounding the Gelman case, for which it had been condemned by the Inter-American Court of Human Rights (IACtHR) in March 2011. The president also acknowledged the broader human rights violations perpetrated as *terrorismo de Estado* (state terrorism) committed during the civil-military dictatorship of 1973–85, thus publicly recognising for the first time the institutional responsibility of

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the three branches of government for the act of forced disappearance.[1] Mujica read calmly from a manuscript carefully tailored to the IACtHR's ruling on *Uruguay vs. Gelman*, to which this official apology was a response. Present in Parliament, where this historic event took place, were the plaintiffs in the case, Argentine poet Juan Gelman and his granddaughter Macarena Gelman. Now aged 36, Macarena was born in captivity to an Argentine teenage mother who had been kidnapped by state forces in Buenos Aires, together with her politically active husband Marcelo Gelman (Juan Gelman's son), in the early days of the dictatorship. While her father had disappeared in Buenos Aires, Macarena's mother had been transferred to Montevideo before giving birth to her and subsequently 'disappearing'. Also present were representatives of all three armed forces, the whole Supreme Court, and the leaders of the three main political parties. This was the latest, but not final, bend in the winding road from impunity to (greater) justice in Uruguay.

Only a year earlier, Uruguay had become the third country in Latin America, after Argentina and Peru, to overturn the amnesty law protecting its military from prosecution for human rights violations committed during the dictatorship. This had been preceded by extensive political, legal and public wrangling over whether to uphold the so-called Ley de Caducidad de la Pretensión Punitiva del Estado (Law of Expiry of the Punitive Power of the State, henceforth Expiry Law or Amnesty Law). The Supreme Court had declared the law unconstitutional in three different court rulings on three specific cases, thus incrementally broadening the scope for punitive action in cases of past human rights violations.[2] Parliament, after two years of intense but ultimately futile discussions over the so-called Ley Interpretativa, finally repealed the Expiry Law in October 2011 through Law 18.831, which re-established the state's punitive capacity regarding dictatorship crimes.[3] This was a most unexpected turn of events given that the populace had declined to overturn the Expiry Law in a plebiscite held alongside presidential elections in October 2009. Parliament's decision to issue the Ley Interpretativa, which for all practical purposes invalidated the Amnesty Law, was no doubt catalysed (though not determined) by the IACtHR ruling,[4] in the wake of which, by

[1] Ricardo Scagliola, 'El Acto Oficial por el caso Gelman: elogio de la razón sensible', *Brecha*, 23 March 2012, p. 2.

[2] The Supreme Court declared the law unconstitutional in the Sabalsagaray (2009), Bordaberry (2010) and García Hernández, Amaral y otros (2011) cases.

[3] This was a political compromise. Rather than annul the Expiry Law altogether, the Ley Interpretativa declared only Articles 1, 3 and 4 of the former in conflict with the Uruguayan Constitution and hence legally void. For the political twists and turns, see Gabriela Fried and Francesca Lessa (eds.), *Luchas contra la impunidad: Uruguay 1985–2011* (Montevideo: Trilce, 2011). The law ultimately failed to secure parliamentary approval in May 2011.

[4] Parliamentary discussions over having the Expiry Law revalidated started in September 2010 and were anticipated to end before the IACtHR's verdict, which was originally expected on

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October 2012, 138 cases for past human rights violations were at various stages of completion in the many courts in Montevideo.[5]

This encouraging recent political–legal development in the human rights field contrasts sharply with historically dominant anti-prosecution views, both in politics and in the judiciary. For a quarter of a century, the Uruguayan state refused to venture into the field of punitive justice. While in the late 1990s neighbouring Chile and Argentina became internationally hailed as the regional protagonists of so-called late justice, Uruguayan judges dragged their feet.[6] It is therefore all the more surprising that Uruguay is currently one of the few countries in Latin America – perhaps in the world – that has two former presidents in jail for gross human rights violations, along with a number of lower-level military officials.[7] This progress in judicial matters occurred in spite of the country's population refusing democratically not once, but twice, to revoke the Amnesty Law.

This article examines how limited prosecutions have been made possible, in spite of the existing Amnesty Law and substantial public support for impunity. Based in part on interviews conducted in Montevideo in 2000, 2001 and 2012,[8] the main argument is this: due to a peculiar twist of the Expiry Law, executive-branch policy preferences have dominated the judicial scene in Uruguay with respect to addressing past human rights violations. The article shows that there has been a significant shift since the transition to democratic rule in the policy preferences of the main protagonists – civil society, politicians, judges – with respect to retroactive justice and impunity. Some of these

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4 October 2010. The actual court ruling was only issued in March the following year. See 'Proyecto interpretativo de la Ley de Caducidad ingresa hoy al Parlamento', *La Red 21*, 21 Sep. 2010, available at www.lr21.com.uy/politica/424709-proyecto-interpretativo-de-la-ley-de-caducidad-ingresa-hoy-al-parlamento.

[5] 'Estado de las cosas', *La Diaria*, available at http://ladiaria.com.uy/articulo/2012/10/estado-de-las-cosas/.

[6] In Argentina and Chile, the onset of late, or post-transitional, justice can be dated to the mid-1990s, whereas in Uruguay the first judge to take on a criminal justice case for past human rights violations did so only in 2002. For a comparative analysis of the propensity of judges in the Southern Cone to prosecute the military, see Elin Skaar, *Judicial Independence and Human Rights in Latin America: Violations, Politics and Prosecution* (New York: Palgrave Macmillan, 2011).

[7] Following the transition to democratic rule in 1983, Argentine courts sentenced five of the country's nine former junta leaders to prison. They were later pardoned by the next president, Menem. Bolivia too put its former dictator, García Meza, on trial in 1983. The Peruvian Supreme Court sentenced former president Alberto Fujimori to 25 years in jail in 2010. The trend of holding former civilian and military leaders to account for past gross human rights violations in Latin America is explored in Ellen Lutz and Caitlin Reiger (eds.), *Prosecuting Heads of State* (New York: Cambridge University Press, 2009).

[8] I conducted about 50 interviews with judges, human rights lawyers, academics, politicians and representatives from human rights organisations and civil society.

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changing policy preferences are closely tied to changes in the regional and global human rights context, but the main explanation for the recent advance in retributive justice seems to have been the increasing receptivity of human-rights-friendly executives and liberal-minded judges (and lately also prosecutors) to civil society demands for justice. Whereas for years judges lacked independence due to a combination of institutional and structural factors, recent changes in the political environment more in favour of prosecutions have reduced judges' fear of executive and military reproach. Yet institutional obstacles remain, and judges still look to the political elites for direction in human rights cases pertaining to the dictatorship era.

The article is organised into five remaining main parts. The next part shows briefly how the combination of the Amnesty Law and executives reluctant to address punitive action against the military explains why there was no progress in retroactive justice during the first three presidencies after the transition back to democracy: Juan María Sanguinetti (1985–90), Luis Alberto Lacalle (1990–5), and Sanguinetti's second term (1995–2000). Part three illustrates how judicial action in the human rights field continued to be restrained even after the 'truth' issue was placed on the political agenda by President Jorge Batlle (2000–5), and focuses on institutional and non-institutional obstacles to independent judicial action. The fourth part examines how and why some judges managed to make progress in prosecuting high- and mid-level officials for past gross human rights violations during the governments of Tabaré Vásquez (2005–10) and José 'Pepe' Mujica (2010–present), in spite of the Expiry Law. Part five offers a preliminary analysis of why justice came (relatively) late in Uruguay, while part six accounts for why justice came at all.

Repression and Impunity

Repression in Uruguay is intimately linked to the dictatorship period in Argentina and the wider Operation Condor network operating in South America in the 1970s and 1980s. In their battle against communism, several countries in the region carried out joint actions of repression, traded secret information and prisoners, and covered up their crimes.[9] The hallmark of repression in Uruguay was unlawful detention, imprisonment and torture, affecting tens of thousands of Uruguayans.[10] Although the practice of 'disappearing' political opponents was never employed with the same fervour as in

[9] Operation Condor first encompassed Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay. Peru and Ecuador later joined the network as peripheral members.

[10] Estimates for imprisoned and tortured people vary from 60,000 people (Amnesty International in 1976) to 200,000. See Alejandro M. Garro, 'Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?', *Colombia Journal of Transnational Law*, 31: 1 (1993), pp. 1–102.

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neighbouring countries, almost 200 people suffered this fate. Importantly for later judicial proceedings, the majority disappeared outside the borders of Uruguay (principally in Argentina) as part of Operation Condor. This includes the 13 Uruguayan children reported missing in Argentina at the beginning of the dictatorship period. One of the disapperead children was found in the course of the *Uruguay vs. Gelman* case. The 30 or so people who disappeared inside Uruguay likely died under torture, not as a result of a systematic purge of opponents, though this remains debated among scholars and activists. Nevertheless, the disappeared became a major bone of contention between the military and civilian forces at the time of transition.

To facilitate the 'pacted' transition to democratic rule in Uruguay, the new democratic regime was forced to negotiate its way into existence.[11] As is common in situations where the balance of power between the outgoing military regime and the incoming civilian regime tilts in favour of the outgoing regime, the new democratically elected government had to make concessions with respect to the human rights issue.[12] Typically, the incoming Uruguayan government was cautious about implementing transitional justice measures that may have provoked the outgoing military regime into renewed forceful action.[13] Retributive justice was ruled out of the question. An informal agreement was allegedly reached (but never officially confirmed) in the so-called Club Naval talks between the military, the new right-wing Colorado government and the left-wing coalition opposition party Frente Amplio (Broad Front) that the military would be granted impunity. However, encouraged by information released by the two parliamentary commissions established to investigate the fate of the disappeared and the political murder of four prominent left-wing politicians respectively, hundreds of cases regarding past human rights violations were brought to court by victims and their families

[11] For a discussion on various types of transition to democratic rule, see Wendy Hunter, 'Negotiating Civil-Military Relations in Post-Authoritarian Argentina and Chile', *International Studies Quarterly*, 42: 2 (1998), pp. 295–317; and Terry Lynn Karl and Philippe C. Schmitter, 'Modes of Transition in Latin America, Southern and Eastern Europe', *International Social Science Journal*, 128 (1991), pp. 269–89.

[12] For a comprehensive discussion on political use of amnesties, see Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford and Portland, OR: Hart Publishing, 2008).

[13] In such situations, underperformance in human rights matters was the norm rather than the exception during the early transition period. See Jorge Correa Sutil, '"No Victorious Army has Ever Been Prosecuted...": The Unsettled Story of Transitional Justice in Chile', in A. James McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame, IN: University of Notre Dame Press, 1997), pp. 123–54; Neil Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vols. 1–3 (Washington, DC: United States Institute of Peace Press, 1995); and Elin Skaar, 'Truth Commissions, Trials – or Nothing? Policy Options in Democratic Transitions', *Third World Quarterly*, 20: 6 (1999), pp. 1109–28.

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between 1985 and the end of 1986.[14] Imminent military reactions threatened to overthrow the government.

Not willing to risk military opposition (and, in the worst-case scenario, a coup), President Sanguinetti finally passed the Expiry Law (Law 15.848) with parliamentary approval on 22 December 1986. Its essence was to preclude the military and police forces from legal prosecution for human rights violations from the onset of civil-military rule in 1973 to 1 March 1985. The judges who had started working on the disappearance cases were thus forced by law to drop them. Moreover, Sanguinetti secured control over any future court case specifically regarding disappearances and kidnapped children by including the now infamous Article 4, which stated:

> Notwithstanding the provisions of the preceding Articles the trial judge shall transmit to the Executive witness statements of complaints filed up until the date of enactment of this Act relating to proceedings concerning persons allegedly detained in military or police operations and children missing and presumed abducted under similar circumstances. The executive branch shall immediately order investigations to clarify the facts. The executive branch shall, within 120 days of judicial communication of the complaint, advise the complainant of the outcome of these investigations and provide them with the information compiled.

Although this clause precluded legal action, it technically opened up the possibility of further investigations into the fate of the *desaparecidos* and of their children. But this was a carefully designed political move to transfer political and legal responsibility for investigation from the courts to the executive. If the executive had no will to investigate such cases, they would stall in the presidential office. Indeed, Article 4 was effectively used as a pretext for non-action in the field of human rights for many years to come.

The Amnesty Law was further cemented through two events. First, in 1988 the Supreme Court found the law constitutional in a minimum majority decision (3–2), which meant that the highest court in effect ceded control over cases of human rights violations to the executive.[15] Second, the majority of

[14] For a discussion of the two parliamentary commissions, see Francesca Lessa, 'Parliamentary Investigative Commission on the Situation of Disappeared Persons and Its Causes' and 'Investigative Commission on the Kidnapping and Assassination of Former National Representatives Zelmar Michelini and Héctor Gutiérrez-Ruiz', in Lavinia Stan and Nadya Nedelsky (eds.), *Encyclopedia of Transitional Justice* (New York: Cambridge University Press, 2013); Alexandra Barahona De Brito, *Human Rights and Democratization in Latin America: Uruguay and Chile* (New York: Oxford University Press, 1997); and Felipe Michelini, 'Las Comisiones de la Verdad en el Cono Sur: una perspectiva desde el año 2000', in CELS (ed.), *Homenaje a Emilio Mignone* (Buenos Aires: Instituto Interamericano de Derechos Humanos and CELS, 2000).

[15] Suprema Corte de Justicia, 'Sentencia No. 184: sobre denuncia de inconstitucionalidad Ley No. 15.848, Arts 1, 2, 3 y 4', 2 May 1988. One of the judges had apparently been prepared to vote the law unconstitutional, but was pressured by the executive into declaring it

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Uruguayans (55.9 per cent) gave the Amnesty Law a democratic seal of approval when they voted to keep it in the 1989 referendum.[16] Deeply discouraged, the victims of human rights abuses, their families and supporters went into a state of inertia for several years.

Some organisations took their unresolved concerns to foreign courts. A few months after the referendum, the Instituto de Estudios Legales y Sociales del Uruguay (Uruguayan Institute of Legal and Social Studies, IELSUR), with the support of Americas Watch, started bringing cases to the Inter-American Commission on Human Rights (IACHR) and also to the UN Human Rights Committee, arguing that the Expiry Law was in violation of the American Convention on Human Rights, which Uruguay had ratified in 1985.[17] These foreign proceedings had little effect at the time, however, and no new case of human rights violations was brought before Uruguayan courts between the referendum and 1996. Hence, impunity characterised the rest of Sanguinetti's first presidential period, as well as the succeeding government of Luis Alberto Lacalle from the Blanco Party (1990–5).

Challenging the Expiry Law

The first judicial attempts to get around the impunity law came during Sanguinetti's second term in office (1995–2000). Provoked by unexpected public confessions by Argentine and Uruguayan high-ranking military officials who acknowledged their participation in the torture, killing and disappearance of thousands of people, the human rights community in Uruguay was fuelled into renewed action. Under the lead of social democratic senator Rafael Michelini, the movement mobilised between 30,000 and 50,000 people in a March of Silence on 20 May 1996, to commemorate the 20th anniversary of the murder of Michelini's father, Zelmar Michelini (a Colorado senator and later a founder of the Frente Amplio), along with three other high-profile Uruguayan politicians murdered in Argentina in 1976.

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constitutional. Another who voted to declare it unconstitutional did so in spite of direct pressure from former General Medina. Information confirmed in interviews with historian Gerardo Caetano, Montevideo, 21 March 2012, and human rights lawyer Juan Erradonea, Montevideo, 23 March 2012.

[16] For a detailed account of the referendum and all its surrounding debates, see Luis Roniger and Mario Sznajder, *The Legacy of Human Rights Violations in the Southern Cone: Argentina, Chile, and Uruguay* (New York: Oxford University Press, 1999).

[17] *Hugo Leonardo de los Santos Mendoza et al. vs. Uruguay*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report No. 29/92, OEA/Ser./L/V/II.83 (1992). Cited in Louise Mallinder, *Uruguay's Evolving Experience of Amnesty and Civil Society's Response*, Working Paper no. 4 from Beyond Legalism: Amnesties, Transition and Conflict Transformation (Belfast: Institute of Criminology and Criminal Justice, Queen's University Belfast, 2009).

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When Sanguinetti turned down a petition from Michelini to create a truth commission to investigate these four murders, in March 1997 the latter filed a landmark collective case, which a trial judge in the Criminal Court of Montevideo, Alberto Reyes, took on. In April 1997 Reyes ordered an investigation into the fate of more than 150 'detained or disappeared' persons in the so-called *caso Zanahoria*, in part on the basis that two years earlier Uruguay had ratified the Inter-American Convention on the Forced Disappearance of Persons. However, the aim was simply to determine the existence of the clandestine cemetery, exhume the bodies and return them to their families, not to instigate punitive action against the perpetrators.

In June 1997, the Montevideo Court of Appeals overturned Reyes' ruling ordering the investigation. The court deemed it irrelevant to discuss whether or not Law 15.848 offered an amnesty, ruling that responsibility to order such investigations lay with the executive, not the courts.[18] Thus, in August 1997 Reyes forwarded the case to President Sanguinetti. The government then informed him that the disappearances in question were covered by Article 1 of the Expiry Law, which gave immunity to state officials for crimes committed for political reasons during the period in question. Consequently, the government ordered that the case be closed. Reyes was sanctioned by losing his position as a criminal judge and being transferred to a civilian court in the interior.[19]

The Zanahoria case was the first in which, under Article 4 of the Expiry Law, the Uruguayan judiciary presented evidence for the executive branch to determine whether or not a particular crime was covered by Article 1 of the law. While the executive's response was a severe blow to human rights activists, the case had wider implications. First, the appellate court's unwillingness to uphold Reyes' decision to investigate suggests that it perceived dealing with the disappeared as a political, not a judicial, matter. Second, the next stage of the appeal shows how the executive actively used the Expiry Law to prevent legal investigation into the alleged crimes, thus making a mockery of judicial independence. Finally, the removal of Reyes from his position demonstrated that Uruguayan judges who tried to go beyond what was deemed politically acceptable in human rights cases risked severe sanctions.[20]

[18] Lilia E. Ferro Clérico and Diego Escuder, 'Conjugando el pasado: el debate actual en Uruguay sobre los detenidos desaparecidos durante la dictadura', paper presented at Latin American Studies Association, Chicago, IL, 1998, pp. 1–31. The ruling by a Montevideo appellate court (Tribunal de Apelaciones en lo Penal de 2° Turno) was published in full in *La República* on 14 June 1997.

[19] Interview with Felipe Michelini, Frente Amplio member of Parliament and professor of human rights at the Universidad de la República, 12 July 2001.

[20] The court system facilitates this as Uruguay's Supreme Court is responsible for appointing, removing, promoting, relocating and disciplining lower court judges and thus has total control over their careers.

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Throughout his time in office Sanguinetti continued systematically to turn down requests for 'truth' and 'justice' from various segments of Uruguayan society, as well as international requests for information regarding alleged human rights violators, including from Judge Baltasar Garzón in Spain for information regarding the disappearance of Spanish citizens during the Dirty War in Argentina. Nevertheless, three emblematic 'truth' cases – the Gelman case (involving a disappeared child), the Simón Riquelo case (also involving a disappeared child) and the Elena Quinteros case (involving a disappeared young woman) – would gradually work their way into the Uruguayan court system.

Luis Alberto Lacalle continued Sanguinetti's policy of impunity, and no progress was made in the area of human rights during his presidency (1990–5). It was only when Jorge Batlle took over the presidency in March 2000 that there was a notable positive shift in the human rights discourse. Batlle was the first executive in Uruguay's post-transition period to take Article 4 of the Expiry Law seriously, ordering investigations into disappearance cases when claims for truth were brought to court. He resolved the long-standing Gelman case by ordering DNA tests of the child believed to be the disappeared grandchild, and successfully restored her true identity.[21]

Next, Batlle established the Comisión para la Paz (Peace Commission) to enhance national peace and reconciliation. The commission, a purely investigative body without punitive powers, had two main objectives: to clarify the fate of all disappeared Uruguayans, whether they had vanished inside or outside the country's borders, and to find the whereabouts of the four disappeared children not yet restored to their rightful families. In its final report of April 2003, the commission stated that the 26 Uruguayans who had disappeared inside Uruguay during the dictatorship period had died as a result of torture and that 182 Uruguayans had been detained in Argentina during the military dictatorship. It also provided substantial evidence for the existence and activities of Operation Condor.[22] It refrained from pronouncing on the Expiry Law.

Despite high hopes for prosecution, no criminal trials were held immediately after the release of the report. However, the commission succeeded in placing the disappeared on the political agenda by reopening the public debate about the right to truth. This was to slowly pave the way for justice.

[21] Batlle also addressed the case of Simón Riquelo, but here the DNA tests were negative. This case was later resolved in Argentina, in connection with the reopening of a formerly closed case related to Operation Condor. Amnesty International, 'The Case of Simón Riquelo: A 25-Year Struggle for Truth and Justice' (London: Amnesty International, 25 July 2001), AMR 52/001/2001.

[22] Government of Uruguay, Office of the President, *Informe Final de la Comisión Para la Paz* (Montevideo: Uruguay Centro de Medios Independientes, 2003).

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The Elena Quinteros case is significant as it meandered through many legal twists and turns in Argentine as well as Uruguayan courts, straddling three presidencies in changing political climates before it was finally resolved. Initially a 'right to truth case' pursuing information about the destiny of a detained-disappeared person, it turned into the first court case for justice for past human rights violations in Uruguay. It was taken on by a lowly trial court judge, Estela Jubette, and made it all the way to the Supreme Court.[23]

Shortly after Batlle took office, in May 2000 Judge Jubette had strongly criticised former president Sanguinetti for his failure to comply with both national and international law, and demanded investigation into the disappearance of Elena Quinteros under Articles 7, 29 and 72 of the Uruguayan Constitution and Uruguay's obligations under the American Convention on Human Rights and the International Covenant on Civil and Political Rights. The Batlle government appealed, but surprisingly, the Montevideo Court of Appeals agreed with her view that Article 4 of the Expiry Law and the various international human rights treaties signed by the Uruguayan state obliged the executive to investigate the matter.[24] President Batlle put pressure on her to drop the case and, when she refused to comply, urged the Supreme Court to sanction her. The Supreme Court refused to oust her from her position, even though it made clear that it was not happy with her ruling. This was a small but significant advance in bringing judges back as actors in the quest for truth and justice in Uruguay. For the first time, a lower court judge invoking international human rights legislation had been explicitly supported by the appellate court and her judicial prerogatives, if not her ruling, backed by the highest court in the country.

To the surprise of all, in April 2002 criminal trial judge María del Rosario Berro formally charged the former minister of foreign affairs, Juan Carlos Blanco, with the unlawful kidnapping and disappearance of Elena Quinteros. Never before had prosecution been sought in a case of human rights violations stemming from the dictatorship period. The judge argued that Blanco was a civilian and was therefore not covered by the Expiry Law, which grants impunity only to military and police. Moreover, she ruled that disappearance is a crime still in progress and can therefore be investigated. Blanco was arrested in 2002.[25] Clearly disturbed, the government responded to the detention in

[23] Even before Jubette took on the court case, Quinteros had appealed in 1987 directly to then-president Sanguinetti to help her find her missing daughter. He responded that the Expiry Law precluded an investigation. At the end of the millennium, the Supreme Court apparently sent new evidence in the case to Sanguinetti, who, under Article 4 of the Expiry Law, was obliged to order an investigation. The executive again refused, with the same argument.

[24] Official legal document from the Montevideo Court of Appeals, Case No. 98, 31 May 2000.

[25] *Amnesty International Report 2003 – Uruguay* (London: Amnesty International, 2003).

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April 2003 by attempting to extend the Expiry Law to cover not only police and military personnel but also civilians. Although Amnesty International expressed 'serious concerns that the government was interfering with the judiciary', legal proceedings against Blanco continued.[26] Eventually, under the new government of Tabaré Vásquez, trial judge Eduardo Cavalli successfully convicted Blanco for the disappearance and murder of Elena Quinteros.

Pushing for Retributive Justice

Tabaré Vásquez of the Frente Amplio, Batlle's opponent in the run-off election for president in 2000 and a member of the Comisión para la Paz, won the 2004 elections with just over half the vote. Even before he took office in March 2005, he had made clear that he intended to address the issue of retributive justice, and during the first four years of his term he accomplished more than his four predecessors combined, even though the Expiry Law remained in force throughout. He used presidential decree to exempt at least 45 cases from the Amnesty Law, thus allowing prosecution of certain crimes from the dictatorship period. In addition to two former presidents, a growing number of military and police officials were formally accused of committing atrocities in the 1970s and 1980s. By October 2009, Uruguayan courts had convicted at least eight former soldiers and police officers. In November 2010, the first general in active service was sentenced to prison after being convicted of a murder back in 1974. How was all this possible?

One reason was that in 2005 the Vásquez government reinterpreted the scope of the Expiry Law as 'limited to human rights violations committed under the military government after the June 1973 Coup'.[27] This opened up the possibility of legal action against some 600 active and former members of the armed forces in connection with crimes committed *before* the coup. His government also excluded from the Expiry Law 'cases that took place in Argentina, allegedly with the co-operation of the Uruguayan and Argentinean armed forces'.[28] In addition to making it legally possible to look into the role of the military high command in the repression, this also allowed criminal charges to be brought against a number of other retired lower-ranking military officials and former police. This clearly demonstrates that where the executive

[26] *Amnesty International Report 2004 – Uruguay* (London: Amnesty International, 2004).

[27] *Amnesty International Report 2006 – Uruguay* (London: Amnesty International, 2006). The full list of proposed exclusions put forward in executive-initiated legislative bills was: economic crimes (the only exclusion in the original text of the amnesty); disappearances; crimes committed by civilians; crimes committed by high-ranking military or police personnel (with the assumption that lower ranks would still be covered as they had been following orders); crimes committed outside Uruguay; and crimes committed before the start of the dictatorship – that is, the early 1970s. Many of these exclusions were based on judicial developments.

[28] *Ibid.*

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has political will, progress in retributive justice can be made, even if domestic legislation at the outset precludes prosecution. Since many of these cases are, as of May 2013, at an early stage in the penal courts, only a handful of the most emblematic cases will be discussed here.

The most spectacular achievements have been the arrest and trials of two former presidents and one former minister. In November 2006, the 11th Criminal Court judge in Montevideo ordered the detention and trial of former president Juan María Bordaberry (1972–6) and the former minister of foreign affairs, Juan Carlos Blanco, on charges of crimes against humanity. The families of legislators Zelmar Michelini (represented by Hebe Martínez Burlé) and Héctor Gutiérrez Ruiz were plaintiffs in the case against Bordaberry. Bordaberry and Blanco were jointly charged with the murders of Michelini, Ruiz and two members of the Tupamaro guerrilla group, Rosario Barredo and William Whitelaw, in Argentina in 1976. The decision was appealed,[29] but in September 2007 the appellate court confirmed the trial and detention of Bordaberry on charges of being the co-author of ten homicides.[30] He was sentenced to 30 years in jail in November 2010.[31]

A year after Bordaberry's detention, in December 2007 Judge Luis Charles arrested General Gregorio Álvarez, the former de facto president and leader of the civil-military dictatorship in Uruguay (1981–5), on enforced disappearances charges. On 22 October 2009, Judge Charles found the 83-year-old Álvarez guilty of the deaths of 37 people who disappeared during the dictatorship, as well as several additional human rights violations, while he was commander-in-chief of the army, and sentenced him to 25 years in prison. During the same session, a former navy captain, Juan Carlos Larcebau, was sentenced to 20 years in prison for 29 cases of aggravated homicide.[32] This was the fourth time in Latin American history that a former dictator had been put on trial, convicted and sentenced to prison. The verdict against Peru's Fujimori had been handed down in April the same year.

In addition to these high-profile cases, from 2005 onward a number of less politicised and publicised cases trickled into Uruguayan courts, each with the precondition that the executive had to order an exception to the Expiry Law before investigations could occur. In line with Vásquez's interpretation, many of the crimes under investigation had taken place outside Uruguay as part of Operation Condor. In September 2006, for instance, a trial judge in Montevideo found six military officers and two former police officers guilty of organised crime and of kidnapping members of the Uruguayan opposition

[29] *Amnesty International Report 2007 – Uruguay* (London: Amnesty International, 2007).
[30] *Amnesty International Report 2008 – Uruguay* (London: Amnesty International, 2008).
[31] Bordaberry died under house arrest the following year, aged 83.
[32] 'Former Uruguay Leader Detained', AlJazeera.net, 18 Oct. 2007; 'Uruguayan Dictator Guilty of Murder', AlJazeera.net, 23 Oct. 2009.

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group Partido por la Victoria del Pueblo (People's Victory Party, PVP) in Argentina in 1976.[33] In June the following year Vásquez exempted 17 cases from the Amnesty Law, including at least five transfers of detainees from Argentina to Uruguay between February and August 1978. In September 2007 he also excluded the kidnapping of two Uruguayans in Paraguay in 1977, paving the way for judicial investigations.[34]

As in previous years, neighbouring countries continued to demand extradition of Uruguayan citizens to stand trial in cases stemming from Uruguay's participation in Operation Condor. Compared to his predecessors, Vásquez was much more receptive to these requests. He was also ready to ask for extradition himself, as in the case of former colonel (and Uruguayan citizen) Juan Manuel Cordero, whose involvement in human rights violations during the military government included the murders of Zelmar Michelini and Héctor Gutiérrez Ruiz. Cordero was wanted by both the Uruguayan and the Argentine governments for involvement in Operation Condor activities and had fled to Brazil, where he sought refuge from prosecution. He was extradited from Brazil to Argentina in January 2010.

Alongside criminal investigations into past human rights violations, the Peace Commission report paved the way for progress in terms of both learning the fate of the disappeared and providing reparations to the victims' families. In November 2005, the first remains of communists who had been kidnapped, tortured and murdered by the dictatorship were found. In July 2007, the Humanities Faculty anthropology team from the Universidad de la República started excavations in the Tablada military compound in an effort to locate the remains of more detainees. In September the same year, new exhumations began on military premises in search of the remains of Elena Quinteros.[35]

On the Peace Commission's recommendation, torture was codified in Law 18.026 of 4 October 2006. Furthermore, provision of reparations to relatives of victims of human rights violations during the military government was enshrined in two laws: Law 18.033 of 3 October 2006 and Law 18.596 of 13 October 2009. A Special Reparations Commission was established in November 2009 and implemented toward the end of January 2010.[36] Reparations were granted to families of the disappeared, to political prisoners (before and after the coup), and to children born in captivity or held with their mothers in prison. The government allocated funds and reparations began, although much remains to be done.[37]

[33] *Amnesty International Report 2007 – Uruguay* (London: Amnesty International, 2007).
[34] *Amnesty International Report 2008 – Uruguay* (London: Amnesty International, 2008).
[35] *Ibid.*
[36] I thank Gabriela Fried for this information (personal communication, 28 Jan. 2010).
[37] Interviews with representatives for CRYSOL (Asociación de ex Pres@s Polític@s de Uruguay) and Familiares, Montevideo, 20 and 23 March 2012 respectively. For figures

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The most dramatic legal development in the human rights field came in October 2009, when the Supreme Court ruling in the Sabalsagaray case unanimously declared the Expiry Law unconstitutional.[38] The case concerned a young female communist and social activist opposed to the military government, Nibia Sabalsagaray, who died in a military barracks outside Montevideo in 1974, allegedly from the effects of torture. The victim's sister, Blanca Sabalsagaray, appealed in 2004 to the government for redress, but President Vásquez decided the following year that the law provided immunity. Three years later, criminal prosecutor Mirtha Guianze filed a new suit, arguing that the Amnesty Law was unconstitutional and could not be applied to the Sabalsagaray case. In its ruling in favour, the Supreme Court stated that (a) the Expiry Law violated the independence of the three branches of government and could be interpreted as an amnesty law because it was not approved according to constitutional procedures, which demand a special majority vote in Parliament, and (b) the law violated international obligations to protect the rights of citizens. Prosecutor Martha Guianze praised the ruling for showing that Uruguay now had 'a totally independent Supreme Court' and said it reflected 'a very solid, forceful position from the Court'.[39]

Yet, although the Supreme Court ruling was innovative, in that it was based on Article 259 of the Constitution, it could only apply to the Sabalsagaray case and did not set a precedent. Nevertheless, it was correctly considered to be 'a critical blow to the amnesty law', and in the opinion of the family's attorney, Juan Errandonea, it 'rang the death knell for the statute of limitations'.[40] The court repeated its declaration of the unconstitutionality of the Expiry Law in two new cases (2010 and 2011), slowly turning what had been considered a one-off ruling into new jurisprudence in the question of accountability for past crimes.

Evidently, the main legal and political obstacle to prosecution of the military in Uruguayan courts throughout the post-dictatorship period was the Expiry Law. Although it was criticised repeatedly and extensively over the years

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on the amounts paid, see www.lr21.com.uy/politica/443601-indemnizacion-a-victimas-del-terrorismo-de-estado-suma-us-2500000-al-2011.

[38] 'Sabalsagaray Curutchet, Blanca Stela: Denuncia, Excepción de Inconstitucionalidad Arts. 1, 3 y 4 de la Ley No 15.848', Ficha 97-397/2004, Sentencia No. 355, Montevideo, 19 Oct. 2009. Preceding the decision, in February 2008, the Uruguayan Parliament (where the Vásquez government had a clear majority in both chambers) had already signalled that it favoured declaring the Expiry Law unconstitutional. 'Uruguayan Court Throws Out Special Amnesty for Crimes under Dictatorship', *MercoPress*, 20 Oct. 2009.

[39] Raul O. Garces, 'Uruguay Supreme Court Rules Out Dirty War Amnesty', *Associated Press*, 19 Oct. 2009.

[40] 'Supreme Court Strikes Blow Against Uruguayan Amnesty Law', dpa International, *Earth Times* online, 20 Oct. 2009.

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for being out of tune with international law and for violating Uruguay's international obligations, no real political efforts were made to revoke it until February 2008, when the two chambers of Uruguay's Parliament (where the Vásquez government had a clear majority) said they favoured declaring the 1986 bill unconstitutional. A public campaign for a second referendum (now termed a plebiscite) to revoke it had started in 2007, pushed by civil society sectors.[41] The effort drew support from elements of the Frente Amplio, though not the top leadership. Vásquez himself had originally refused to abrogate the law, and the Frente Amplio was generally opposed to the plebiscite and did not want to hold it at the same time as the presidential election.

Nevertheless, the plebiscite on the Expiry Law was held in tandem with the general elections on 20 October 2009. Although public opinion polls showed that support for repeal of the law had fallen from 48 per cent in May 2008 to 42 per cent in September 2009, campaigners were optimistic about winning the simple majority needed.[42] The Frente Amplio's presidential candidate, José 'Pepe' Mujica, was substantially more popular than his rivals – Juan Bordaberry, son of the former dictator, and Luis Alberto Lacalle, who had been president from 1995 to 2000. Mujica, a former Tupamaro guerrilla leader, had promised to follow Vásquez's lead on the human rights question. Many people also believed that the Supreme Court ruling in the Sabalsagaray case only days before would swing votes in favour of overturning the Amnesty Law.[43]

Mujica won with 52.4 per cent over Luis Alberto Lacalle's 43.5 per cent in the run-off election. It was therefore a great surprise that in the plebiscite just under 53 per cent voted *against* repealing the Amnesty Law, and it remained in place.[44] Had the law been repealed, the statute of limitations defence would

[41] Luis Roniger, 'Transitional Justice and Protracted Accountability in Re-Democratised Uruguay, 1985–2011', *Journal of Latin American Studies*, 43: 4 (2011), pp. 693–724.

[42] For the arguments of those campaigning for the referendum, see Alvaro Rico, 'Represion y exterminio de uruguayos en la dictadura: razones para la anulación de la Expiry Law', 14 Oct 2009, available at www.tel.org.ar/spip/spip.php?article21.

[43] Raul O. Garces, 'Uruguay Supreme Court Rules Out Dirty War Amnesty', Associated Press, 19 Oct. 2009.

[44] Voting is compulsory in Uruguay, and turnout was estimated at 90 percent. Referendum results by department can be found on the website of Electoral Geography 2.0 (www.electoralgeography.com), under 'Uruguay: Amnesty Law Referendum 2009'. The plebiscite was held in conjunction with the first round of presidential elections on 25 Nov. 2009. Nobody really voted *for* the Expiry Law, as there was only one option in the plebiscite: the so-called *voto rosado* (pink slip), which meant giving support to a constitutional reform project that would annul Articles 1, 2, 3 and 4 of the Expiry Law. This procedure, determined by the Electoral College, was heavily criticised by several sectors of the Uruguayan population, especially the human rights community, as a deliberate ploy to confuse the electorate. This was confirmed in interviews with a number of informants in Montevideo, March 2012. See

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also have disappeared, exposing many other figures from the military dictatorship to prosecution. This would have enabled the reopening of dozens of cases excluded from investigation by the Amnesty Law. Once again the majority of the Uruguayan population seemed out of step with the political and judicial consensus. But whereas that consensus had been against repeal in the first referendum in 1989, now it was swinging in favour. After unsuccessful attempts to eliminate the Expiry Law through a plebiscite in 2009 and an interpretative law between 2010 and 2011, it was finally abolished by Parliament in compliance with the February 2011 Gelman verdict by the IACtHR. On 27 October 2011, Law 18.831 re-established the state's capacity to punish the crimes of state terrorism committed until 1 March 1985, and declared crimes of state terrorism to be crimes against humanity.

Explaining the 'Lateness' of 'Late Justice'

At the turn of the millennium, Uruguayan judges and prosecutors were severely lagging behind their Argentine and Chilean counterparts in addressing dictatorship-period human rights violations, but they have been catching up quickly and have since become regional protagonists of late justice.

A key question is why Uruguayan judges initially failed to pick up on the two central legal arguments used in Chile and Argentina in the mid-1990s to get around existing amnesty laws. These alleged that enforced disappearance is (a) an international crime that cannot be exempted from domestic amnesty laws, and (b) a continuing crime that should not be subject to statutes of limitation. In Uruguay, no judge before 2002 had officially interpreted enforced disappearance as a crime still in progress and used this as an argument for not applying the Expiry Law.[45] Why, then, did Uruguay's courts and judges not respond to the (admittedly limited) public demands for justice? Why did they not act more independently in the face of executive failure to comply with Article 4 of the Expiry Law? Indeed, what explains the political and judicial deference to the Expiry Law?

My argument is that judges were not more proactive in the quest for retributive justice precisely due to their lack of independence. Part of the explanation lies in the institutional set-up of the Uruguayan justice system, whose conservative nature has been largely untouched by reform, unlike most

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also Oscar Destouet, 'La lucha contra la impunidad en Uruguay: del Voto Verde al Sí Rosado', in Fried and Lessa, *Luchas contra la impunidad*, pp. 69–73.

[45] Only Judge Jubette dared invoke international law, in the court case regarding the disappearance of Elena Quinteros, but she did so solely to achieve truth for the victim's family, not to bring the perpetrators to justice. She declined to invoke the legal interpretation of 'disappearance' as a continuing crime.

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other judicial systems in Latin America.[46] Thus changes in judicial behaviour in military-era human rights cases have been slower in Uruguay than in Chile or Argentina, where the judiciaries have undergone not only inevitable generational renewal, but also important structural reforms that have made them more receptive to rights claims.[47] In the absence of reform, observed changes in judicial behaviour in Uruguay are therefore due chiefly to generational changes, with certain younger, more liberal-minded judges gradually taking on the human rights agenda, whereas more seasoned judges have leaned more towards prevailing executive policy positions and have been much more reluctant to engage with international human rights law or react to regional developments in transitional justice.

Institutional obstacles to the exercise of judicial independence in 2000

Scholars recognise that institutional design shapes judicial performance. In particular, judicial independence is a prerequisite for autonomous judicial action. Independence from *whom*, though, is a crucial question. Helmke makes the crucial point in the Argentine case that, in a context of institutional instability, not only are independent judges likely to rule against the sitting government in controversial matters (not specifically human rights), but they may also adapt their behaviour according to calculations about who may be in power in *future* governments in order to increase their chances of staying

[46] After the transition, attempts to reform the Uruguayan judicial system and make judges more independent and more efficient included a proposal to establish a separate *consejo de la magistratura* to take over some of the administrative responsibilities of judges, and reform of the criminal procedural code. However, reform efforts quickly stalled. On judicial reform in Latin America, see Christina Biebesheimer and Francisco Mejía (eds.), *Justice Beyond Our Borders: Judicial Reforms for Latin America and the Caribbean* (Washington, DC: Inter-American Development Bank, through Johns Hopkins University Press, 2000); Edgardo Buscalgia, Maria Dakolias and William Ratcliff, *Judicial Reform in Latin America: A Framework for National Development* (Stanford, CA: Stanford University Press, 1995); Pilar Domingo and Rachel Sieder (eds.), *Rule of Law in Latin America: The International Promotion of Judicial Reform* (London: Institute of Latin American Studies, University of London, 2001); and Linn A. Hammergren, *The Politics of Justice and Justice Reform in Latin America* (Boulder, CO: Westview Press, 1998).

[47] The single most important factor in Argentina was (as part of a larger judicial reform package) the granting of constitutional status to international human rights law in 1994, which expanded the legal basis for judicial review in human rights cases. In Chile, Supreme Court reform in 1998 brought new, more liberal-minded judges into the system by expanding the number of judges on the court, changing appointment procedures and creating specialised chambers within the court. The large number of special appellate court judges assigned in 2001 specifically to deal with disappearance cases further spurred these processes. See Elin Skaar, 'Un análisis de las reformas judiciales de Argentina, Chile y Uruguay', *América Latina Hoy*, 34 (2003), pp. 147–86; and *Judicial Independence and Human Rights in Latin America*.

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in office.[48] Hilbink argues that both the institutional structure and ideology of the Chilean judiciary made judges initially reluctant to engage with human rights issues after the transition to democracy. Whilst fiercely independent from the new democratic government, the Supreme Court judges were still loyal to Pinochet.[49] Ideology or legal culture, then, is also central to shaping judicial behaviour.[50]

The following analysis focuses on the links between institutional set-up, legal culture and judicial performance in human rights matters in Uruguay. Paradoxically, according to recent research, Uruguay enjoys a high degree of respect for human rights and the rule of law. Although its courts have been ranked among the most de facto independent in the region, together with those of Costa Rica and Chile, Uruguay scores low on formal judicial independence, according to the constitutional guarantees for judicial independence.[51] For instance, the lack of financial independence was frequently cited as impeding the independent work of judges.[52] There were no constitutional guarantees for the size of the budget, which was already small compared to many other Latin American countries, making the judiciary dependent on the executive and legislature for funding.

Furthermore, the appointment system in Uruguay may have compromised judges' independence. Systems thought to favour judicial independence include life tenure for Supreme Court justices, appointment by independent judicial organs, and so forth. Unlike most Latin American countries, where Supreme Court judges tend to be appointed either by the executive or, after

[48] The so-called strategic defection argument was developed by Helmke based on a historical analysis of the Argentine case, where the Supreme Court enjoys de jure but not de facto independence, as judges have in practice been removed from office at irregular intervals. Gretchen Helmke, *Courts Under Constraints: Judges, Generals and Presidents in Argentina* (Cambridge: Cambridge University Press, 2005).

[49] Lisa Hilbink, *Judges beyond Politics and Dictatorship: Lessons from Chile* (New York: Cambridge University Press, 2007). Importantly, Hilbink's analysis is based on the era *before* judicial reform in Chile, and therefore does not explain the engagement of judges in human rights matters *after* the reforms.

[50] Alexandra Huneeus, 'Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn', *Law & Social Inquiry*, 35: 1 (2010), pp. 99–135. More generally, the links between institutions, legal cultures and increased activism of judges (not necessarily in the human rights field) are explored by a number of scholars. See Rachel Sieder, Line Schjolden and Alan Angell (eds.), *The Judicialization of Politics in Latin America* (New York: Palgrave Macmillan, 2005).

[51] Joseph L. Staats, Shaun B. Bowler and Jonathan T. Hiskey, 'Measuring Judicial Performance in Latin America', *Latin American Politics & Society*, 47: 4 (2005), pp. 77–106. The criteria for measuring judicial independence are obviously of importance; see Julio Ríos-Figueroa, 'Judicial Independence: Definition, Measurement, and Its Effects on Corruption – An Analysis of Latin America', PhD thesis, New York University, 2006. Figueroa gives Uruguay low to medium scores on different indicators of autonomy and independence.

[52] Interviews with late Supreme Court justice Jacinta Balbela, first instance civil court judge Estela Jubette and Supreme Court justice Jorge Marabotto, Montevideo, March–April 2001.

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judicial reforms in the 1990s, by National Judicial Councils, Uruguayan judges on the highest court are appointed by Parliament (the General Assembly) by a two-thirds vote for ten-year terms – the shortest term for Supreme Court justices in all of Latin America.[53] The term may be renewed after five years out of office. Supreme Court judges may thus enjoy a fair degree of structural independence from the executive but have incentives to please those in Parliament to secure re-election. Unlike Argentina, the Uruguayan political system has historically been very stable, which means that judges can reasonably predict who will be in power next and hence whom they should try to please.

Before Vásquez and the Frente Amplio came to power, there was a long-standing tradition of the Colorados and Blancos dividing up the new judgeships between them. Since neither of these two dominant political parties enjoyed a two-thirds majority in Parliament after 1942, each party had veto power over the other party's judicial candidates. Until the 1994 elections, however, together they jointly controlled at least two-thirds of the vote in Parliament. Their solution was therefore to alternate in appointing judges to the vacancies that arose. Given that the Supreme Court had only five members with a ten-year tenure, each party would appoint a new Supreme Court justice every two years on average.

One interpretation of this would be that since neither the Blancos nor the Colorados officially favoured prosecution, politically appointed Supreme Court judges would not favour it either. The two parties would also be prone to go for non-controversial, conservative judges rather than liberals inclined to challenge government policies. Hence, because the appointment system was tied so closely to consensus policies in the legislature, the Supreme Court was not likely to challenge the executive on important controversial matters, and thus lacked both de jure and actual independence.

In addition, the institutional set-up further compromised the independence of lower court judges, resulting in a pervasive lack of internal independence throughout the system. The Uruguayan judiciary is strongly hierarchical and has been characterised as a 'generally conservative judiciary that is cautious, resistant to change, and very orthodox in its interpretations of the laws'.[54] As in Chile, the Supreme Court is responsible for the hiring, firing and discipline of lower-level judges who must therefore please their superiors at both the appellate and Supreme Court level. Those who step out of line with their superiors may risk sanctions in the form of transfers or non-promotions

[53] The appointment system did not change after the transition. During civilian-military rule, Supreme Court justices were appointed by the military.

[54] Daniel M. Brinks, *The Judicial Response to Police Killings in Latin America: Inequality and the Rule of Law* (New York: Cambridge University Press, 2008), p. 199.

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(as happened to Reyes, who took on the Zanahoria case, and Estela Jubette in the Elena Quinteros case). Although judges themselves invariably claim that they are independent, many lawyers and legal experts during the Batlle presidency did not believe this. According to Javier Miranda, 'the judicial power [in Uruguay] has always been unimportant. A power lacking political weight.'[55] Eduardo Pirotto called the judicial branch the 'Cinderella of the country' – poorly clad and poorly funded, marginalised, and treated with little respect.[56] Even some liberal judges concurred about the lack of judicial independence in Uruguay.[57]

In addition, many institutional bottlenecks in criminal case procedures hindered trials of the military. This is evident when tracing the different steps in a criminal case. First, according to the Uruguayan code of criminal procedure, the prosecutorial function is split between the judge and the prosecutor, forcing the two to work closely together. The judge is responsible for both the investigation and the final decision in the case – the hallmark of the inquisitorial model.[58] Prosecutors are part of the executive branch, which appoints them with the advice and consent of the Senate, but enjoy the same tenure protection as judges. The result is 'a prosecutorial corps with job security, but with considerable incentive to respond to their politically appointed top leadership'.[59] Thus, if the government does not want investigation into cases of human rights abuse, as was the case under the four post-transition governments, nothing much happens.

Second, even if the prosecutor investigates a case and orders the military to testify, the latter can refuse. Under Uruguayan law, all citizens, not only the military, are protected from subpoena. As long as the military refused to give evidence, the absence of evidence made it virtually impossible to solve the cases in which the military had the final proof. Progress was made under the Batlle government when the Peace Commission managed to get the military to talk with guarantees of confidentiality.[60] But although the commission obtained 90 per cent of the information needed to solve the disappearances, the remaining 10 per cent remained in the hands of the military, resulting in insufficient evidence to start a trial process in many of the cases.[61]

[55] Interview with Javier Miranda, human rights lawyer, Montevideo, 5 April 2001.

[56] Interview with Eduardo Pirotto, Madres y Familiares del Uruguay, Montevideo, 2 April 2001.

[57] Interviews with Estela Jubette and Jacinta Balbela, Montevideo, April 2001.

[58] 1980 Code of Criminal Procedure, Decree Law 15.032. For more information on the division of labour in criminal cases, see Brinks, *The Judicial Response to Police Killings in Latin America*.

[59] *Ibid.*, p. 194.

[60] Some of the information provided by the military later proved to be false, as bodies of detained-disappeared persons have been found in Uruguay in recent years.

[61] SERPAJ, *Derechos humanos en el Uruguay* (Montevideo: SERPAJ, 2000).

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Third, it was widely assumed that the Expiry Law precluded prosecution (regardless of evidence) because it guaranteed the military impunity for crimes committed during the period of civil-military rule. However, progressive Uruguayan judges and lawyers began to claim that technically it would have been possible to prosecute the military for human rights violations if 'detention-disappearance' had been defined as a continuing crime.[62] Other human rights violations, such as murder, would still be subject to the statute of limitations, which in the case of Uruguay is 20 years.[63]

Courageous and independent judges could indeed have ruled that the Expiry Law does not cover detention-disappearance because it is a continuing or permanent crime, and they could have invoked international law to instigate prosecution. In theory, even if the prosecutor had appealed against a trial court ruling advocating prosecution, an independent appellate court could have upheld it if there were sufficient evidence. And if a criminal case were subject to further appeal, the Supreme Court could have upheld the decision to prosecute if there were enough evidence and if international law were applied. Yet a serious problem marred this best-case scenario: even if judges had invoked international law and successfully condemned military officers guilty of human rights violations, it would have been on a case-by-case basis with no general applicability. Unlike the US or UK common law system, a Supreme Court judgement in a civil law system such as Uruguay's does not automatically establish binding precedent for ensuing cases in lower courts.[64]

Other factors conditioning judicial behaviour

Since judicial behaviour is conditioned but not solely determined by institutional factors, other factors may also influence the way judges perceive themselves and their role in society, particularly with respect to human rights. Uruguay's legal developments took place in a context of rapidly changing regional and international human rights law and jurisprudence. To what extent, then, were Uruguayan judges influenced by the rulings of the IACtHR, the legal processes in Chile and Argentina, and the legal wrangling in Europe concerning the arrest and prosecution of Latin American military officers? The simple answer is: not much.

[62] This view was held by, among other informants, human rights lawyer Javier Miranda, labour lawyer Pablo Chargoñia, and judges Estela Jubette and Jacinta Balbela. Interviews conducted in Montevideo, April 2000.

[63] War crimes and crimes against humanity are, according to international law, not subject to statutory limitations.

[64] This can, of course, swing both ways: lower court judges are bound by neither well- nor ill-founded Supreme Court judgements.

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There are several plausible explanations for why Uruguayan judges were initially much slower to respond to these regional and international changes than were Chilean and Argentine judges. The first is closely linked to the institutional framework outlined above. Human rights attorneys in Uruguay have lamented that the characteristics of the judiciary (appointment procedures, career incentives and so on) 'make it difficult to prevail on claims that rest on such innovative notions as the domestic applicability of international human rights law or new interpretations of existing laws. These are indeed serious obstacles to the prosecution of the human rights violations of the previous regime, which are not only difficult to frame within the ordinary criminal code, but which are further protected by an amnesty law.'[65]

Second, there were fewer disappeared in Uruguay than in other Latin American countries. Of the 200 or so officially recorded, the vast majority had disappeared in Argentina. Due to this peculiar pattern of repression, very few Uruguayans were prosecuted in foreign courts. Uruguayan judges were not forced to respond to Judge Garzón in Spain or to requests from other European judges for information or cooperation, the Elena Quinteros case being a notable exception.

Third, as a result of the above and because Uruguayan civil society has relatively few international connections, Uruguay a decade ago hardly attracted any international press on human rights issues, which meant that Uruguayan judges were initially much less exposed to international public opinion and pressure. Moreover, they did not have to effectively compete with judges in European countries to prosecute their own people.

A fourth and very important related factor is that Uruguayan judges had little direct exposure to international human rights legislation. There was no tradition of applying international human rights law, in spite of the ratification of decrees and covenants. The conservative cast of judges and the civil law tradition combined to prevent progressive decisions, such as Jubette's, which did invoke international law, from having an immediate or binding effect on future judgements. It took time for new interpretations of law to sink in until eventually different pieces of international human rights law were adopted by the Uruguayan government.

Technically, international law has the same standing as national law in Uruguay, but in practice judges tended to invoke only national law as a matter of custom and practice. In response to a case brought before it after the 1989 referendum, the IACHR concluded in a historic decision in 1992 that the Expiry Law was at odds with two international human rights treaties and recommended that the Uruguayan state pay compensation to the victims, but did not ask the Uruguayan government to repeal the law. This was the first

[65] Brinks, *The Judicial Response to Police Killings in Latin America*, p. 199.

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time that *any* intergovernmental body had directly addressed the question of the compatibility of an amnesty measure with a state's obligations under a human rights treaty. Yet, the decision had little impact in Uruguay.[66]

This was partly because the Uruguayan system remained unreformed after the transition to democracy. Generational changes were obviously not enough to bring about noticeable shifts in conservative judicial culture, though younger judges such as Jubette have shown a willingness to challenge the system. Younger judges are not only considered more liberal than their superiors, but are also more open to using international law in their evaluation of cases; this is because they have received training in human rights as part of their education over the past seven to eight years, whereas most of the judges at the appellate and Supreme Court levels did not.[67] Since younger judges are dependent on their superiors and are moulded as they advance through the system, structural changes affecting the top echelons of the judiciary ought to effect quicker changes in judicial culture and practice than can be achieved from below through generational change. Although there were some indications that shifts were slowly taking place within the judicial system during Batlle's presidency, the Supreme Court's official position was that of silently supporting the Expiry Law.

Given the obvious lack of executive interest in legally solving the problem of the disappeared, combined with the apparent lack of judicial activism and reinterpretation of the law, the chances of seeing military men in the dock seemed slim. While the number of trials of former military officials was growing exponentially in Chile and Argentina, few thought similar developments likely in Uruguay. Yet important changes took place with respect to retributive justice after Vásquez assumed power in 2005.

Accounting for the (Delayed) Onset of Post-Transitional justice

Over the past decade, the judiciary changed its stance on how to handle the issue of past human rights violations, particularly within the Supreme Court.[68] As a Frente Amplio politician noted, 'the coming to power of the left was crucial for progress in human rights matters'.[69] Although Vásquez's personal commitment indisputably helped, he was also mandated by the Frente Amplio

[66] Mallinder, *Uruguay's Evolving Experience of Amnesty*.

[67] Interviews with Supreme Court judge Jorge Chediak, Estela Jubette and first instance criminal court judge Mariana Mota.

[68] Even during the Batlle presidency, the Supreme Court had on a couple of occasions carefully signalled that it was not totally happy with the status quo, refusing to bow to Batlle's pressure to sack Judge Jubette after her 2000 ruling in the Elena Quinteros case.

[69] Interview with Constanza Moreira, Frente Amplio senator, Montevideo, 20 March 2012. This view was echoed by large number of informants from within as well as outside the justice sector in Montevideo, such as Juan Errandonea, human rights lawyer (23 March

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party congress prior to his candidacy and campaign, consistent with a long-standing tradition of the Left in favour of human rights questions. The reinvigoration of the human rights movement was arguably also a factor in bringing more cases to court. Given that the increased propensity of judges to take on these cases coincided with a sea change in official human rights policy, what precisely motivated judicial activism in human rights cases?

There are at least two interpretations. One is that the trials taking place in later years were due exclusively to Vásquez's pro-prosecution policies, and that judges have responded favourably to this stance since dependent judges do what they are expected to do. A more nuanced interpretation is that the onset of post-transitional justice is due to a combination of factors. These include executive push for trials, signalling that it is politically acceptable to address the issue of military accountability for human rights violations, even though a significant part of the population opposes prosecution, as the 2009 plebiscite revealed; more vocal demands for justice from the human rights sector, reflected in a larger number of cases being brought to court; a judiciary more receptive to individual complaints; and a military subservient to civilian rule.[70]

The key question is, what explains increased judicial receptiveness? Did judges just follow executive policy preferences, as in the past? Or did judges exercise autonomy in advancing the quest for justice? I argue that although the judiciary operates in a regional and legal context more favourable to human rights than a decade ago, the judiciary still largely defers to dominant national political views due to institutional factors.

Institutional factors

The Uruguayan judicial system in 2012 was very similar to that in 2000, and the country's criminal procedural code is now the last in Latin America to remain unreformed.[71] There is still a lack of financial independence – as one lower court judge put it, 'the executive branch gives us the money'.[72] And there is arguably still a lack of both structural and internal

2012), Walter Pernas, journalist for *Brecha* (23 March 2012), Maria Ruiz, Amnesty International (19 March 2012), and Martin Pratz, IELSUR (26 March 2012).

[70] There is widespread agreement in Uruguay that the military no longer poses a threat to democratic rule. Nevertheless, it remains a tightly closed, 90 per cent family-based institution with a strong sense of internal loyalty and esprit de corps. There are strong ties between the military and Colorados. Interview with Juan Erradonea, private lawyer, Montevideo, 23 March 2012.

[71] The 1980 Code of Criminal Procedure, from the dictatorship period, was replaced by a new code (Law 16.893 of 1997), which has not been implemented. Interview with Mariana Mota, Montevideo, 23 March 2012.

[72] Interview with Estela Jubette, Montevideo, 21 March 2012.

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independence.[73] Yet, in nearly three decades since the transition to democratic rule, important changes to the judiciary have come about principally as a result of generational change, not reform. More than half of the judges in the whole judicial system were appointed after the end of the dictatorship, and all the justices on the Uruguayan Supreme Court replaced. The Colorados and Blancos then lost their two-thirds majority in the 1994 elections and failed to reach an agreement with the Frente Amplio on alternate appointments.[74] When Vásquez came to power in 2005, the Frente controlled just over half the seats in both houses of Parliament, giving it a fair say in who would fill Supreme Court vacancies that opened up after 2005. The two newest justices have certainly been elected in a political climate more favourable to human rights trials. Yet, since it needs the support of either Blanco or Colorado parliamentarians to reach the necessary two-thirds majority, the Frente cannot hand-pick its preferred candidates. Therefore, when the party in power is not dominant enough and there is no political consensus among the three main parties in Parliament, new Supreme Court justices continue to be largely conservative as this impasse forces the government to appoint the most senior appellate court judge.[75] Although all appointments are done on the basis of merit,[76] the appointment system has been criticised for lacking transparency.[77] Nevertheless, a slow but positive cultural as well as generational change has been trickling through the echelons of the judicial hierarchy. Many of the judges and prosecutors who have taken on a high profile in human rights cases in Uruguay are relatively young women for two reasons: some 80 per cent of lower court judges are now women, and the incorporation of human rights into legal training has increased their sensitivity to national as well as regional legal developments in human rights.

Expanded room for judicial decision-making

In 2000 Uruguay ratified the Rome Statute establishing the International Criminal Court. Following a 2003 proposal forwarded to Parliament, on 31 October 2006 Uruguay became the first Latin American country to fully incorporate the statute into domestic law. The legislation provided for both complementarity and cooperation with the International Criminal Court.[78]

[73] This view is held by judges as well as people outside the judicial system.

[74] Brinks, *The Judicial Response to Police Killings in Latin America*, pp. 196–7.

[75] The largely conservative inclinations of Supreme Court judges were confirmed by several informants.

[76] Interview with Jorge Chediak, Montevideo, 19 March 2012.

[77] Interview with Mariana Mota.

[78] Ley 18.026, 'Cooperación Con la Corte Penal Internacional en materia de lucha contra el genocidio, los crímenes de guerra y de lesa humanidad', available on the Uruguayan Parliament website under 'Leyes promulgadas por legislatura: Legislatura 2005–2010 (XLVIa)',

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This was an important step in doing away with the Uruguayan legal code's deficiency regarding torture, which was one of the most widespread crimes during the dictatorship. Nevertheless, anecdotal evidence suggests that these legal changes have so far only had a moderate effect on judicial decision-making. International law has been used actively by a handful of lower court judges such as Estela Jubette and Mariana Mota, a couple of appellate court judges, and a couple of prominent prosecutors (Mirtha Guianze, prosecutor in the Gelman case, deserves special mention), resulting in a rather 'slow process of incorporating international law in the jurisprudence'.[79] Some judges refrain from applying international law due to 'lack of knowledge',[80] whereas others are 'vehemently opposed' to international law, which they perceive as a threat to national legal sovereignty.[81]

Regional developments in human rights seem to have carried more weight. Whereas the trials in Chile and Argentina were reported to have had little impact on the human rights issue in Uruguay in 2000, ten years later many Uruguayans characterise events especially in Argentina as key.[82] The Peace Commission members travelled to Chile and Argentina for inspiration. The unfolding ESMA trials in Buenos Aires,[83] the exchange of information and the excavation of new mass graves have all contributed to increased levels of knowledge and thus sensitivity on the human rights issue. Many cited the Gelman case in particular as pivotal in tackling impunity in Uruguay, due not only to the legal ruling itself, but also to all the subsequent actions that the IACtHR demanded from the Uruguayan state: reparations, opening of mass graves, disclosure of state archives and an official apology for state involvement in human rights crimes.[84]

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no. 18013, at www.parlamento.gub.uy/palacio3/abms2/dbtextoleyes/LeyesXLegislatura.asp?Legislatura=46.

[79] Interview with Jorge Chediak.

[80] Interview with Mariana Mota.

[81] Interview with José Luis Gonzales, Facultad de Derecho, Montevideo, 23 March 2012.

[82] This view was echoed by many informants, for example Constanza Moreira.

[83] In the largest trial to date carried out in Argentina to address dictatorship crimes, 68 individuals have been charged with 789 crimes committed in the secret detention centre of the Escuela de Mecánica de la Armada (Navy Mechanical School, ESMA). Charges include torture, kidnappings, enslavement and murder, including so-called 'death flights'. See Mariel Matze, 'Monumental ESMA Trial Begins', *Argentina Independent*, 29 Nov. 2012, available at www.argentinaindependent.com/currentaffairs/monumental-esma-trial-begins/.

[84] All of my informants confirmed this, except Carlos Ramela (Colorado politician and former member of the Comisión para la Paz). In his opinion the democratic will expressed through the popular referendum and plebiscite should have been respected, and Uruguay should have 'defended itself' against the IACtHR instead of implementing the court ruling. Interview with Carlos Ramela, Montevideo, 20 March 2012.

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Mixed political signals – and mixed jurisprudence

The Gelman case spurred the political debate on how to deal with the past, also contributing to heightened tensions and political controversy. The Vásquez government parted company with previous governments as the Blancos and Colorados had 'done nothing, absolutely nothing' to aid the human rights issue.[85] That said, the political elite has continued sending very mixed signals about the immunity issue. By incorporating international law into the national legal framework and by calling for the 2009 plebiscite, the Frente-led Parliament signalled that it was time for a political shift. Yet the coalition was split right down the middle in the intense parliamentary debates over the Ley Interpretativa and never moved to actually strike down the Expiry Law, as occurred in Argentina in 2003. The top leadership never openly wanted to expunge the Expiry Law altogether. Vasquéz opted for the Ley Interpretativa bill, and Mujica has publicly expressed his fear that repealing the Expiry Law would have a 'politically destabilising effect'.

Many sectors of Uruguayan society believed that the plebiscite failed precisely due to lack of firm political commitment on the part of the Frente,[86] and that Parliament finally passed the Ley Interpretativa to avoid international humiliation in the IACtHR's Gelman ruling. These mixed political signals are reflected in a mixed jurisprudence in human rights matters. On the one hand, the three cases in which the Supreme Court unanimously declared the Expiry Law unconstitutional were encouraging steps towards ending impunity. On the other hand, recent judgements similar to the Sabalsagaray case have been handed down by the court that neither invoke international law nor use the word 'detained-disappeared'. The Supreme Court also continues to wield its power over lower court judges who overstep established limits in these human rights cases. Judge Mota in the Blanco case and prosecutor Guianze in the Gelman case, just like judges Reyes and Jubette a decade earlier, have continued to face sanctions from superiors or from the executive when investigating cases of detained-disappeared people.[87] If 'the judges float where the wind is', few dare yet swim against the current.[88]

Conclusions

Analysis of Uruguay's turbulent transitional justice record shows how little progress was made in the quest for retributive justice during the period

[85] Interview with Constanza Moreira.
[86] This view is held by many informants inside as well as outside the judicial system.
[87] Sanctions may take various forms: clear signals that their career will not advance, critical public press, or 'disappearance' of personal belongings such as computers.
[88] Interview with CRYSOL representative.

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1985–2000, under the first three presidencies after transition to democratic rule, chiefly because the executive manipulated the legal process through Article 4 of the Expiry Law and judges were not independent or bold enough to protest. A majority of the population also voted to uphold the Amnesty Law, seeing little political gain in revisiting it. A positive shift in post-transitional justice occurred under the Batlle presidency, but progress was limited to truth-finding through the work of the Peace Commission and a handful of cases. Judicial attempts to challenge immunity were stifled, and impunity for gross human rights violations persisted. The real breakthrough in post-transitional justice came only when Vásquez assumed the presidency in 2005. The number of trials further rose dramatically when Articles 1, 3 and 4 of the Expiry Law were derogated with Parliament's passing of the Ley Interpretativa in April 2011.

This article posed the question of whether increased propensity for judges to prosecute former human rights violators is simply a continuing display of judicial deference to the executive's preferred policy or a result of independent judicial action. Since the activism of Uruguayan courts under the Vásquez and Mujica governments has coincided with a public push by the executive for prosecutions, it is methodologically hard to decipher cause and effect.

There has undoubtedly been a positive interaction between official executive policy, the revitalised push for justice from civil society, a more pro-prosecution stance among certain prosecutors and an improved receptiveness of parts of the justice apparatus. Yet, as this analysis has shown, judges continue to be influenced by prevailing executive views and signals sent by the political elite. Although today's political elites are decidedly more pro-human rights than a decade ago, important splits remain over how to handle the human rights issue. This schism largely explains why the popular initiative to get rid of the Expiry Law through a plebiscite failed and why the judiciary has been so mixed in its responses to the human rights issue.

In the end, the fate of the Expiry Law was decided by the IACtHR's ruling in the *Uruguay vs. Gelman* case, as Parliament (initially unsuccessfully) scrambled to pass the Ley Interpretativa before the international court handed down its ruling in March 2011. As Michelini noted, the Frente Amplio's policy has been to comply with the IACtHR's ruling – no more, no less.[89] Mujica dragging his feet by leaving the official apology until the last moment before the one-year deadline set by the court expired illustrates well the continued reluctance of the Uruguayan political elite to pursue the impunity issue. More changes, it seems, are needed in the judiciary for it to compensate

[89] Interview with Felipe Michelini, Montevideo, 23 March 2012.

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for this political reluctance by becoming truly independent and thus potentially a unified protagonist in bringing delayed justice for past human rights abuses. Some changes have slowly seeped through due both to generational succession and the term limits for Supreme Court justices. It is ironic that the appointment system for judges seems to reinforce rather than counteract the politics of the forces in power, at least in the context of human rights: the effect is doubly negative when the executive is against prosecution and positive when the executive favours it. When the executive sends mixed political signals, the courts waver. But on 9 May 2013 General Miguel Dalmao was sentenced to 28 years in prison for the death of Nibia Sabalsagaray, the first time that a Uruguayan court has convicted a serving general for dictatorship-era human rights abuses. Perhaps this is a sign that the country's courts are now beginning to hit their stride with a new confidence.

Spanish and Portuguese abstracts

Spanish abstract. Muchas naciones latinoamericanas se están dirigiendo hacia una mayor rendición de cuentas por violaciones a los derechos humanos del pasado y existe un creciente consenso global de que el derecho internacional no permite que algunos crímenes sean simplemente exentos de ser procesados judicialmente. Uruguay ha tenido una respuesta profundamente dividida a tales desarrollos. Mientras que la Corte Suprema y las élites políticas lucharon crecientemente para terminar con la impunidad, la población de hecho ratificó en un plebiscito de 2009 la ley de amnistía de 1985 que protegía a los militares de ser enjuiciados. La ley de amnistía fue abolida finalmente por el parlamento en 2011. Este artículo rastrea el tortuoso camino desde la impunidad hasta la rendición de cuentas en Uruguay en el contexto de un apoyo sustancial de la población a la primera. El material sostiene que mientras la falta de independencia judicial obstruyó la búsqueda de justicia por muchos años, la combinación de una continuada demanda de parte de la sociedad civil por justicia, presidentes más receptivos a la cuestión de derechos humanos, y jueces (y, recientemente, fiscales) más liberales es lo que explica los recientes avances en una justicia retributiva.

Spanish keywords: rendición de cuentas, derechos humanos, impunidad, justicia transicional, Uruguay

Portuguese abstract. Muitos países latino-americanos estão indo em direção de maior responsabilidade e transparência pelas violações de direitos humanos passadas e há crescente consenso global de que a lei internacional não isenta certos crimes de serem levados ao julgamento. O Uruguai tem reagido de maneira profundamente dividida sobre estes desenvolvimentos. Enquanto o Supremo Tribunal e a elite política fizeram crescentes esforços para terminar com a impunidade, em um plebiscito em 2009, o público chegou a ratificar a Lei de Anistia de 1985, protegendo os militares de serem levados a julgamento. A Lei de Anistia foi finalmente abolida pelo parlamento em 2011. O artigo traça o trajeto tortuoso desde a impunidade à responsabilidade e

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transparência no Uruguai em um contexto de substancial apoio do público à impunidade. Argumenta que, enquanto a falta de independência jurídica obstruiu a busca pela justiça por muitos anos, o recente avanço na justiça retribuitiva é explicado pela combinação de demandas contínuas da sociedade civil por justiça em conjunto com um executivo cada vez mais solidário aos direitos humanos e a presença de juízes (e, ultimamente, promotores) de pensamento liberal.

Portuguese keywords: responsabilidade e transparência, direitos humanos, impunidade, justiça transicional, Uruguai

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