RETHINKING PACTS
DEALING WITH PINOCHET IN AN ALTERED WORLD

by

ROSS BURNSIDE

M.A., The University of Glasgow, 1999

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

in

THE FACULTY OF GRADUATE STUDIES

( DEPARTMENT OF POLITICAL SCIENCE )

We accept this thesis as conforming to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

August 2001

© Ross Burnside, 2001
In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of **POLITICAL SCIENCE**

The University of British Columbia
Vancouver, Canada

Date **29/8/1**
ABSTRACT

Since the middle of the 1980s a scholarly consensus has built up around the purportedly positive role that “pacts” can play in Latin American democratic transitions. It has been contended that pacts, although an undemocratic route to democracy, may well ultimately have a positive role in establishing a democracy, and provide a positive model for other countries in the region to emulate.

Today, however, there are signs that attitudes towards these pacted transitions may be changing. In recent years, pacts in Venezuela, Colombia, and Chile have collapsed or unraveled as a consequence of changing domestic and international conditions. The situation that has been left in the wake of these alterations suggests the legacy of the pacted democratic transition type may not be as impressive as was once thought. Observation of the current situation in these nations unveils a strikingly different picture than was painted in the initial literature on them. Far from pacts being beneficial to the future development of stable and effective democracy, what can be seen most clearly in these instances is a background of impunity, corruption, lack of accountability or responsiveness, and the distortion of the most basic features of polyarchy, all overshadowing a procedural democratic foreground.

This study argues that the scholarship on “pacts” has some important flaws, yet has largely gone unchallenged. It also argues that some quite fundamental change has been, and is going on in the world today, and this change can have a crucial impact on domestic institutions. Combining these two ideas with empirical analysis from contemporary Chile and the Pinochet saga, I contend that it is time to rethink the consensus that seems to have built up around the notion of pacts in Latin America.
ACKNOWLEDGEMENTS

Thank-you
Max Cameron provided wonderful support and guidance.
His endless enthusiasm is an inspiration.

Dedicated
To who I owe what I value most:
Irene, Gordon, and Greig Burnside.
For love, support and editorial assistance:
Jessie Sohal.
CHAPTER 1: INTRODUCTION

In 1970, Dankwart Rustow began his seminal article on "Transitions to Democracy" with the following question: "What conditions make democracy possible and what conditions make it thrive?" (1970, 337) In seeking an answer to this, most scholars in the last two decades, in contrast to the previous generation of academics, have focused on the interests and values of elites in trying to understand variations in states' democratic stability.

Indeed the literature that emerged in response to Latin American democratic transitions from the late 1970s to early 1990s emphasised the importance of "settlements" and "pacts" designed to protect the core elites in the previous authoritarian regime. "A pact can be defined as an explicit, but not always publicly explicated or justified, "

---

1 Rustow's article established a groundbreaking perspective in which democratisation was a dynamic process of change. He believed that the literature on the causes and conditions of democracy conflated the two and argued that: "the factors that keep a democracy stable may not be the ones that brought it into existence; explanations of democracy must distinguish between function and genesis." By arguing this, Rustow opened possibilities for considering democratic transitions separately from democracy. He argued that the factors that brought democracy into existence were a variety of economic and cultural predispositions mixed with contingent developments and individual choice. His rejection of the then consensus over "preconditions" for democracy, like wealth and literacy, cleared the path for work that considered the potential for democracy in countries with little chance of meeting so called democratic "preconditions" in the near future. Rustow’s work left open the “possibility of democracies (properly so called) in premodern, prenationalist times and at low levels of economic development.”

2 The initial post World War II literature studied the relationship between political culture and democracy (Almond and Verba 1963, Dahl 1966), placing emphasis on the role of social values in maintaining democracy. For example, Almond and Verba make the case that stable democracy is a consequence of a social consensus over a certain set of values – what they termed the “civic culture” (1963, chapters 1, 13). Barry reversed the logic of Almond and Verba by arguing that democracy is not created by, but creates a set of consensus social values (1970, 48-52).

3 The most notable studies of elite roles in transitions have come from O’Donnell and Schmitter 1986, Karl 1990, Przeworski 1991, and Higley and Gunther 1992. Although these works differ in that O’Donnell, Schmitter, Karl and Przeworski talk of "elite pacts", while Gunther and Higley talk of "elite settlements", when discussing the pact literature I include them in the same group – it appears to me that “elite settlements” are a type of transitional pact. The differences between the concepts of elite settlements and elite pacts will be addressed later in this study. Not all contemporary scholars, however, have emphasised elites. Putnam’s (1993) influential study argued for a return to the study of values with far less attention to elite behaviour.

4 There is debate in the literature over what separates an “elite settlement” from an “elite pact”. I consider “elite settlements” (Higley and Gunther 1992) to be a type of political pact, albeit the broadest type of political pact in that it is inclusive of all or almost all significant elites.
agreement among a select set of actors which seeks to define (or, better, to redefine) rules governing the exercise of power on the basis of mutual guarantees for the ‘vital interests’ of those entering into it” (O’Donnell and Schmitter 1986, part IV, 37). “The elite” whose “vital interests” the pact is designed to protect are largely defined in the literature as the people who are able, through their positions in powerful organisations, to affect national political outcomes regularly and seriously. “Elites thus constitute a nation’s top leadership in all sectors – political, governmental, business, trade union, military, media, religious, and intellectual – including both ‘establishment’ and ‘counterelite’ factions” (Burton and Higley 1987, 296). A national elite could be said to include “all those persons capable, if they wish, of making substantial political trouble for high officials (i.e., other elite persons who happen to be incumbents of authoritative positions) without being promptly repressed” (Field and Higley 1973, 8).

Emerging from the consensus over the expediency of elite-led pacts was the idea that transitions to democracy would be inherently conservative. Transitions from authoritarian rule would be constrained by the need to accommodate elite groups, providing them with the confidence that their interests would not be touched by the democratization process. Undoubtedly pacts, which are usually contingent on providing wide-ranging amnesties to the previous regime, have amounted to considerable constraints on democratic consolidation. Indeed, work on transitions has recognised this. Scholars have agreed that pacts made by elites may be “undemocratic means” (Hagopian 1990, Karl 1986) of achieving democracy, but may well be necessary and, ultimately, beneficial to the success of democracy. Thus, in the Latin American context, the Pact of Punto Fijo (1958) in Venezuela, Colombia’s National Front pact (1958), and the more
implicit pact negotiated by the Pinochet regime in Chile in 1988-9, have been viewed favourably and offered as evidence to explain the relative durability and greater robustness of democracy in cases where pacts have been formed.\(^5\)

I should make clear that I use the word “implicit” to describe Chile’s pact as a way to differentiate it from the more “explicit” pacts of Venezuela and Colombia. The pacts to occur in Venezuela and Colombia produced documentation outlining the strict terms and conditions of the agreement between elites. Written agreements made the pact explicit and committed elite factions publicly to the concessions and guarantees they had made privately. In both nations, the problems and conflicts of the recent past were very much in mind. The pact in Chile was more implicit in that it was a negotiation process that did not produce any kind of written agreement. Rather, the negotiation among the elites occurred within the confines of the constitution written by the Pinochet regime in 1980 and was intended to be a mechanism for forgiving and forgetting the brutality of the recent past.

Today, however, there are signs that attitudes toward these “pacted” transitions, both explicit and implicit, may be changing. In recent years, pacts in Venezuela, Colombia and Chile have collapsed or unraveled as a consequence of changing domestic and international conditions. The situation that has been left in the wake of these alterations suggests that the legacy of the “pacted” democratic transition type is not

\(^5\) See O’Donnell and Schmitter (1986), part 4, 45. Here it is argued that in Venezuela and Colombia where pacts have occurred, the “social costs” have not been as bad as in places where pacts did not take place. The “transitions in the contemporary scene” [of 1986] “— those of Peru, Bolivia, Ecuador, the Dominican Republic, and Argentina — are characterized by the absence of political (and economic) pacts. The least that can be said in those cases is that the prospects of consolidation of their democratic regimes looks less encouraging.” The Chilean transition in the late 1980s was also hailed as a paradigm for other countries to emulate. Gerardo Munck praised Chile’s rapid growth towards democratic consolidation, claiming that Chile “has undoubtedly made greater strides toward democratic consolidation than any other country in Latin America” (1994, 1). See, also, Tulchin and Varas (1991), O’Donnell (1994, 64, 68).
nearly as impressive as was once thought. Observation of the current situation in each of these nations unveils a strikingly different picture than was painted in the initial literature on them. Far from pacts being beneficial to the future development of stable and effective democracy, what can be seen most clearly in these instances is a background of impunity, corruption, lack of accountability or responsiveness, and the distortion of the most basic features of polyarchy, all overshadowing a procedural democratic foreground.

In 1998 Hugo Chávez was able to successfully run for the presidency in Venezuela on a platform that promised to abolish the political arrangements of the *Pact of Punto Fijo*.\(^6\) Chávez voiced frustrations with a pact that had decayed into a corrupt and exclusive form of "partyarchy."\(^7\) The irony of this is that Chávez has successfully attacked a system that for the better part of four decades laid foundations for a stable democracy that was a source of pride for many Venezuelans. Since elected president, Chávez has called a succession of elections, including most recently, "mega-elections," new elections for every office in the country, in order to "re-legitimate" his rule. He used his power to convene a constituent assembly, enabling him to rewrite the nation's constitution and remove the clause deeming the military to be a non-deliberative institution. These events have further strengthened the power of the presidency (and the military) leading many observers to voice concerns that there may be very few checks and balances remaining in Venezuela's once stable democratic government (See McCoy

---

\(^6\) The *Pact of Punto Fijo* was signed by the two major political parties, the Acción Democrática (AD) and the Christian Democrats (COPEI) and agreed to exclude the Communists and share power and patronage between the two parties. Although by no means perfect, the flaws in Venezuela's democracy seemed slight when compared to the brutal repression that was taking place in much of Latin America in the two decades following the Cuban Revolution of 1959.

\(^7\) Michael Coppedge defines "partyarchy" as existing when parties control most aspects of the democratic process. He argues that Venezuela "is probably the most extreme case of a pathological kind of political control that I call partyarchy. If democracy is government of the people, by the people, for the people, then partyarchy is government of the people, by the parties, for the parties" (1994, 2).
The direction in which Chávez is leading Venezuela raises questions that pact theorists did not consider: namely, the democracy to emerge in nations where pacts occur may be of poor quality. Pacts may create conditions that contribute to widespread disenchantment with the “democratic” regime – fertile ground for manipulation and further distortion of polyarchy by populist autocrats like Chávez.

Similarly, Colombia’s National Front pact appears to have decayed as the country falls into an abyss of ungovernability and civil war. Jonathan Hartlyn and John Dugas (1999) have even suggested that the exclusion of certain political groups in the National Front has exacerbated the problems the nation has had, and continues to have, with strong and violent non-state actors. Basic state structures and civil rights continue to be challenged by multifaceted violence from left wing guerrillas, drug traffickers, state security forces and right wing paramilitary groups. State weakness is manifested in political violence and human rights violations carried out by non-state actors (some in collaboration with state agents) on one hand, and, on the other, widespread criminal violence carried out with more or less impunity. Thus, Colombian governments have confronted a growing challenge from various directions. The largest and most important opposition group has been the peasant-based Fuerzas Armadas Revolucionarias de Colombia (FARC) with its strong links to the Communist Party – a political party that was excluded from Colombia's National Front democracy (Hartlyn and Dugas 1999). The current political turmoil in Colombia reflects the difficulty in moving beyond a constraining and highly exclusionary pact that left out several interested groups.

---

8 Officially formed in 1964, FARC and many of its leaders evolved politically during and after la violencia – a decade, preceding the 1958 pact, of primarily rural fighting that left 200,000 dead. For a history of FARC, see Molano (2000). Molano argues that the roots of FARC are sunk deep in the issue of class and peasant exclusion from elite group domination of power levers in Colombia.
Additionally, there is Chile – the case with which this study is primarily concerned. The October 1998 arrest of Augusto Pinochet in London has ruptured the pact made between the civilian grouping of the *Concertación de Partidos por La Democracia*\(^9\) and the previous authoritarian regime as Chile made its transition to democracy in the late 1980s. When Pinochet returned to his homeland on 3 March 2000, after his arrest in Britain, he returned to a country where courts were beginning to avoid the 1978 Amnesty Law, which had previously, due to the negotiated pact,\(^\) prevented the trial of those accused of human rights abuses. His arrest created a “political moment” where long-buried issues regarding the country’s brutal past could now be addressed.

Yet, the arrest also highlighted the flaws of the Chilean pacted transition and the strong enclaves of authoritarian power still in place. Today, pact mentalities remain pervasive among Chilean politicians,\(^1\) and undemocratic elements that Pinochet’s regime enshrined in the 1980 Constitution endure, giving Chile one of the strongest and most “unchecked” presidencies in Latin America.\(^2\) As indicated by the polarization of Chile in the

\(^9\) Although 16 different parties originally constituted the *Concertación*, the dominant parties were the Christian Democrat Party (PDC, Partido Democrática Cristiano), the Socialist Party (PS, Partido Socialista), the Radical Party (PR, Partido Radical), and the newly formed Party for Democracy (PPD, Partido por la Democracia).

\(^1\) Despite Chile undergoing a transition to democracy with the election of Patricio Aylwin in 1990, the transition occurred within the confines of a negotiation process in which those who had ruled under the dictatorship would continue to have their interests “protected”. Because Chilean democrats were unable to bring about a complete *ruptura democrática*, they chose to attempt to democratise within the confines of the fundamentally undemocratic constitution set up by the Pinochet dictatorship in 1980.

\(^1\) Witness the reaction of the Frei Government to the arrest of Pinochet in Britain. They were opposed to the arrest in part because this was a violation of the immunity Pinochet had negotiated via the pact. Questions of sovereignty aside, there was never any question of the government’s defense of Pinochet, because the rules of the pact called for such a response. Those who opposed the government’s position were deemed to be breaking the pact. For an excellent portrayal of “pact mentalities” that were evident among Chilean politicians in the wake of the arrest, and in the lead up to the December 1999 Presidential election, see Moulian (1999).

\(^2\) The Chilean President has extraordinary legislative powers. Shugart and Mainwaring (1997, see especially the introduction and conclusion) rank the Chilean president highest in Latin America when it comes to legislative prerogatives. The work of Shugart and Mainwaring points to a strong correlation between presidential strength in the legislative arena and problems of democratic government and efficacy. It is weaker presidential systems that have had more success in sustaining democracy.
aftermath of Pinochet’s arrest, Chile remains a country bitterly divided over its past. Controversies surrounding Pinochet’s arrest reveal that the divisions that contributed to the breakdown of democracy and the imposing of authoritarian rule have not been fully put to rest. Indeed, it is contended that Chile’s experience under Pinochet’s dictatorship served to further exacerbate social divisions. Peter Siaveles argues that “economic transformations that occurred during the military regime have fundamentally altered the socioeconomic structure of the country and provided a context of attenuated social and class conflict” (2000, xiii). Chile’s pact has been unable to remove old scars.

The Venezuela, Colombia and Chile of today provide evidence that goes against the grain of the earlier consensus among “transitologists”: that elite “settlements” or “pacts” may “constitute the only direct and rapid route to consolidated democracy that is available in today’s world” (Higley and Gunther 1992, 24). These three cases raise serious questions of the pacts literature. What constitutes a successful pact? This is an issue that has not been fully addressed, evidenced by the fact that pacts in Venezuela, Colombia and Chile have all been hailed as “successful,” yet have recently collapsed to reveal a less than impressive model of democracy. These three cases indicate that the question of time has not been properly addressed in extant scholarship on pacted transitions. When can a pact be said to be consolidated? Indeed, can a pact ever be said to be consolidated?

I am not arguing that pacts are necessarily negative for democracy. In fact, certain pacts throughout history seem to have resulted in an outcome conducive for solid democratic frameworks. The cases of England in 1688-9\(^{13}\), and Sweden in 1809 (see

\(^{13}\) Elite pacts have rarely been associated in the literature with the Anglo-American democracies – an exception to this is Burton, Higley and Gunther (1992). Nonetheless, pacts did represent crucial steps in the
Higley and Gunther 1992, introduction) seem to have stood the test of sufficient time to allow one to say that they have been elite agreements that have allowed for democratic consolidation. What I am arguing, however, is that pacts do not necessarily lay solid foundations for democracy, and that there are gaping cracks in the literature that should be addressed. For example, the pacts literature pays little attention to the international context within which national level pacts occur and evolve. In my opinion, this is a major shortcoming. In the 1990s, globalisation of the international capitalist economy has become more deeply entrenched. The accompanying enthusiasm for liberal economic arrangements and political institutions, not to mention the increasing prominence of human rights within international norms and legal structures, has had an important impact on the context within which national level debates are waged. Scholarship on pacts should not lose sight of the potential role played by the international community in determining whether a democracy survives or dies.

In order to carry out the arguments I have laid out, a tour of the pacts' literature is necessary. The next chapter will do this, with the remainder of the work addressing in detail the case of Chile and the implications of the Pinochet arrest for pacts in general. It appears to me that the time is right to rethink the notion that elite pacts enhance the probability of a viable and stable democracy. Before these issues and their implications for pacts in Latin America can be fully addressed, however, a definition of democracy must be established.

---

evolution of representation and the consolidation of democracy in both Great Britain and the United States. The most famous English pact is the Magna Carta of 1215. Barry Wiengast (1997) looks closely at the Missouri Compromise of 1820 and makes the argument that U.S. history also reflects a series of pacts.
Defining Democracy

When analysing the pacts literature and its links to “democracy,” it is important to be clear about what exactly democracy constitutes. In Latin America, nations have been labeled democratic, despite lacking some key attributes (O’Donnell 1996, 34). This invites us to try bridging the gap between democratic theory and practice. As Giovanni Sartori correctly argues, what democracy is cannot be evaluated without reference to what it should be (1962, 4-5). Any study of weaknesses in democratic structures must be clear in ensuring a definition of what it is measuring these weaknesses against. For the purposes of this study, the definition of democracy being used is a fairly middle-range one, rooted in Robert Dahl’s classic criteria for “polyarchy”: 1) elected officials; 2) free and fair elections; 3) inclusive suffrage; 4) the right to run for office; 5) freedom of expression; 6) alternative information; and 7) associational autonomy (Dahl 1971, 3).

To this definition, I make four additions. One is that elected (and appointed) officials should not be arbitrarily terminated before the end of their constitutionally mandated terms – Alberto Fujimori in Peru and Russia’s Boris Yeltsin may have been elected in free and fair elections, but they created regimes that fell short of polyarchy when they forcefully closed their countries’ Congresses and fired their Supreme Court Justices. The second criterion is that elected authorities should not be subject to severe constraints, vetoes, or exclusion from certain policy domains by other, nonelected actors, especially the armed forces. In other words, there should be civilian control over a non-deliberative military. This definitional addition seems to be of especial importance in the Latin American context (O’Donnell 1996, 35-36). A third criterion is that people should be able to count on regularity in the rule of law that is applicable to all. A vital aspect of
democratic government lies in the ability of citizens to oversee political authorities, but this cannot happen when political elites are above the law. Equality before the law is also an important addition in the Latin American context in that the problem of impunity – the repeated and systematic failure to investigate and sanction those guilty of both past and ongoing abuses of human rights (Sieder 1995, 1) – has affected the transition to democratic rule in both South and Central America, and continues to condition the nature of democracy throughout the region today. Finally, there should be an effective division of powers. The father of the theory of the separation of powers, Montesquieu, correctly argued that democracy is threatened when power is centralised in the executive or any one branch of government. Checks and balances between constitutionally separated branches of government are essential for the well functioning of democracy. “When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically” (Montesquieu 1989, 157).

In my view, free elections do not make a democracy. The additional criteria outlined above provide the definitional acid test for what I consider to be basic features of polyarchy. A definition of this sort avoids the problem that David Collier and Steven Levitsky (1997) have labeled “conceptual stretching”. Definitions of democracy may be

---

14 Collier and Levitsky examine some of the strategies of conceptual innovation used by analysts of recent democratisation as they attempt to meet a two fold challenge: increasing analytic differentiation in order to adequately characterise the diverse regime types that have arisen in recent years and maintaining conceptual validity by avoiding conceptual stretching (1997, 448). Having outlined the strategies analysts have used, Collier and Levitsky suggest two potential problems that political scientists must be aware of. Due to the complex structures used to define so many different democratic regime types, the potential for confusion and miscommunication in the literature is rife. It is crucial, therefore, that scholars clearly define and explain the conception of democracy they are using. The second problem stems from the increase in concepts and terms in the literature for describing basically the same thing. Again, the danger is that with the proliferation of terms, the literature faces the risk of being thrown into confusion. To control these potential problems, Collier and Levitsky propose that scholars aim for “parsimony and avoid excessive proliferation of new terms and concepts” (1997, 451).
too narrow, making the mere presence of elections a requisite feature (most nations in the world hold regular elections, but most are far from meeting the above criteria), and of being too broad, assuming social and economic equality (such a definition would mean that no democracies currently exist as not even the most democratic nation on earth can have complete social and economic equality).

The pacts literature fails to acknowledge that pacts may actually interfere with the proper functioning of my four additional elements of polyarchy. Pacts may contribute to the short-term stability of a democracy by creating conditions that prevent protests and demands from reaching levels that could threaten the survival of the regime. But it is possible that the long-term effects of pacts on democracy can be negative.

Long-term damage can be done to a polity when negotiations protect the vital interests of the old authoritarian regime. For example, if the military is assured that they will be immune from prosecution for human rights violations as a condition of the pact, then there is no equality for all before the law. Impunity creates an atmosphere where the military feel an exaggerated sense of their own importance and power, something that may make them more likely to return to a deliberative political role. Where a pact agrees to divide power, regardless of the election result, between certain political parties, the way is left open for a situation where corruption and clientilism dominate governance, and where divisions of power become ineffective, or non-existent. When political parties monopolise the electoral process, dominate the legislative process and block informal channels of representation, like the media and interest groups, the functioning, not to mention the spirit, of polyarchy is violated.
CHAPTER 2: PACTS

This chapter serves as a means of presenting the main features of the pacts literature, and outlining what I consider to be the major flaws within it. Scholars have agreed that pacts that protect the “vital interests” of outgoing autocrats are likely to lead to more enduring and viable democracies. Certainly, transitions to democracy in Latin America have often been contingent on providing continued impunity to authoritarian elites for their human rights crimes, and for a number of years the stability of Venezuelan and Colombian democracy has provided grist for those deeming pacts essential for democratic transitions (O’Donnell and Schmitter 1986, 45). This, in turn, has contributed to strengthening the power, not to mention the egos, of military personnel who have considered themselves to be perpetually above the law. Yet, I believe that in the contemporary international context this situation is changing. Changes in international norms and conventions in the post Cold War era have the potential to contribute to different types of democratic transitions occurring in the future: transitions that are less contingent on providing widespread amnesties to human rights violators.

In my opinion, the international context in which a democratic transition occurs is extremely crucial and formative to the course a nation will follow. Choices made by early developing states at a particular point in time influence not only their future range of options, but also the options of later developing states. “The functions that are viewed as proper and legitimate for the state are influenced by general international norms and practices. In the modern system the institutional characteristics of states in more industrially developed areas have set an agenda for states in less developed areas” (Krasner 1984, 241). Rightly or wrongly, history has shown that nations use precedents
made in other nations as a template for their own course -- precedents that are then influential for a long period thereafter. Numerous scholars have focused on major, rapid watersheds in political life, arguing that these transitions establish certain directions of change and foreclose others in a way that shapes politics for years to come. Seymour Martin Lipset and Stein Rokkan call such transitions "critical junctures" (Lipset and Rokkan 1967). Stephen Krasner calls short bursts of institutional change followed by a long period of stasis, "punctuated equilibrium".

15 Influenced by the ethos of modernisation theory (developed in the 1950s, modernisation theory talked of economic "requisites" for democracy, see Lipset 1959), many new nations born out of colonialism have, since WWII, attempted to follow the economic route taken by some of the older industrialising nations. Modernisation theory fairly crudely established a directly proportional relationship between a country's economic strength and the chances of that country becoming democratic. This has resulted in imposing certain economic or political structures on unprepared and ill-equipped countries. Even in recent times, we have witnessed cases of nations following a particular path, used by others, when it has perhaps not been appropriate. For example, in post-communist Russia, "shock therapy" market reforms were imposed with disastrous consequences after they were successfully carried out in Poland. Economists failed to account for the different structural, historical and cultural conditions in Russia. Samuel Huntington has labeled this idea "snowballing" but also highlighted the issue of national idiosyncracies that may hinder the imposing of certain democratic or economic structures. As he says: "the democratization of countries A and B is not reason for democratization in country C, unless the conditions that favoured it in the former also exist in the latter" (1996, 7).

16 Once a particular path is taken by a country, it moulds future developments. To use Przeworski’s words, "the final destination depends on the path" (1991, 51). Sidney Verba has referred to this conceptualisation as the branching of the tree model of sequential development. A critical choice forecloses other options in part because the "choice to set up a program in relation to a particular problem area may lead almost inevitably to the maintenance and even expansion of the program because of the vested interests it creates" (Verba 1971, 308). It is impossible to simply change paths with every alteration in wants, needs and power capabilities. Past choices constrain and preclude certain strategies or make them very costly. As Stephen Krasner put it, "institutions generated by functional demands of the past can perpetuate themselves into the future whose functional imperatives are radically different" (Krasner 1984, 240).

17 Punctuated equilibrium refers to a set of arguments about evolution whose main proponents are Stephen Jay Gould and Niles Eldredge. Gould and Eldredge attacked the conventional Darwinian synthesis that pictures evolutionary progress as a slow, continuous process of change in which entire species slowly adapt to environmental conditions. They have argued instead that change tends to take place rapidly in geographically isolated groups which may then displace their ancestral populations. Such displacements are rare. Generally species can only undergo substantial changes over evolutionary time. Evolutionary change, they argue, is concentrated in geographically instantaneous events. "Is our world primarily one of constant change (with structure as a mere incarnation of the moment), or is structure primary and constraining, with change as a 'difficult' phenomenon, usually accomplished rapidly when a stable structure is stressed beyond its buffering capacity to resist and absorb?" Gould's answer to this question is the latter. This description of the basic nature of the debate in evolutionary theory is similar to the debate in social and political analysis. Punctuated equilibrium is an apt description of an analytic stance that sees political institutions enduring over long periods once they are established. From Krasner (1984, 242-243). Gould quote, originally in “Darwinism and the expansion of Evolutionary Theory,” in Science, 216 (April 23, 1982).
It will be demonstrated later (in chapter four) that the arrest of Pinochet in Britain and his potential prosecution in Chile is a watershed international event in terms of dealing with elites in the previous regime. It is indicative of a world with different priorities and is bound to have (and indeed already has produced) profound “knock-on” and lasting effects, which has the potential to mould future developments in many nations. I would argue that the Pinochet arrest is reflective of the critical juncture in the post Cold War international context whereby human rights are more, instead of less, important than any strategic “balance of power.”

It is no accident, therefore, that pacts in Chile, Venezuela and Colombia have all fallen apart in the 1990s. In the first decade after the Cold War, the agenda of the international community changed. Exclusion of the Communists from the political arena, which for so long was the excuse of elites in Venezuela and Colombia for having their respective pacts, is no longer considered a strategic necessity.\(^\text{18}\) Similarly, in Chile the post Cold War international environment lost Pinochet any kind of justification for brutally repressing dangerous leftist elements. With humanitarian concerns now firmly on the international agenda, manifested in processes like the creation of the International Criminal Court (ICC) and other legal declarations and structures\(^\text{19}\), the political context is

\(^{18}\) Despite this new reality, the defenders of the Pact of Punto Fijo in Venezuela have been at pains to recreate a Cold War ambience by sharply criticising Chávez’s close ties with Fidel Castro and Cuba. There is clearly awareness that the Cold War milieu reinforced Venezuela’s domestic pact. Rather than concerning themselves with Chávez’s more damaging and autocratic moves, many political figures seem intent on clinging nostalgically to a bygone era. There was also a near hysterical Cold War era reaction by members of Chile’s Right to Socialist candidate Ricardo Lagos’s successful presidential bid of 1999. They feared that a Socialist president would return the country to what they deemed the polarised “chaos” of the early 1970s.

\(^{19}\) The 1993 Vienna Declaration on Human Rights declared that all human rights were of legitimate concern to the international community, and it rejected any kind of international-domestic division or cultural relativist excuse on human rights violations. The next step was to establish that external intervention was occasionally needed to protect human rights and to accomplish justice when states were not capable of punishing previous regimes for human rights violations due to amnesty laws of domestic impunity. This led to the establishment of ad hoc international tribunal-like in concrete cases of massive human rights
right for countries making democratic transitions in the future to be less lenient to human rights abusing members of the previous regime. Pinochet’s arrest has served to change institutional structures in Chile and send out an international message to all future dictators that they may one day be held responsible for their crimes. Now that there is international momentum in favour of prosecuting human rights violators, pacts of the future may not need to be so generous to the previous governing elite in terms of granting them criminal immunity. Consequently, existing scholarship on pacts may become out of step with the phenomenon it seeks to explain. Compromises, like the one in Chile, that forget the past in order to face the future may become an anachronism in a world with established structures, like the ICC, designed to hold everybody on earth to codes of international law. If this occurs, it is important that academic work on negotiated transitions remains in step with reality. Let us now look to the pacts literature.

*Logic of Pacts*

As footnotes from my opening paragraph make clear, initial theorists of comparative politics sought to understand democracy in developing countries by searching for its prerequisites. Later scholars, however, began to follow a more process...
orientated path based upon contingent choice. According to Terry Lynn Karl, the failure to identify clear prerequisites for democracy caused theorists of comparative politics to “move their attention to the strategic calculations, unfolding processes, and sequential patterns that are involved in moving from one type of political regime to another” (Karl 1990, 5). Karl argued that the prospects for democratic consolidation are conditioned by the nature of the transition process. Specifically, she suggests that democratic stability is more likely, at least in the short term, when elites rather than the masses are ascendent during the transition process and when elites define the parameters of political and economic change through negotiated political pacts rather than the forceful imposition of any single actor’s political project.

According to Michael Burton and John Higley (1987, 295) the “ideal type” of elite led transitions, which are relatively rare events where previously warring elites transform their behaviour and suddenly and deliberately reorganise their relations via negotiating compromises on their most fundamental disagreements (see also Kirchheimer 1969), have two major consequences. The first is that they create patterns of open and peaceful competition that is founded on the “norm of restrained partisanship” (Manley 1965; Di Palma 1973), among all major elite factions. The second consequence is that they transform previously unstable political regimes, where irregular seizures of governmental power by force are frequent and expected occurrences, into stable regimes, where seizures of power by force do not occur and are not expected. These alterations in intolerant traditions was deemed to have the opposite effect in Latin America (see Wiarda 1981, Morse 1974). Almond and Verba (1963) talked of the need to have a “civic culture”. In short, there is a need for a favourable attitude toward democracy among the citizenry for democratic structures to have the legitimacy they need to survive.

This is an important qualification that adds empirical validity to Karl’s work given that pacts in Latin America have not made democratic stability more likely in the long run. Unfortunately for the pacts literature as a whole, this qualification outlined by Karl is not commonly used.
elite behaviour clear the path for, but do not guarantee, the emergence of a democratic political system. Burton, Gunther and Higley (1992, 14) correctly argue that elite led transitions are as consequential as social revolutions, but they have not received anything close to the same amount of scholarly attention.

The notion that it is elites who are the primary actors in pacted transitions is an extension and modification of the classical elite theory that was developed by Gaetano Mosca (1939) and Vilfredo Pareto (1935). Central to this theory is the contention of "elite variability," the idea that elite structure and behaviour vary significantly among societies and within them over time. These variations occur independently of social, economic and cultural forces, yet elite variations have important determinate effects for the character of political regimes. As Mosca says, "The varying structure of ruling classes has a preponderant importance in determining the political type, and also the level of civilization, of the different peoples" (1939, 51). Pareto was also concerned with specifying the variations among elites in relation to the differing nonlogical "sentiments" that ostensibly motivate their thinking and behaviour. He would link these variations to the different regime-types that evolved. Although these notions of elite variability were not developed very far by Mosca and Pareto, and the idea of elite settlements or pacts in relation to elite variability was not addressed at all, they provided a useful platform for scholars writing about elite pacts to build on. The concept that the motivations of elites are subject to variation points to an important aspect of the nuanced psychological dilemma and uncertainty involved in the pact making process.

It is important to be aware that pacts are taking place in a very uncertain environment where actors are unsure of exactly what their interests and motivations
actually are, who will support them, and what groups will comprise their allies and opponents. Yet these are not new ideas. Philippe Schmitter (1995, 11), correctly points out that it was Machiavelli who gave “transitology” its fundamental principle of uncertainty:

There is nothing more difficult to execute, nor more dubious of success, nor more dangerous to administer than to introduce a new system of things: for he who introduces it has all those who profit from the old system as his enemies and he has only lukewarm allies in all those who might profit from the new system.²²

The absence of any predictable “rules of the game” during the regime transition serves to expand the boundaries of contingent choice (See Przeworski 1989). Adapting Machiavelli’s maxim, Karl outlines the dynamics of the modern day transition process:

Indeed the dynamics of the transition revolve around strategic interactions and tentative arrangements between actors with uncertain power resources aimed at defining who will legitimately be entitled to play in the political game, what criteria will determine the winners and losers, and what limits will be placed on the issues at stake. From this perspective, regime consolidation occurs when contending social classes and political groups come to accept some set of formal rules or informal understandings that determine ‘who gets what, where, when and how’ from politics. In so doing they settle into predictable positions and legitimate behaviours by competing according to mutually acceptable rules. Electoral outcomes may still be uncertain with regard to person or party, but in consolidated democracies they are firmly surrounded by normative limits and established patterns of power distribution (Karl 1990, 6).

Of crucial importance in maintaining civilian rule after the pact making process, is finding ways that will limit uncertainty, especially by reducing incentives for civilians who have lost out in the negotiation process to appeal to the military for assistance. This suggests that there are two crucial tasks facing pact-makers. One of these is to establish a suitably strong consensus of the rules of the game so that no major elite is tempted to approach the military for protection of their vital interests. The second task is to begin to

design conscious strategies that create qualitatively new civil-military relations appropriate for future stable rule (Karl 1990, 12). To successfully carry out these tasks, civilian pact-makers must reconcile the *two major conundrums* that they face in the negotiation process: one is that they may be overly cautious in their demands in the process which could potentially lead to the strengthening of the unity of non-democratic adversaries, or to terms they may regret; the second is that they could be too reckless in their demands, provoking the military into retreating to repression and an overall regression from democracy. This is the central moral and strategic dilemma of the pact making process. The future course of the nation can be adversely affected if the pact-makers overshoot in either direction.

*Importance of Pacts*

Although often initially regarded as temporary solutions intended to avoid certain potential problems, pacts often pave the way for a more permanent resolution of conflicts. It is for this reason that the pact making process is so crucial to a nation’s course.

How regimes are born sharply influences their present and future character. Patterns of politics that emerge during periods of transition have a strong potential to become semi-permanent features of a country’s political landscape. This is not to say that change is out of the question, but change is likely to be slow and painful. At moments of political transition and convulsion, unique opportunities arise to discard the constraints

---

23 Pacts are often designed to appease the military. For example, in exchange for non-interference in the affairs of the civilian government, the negotiations would protect the interests of military personnel by giving them immunity from prosecution on human rights abuse charges. Both sides have a shared interest
and organisational forms inherited from the previous regime, but missed opportunities are
difficult to regain. The Chilean transition, which will be analysed in greater detail later, is
a useful case to utilise in support of this claim. Via a pact attempting to forgive and forget
the brutality of the recent past and maintaining “authoritarian enclaves” designed by
Pinochet, Chile’s democracy has grown from a birth defect that has proven difficult to
heal – the result is an undemocratic constitution constraining chances of a better quality
democracy and a public bitterly divided over the past. Political institutions are built to
suit the regime that they uphold, and, as Frances Hagopian has said, state elites and
societal organisations build bridges to one another that are appropriate for the immediate
political environment (1990, 148). The individual elites involved in the pact making
process use their positions to perpetuate modes of political interaction that favour them.
As a result, political arrangements, once in place, condition future political behaviour and
possibilities. Chile has shown itself to be no exception to this. Political systems carry
with them the seeds of their own reproduction and it is with great difficulty that they are
transformed.

Therefore, it is useful to think about the possibility of “birth defects” in the
democratisation process – defects that are not only a result of structural features that have
long been present in society, but also accidental circumstances that surround the moment
of regime change. Studies of the wide array of democratic regimes in existence in the
world today (see for example, Casper and Taylor 1996) show that every democratic
transition evolves in a different way. Yet this reality has not been recognised in the pacts
literature. It often suggests that nations who follow negotiated transitions to democracy

in avoiding any escalating conflict that threatens the very existence of the newly established democratic
system.
present the best “trail” for newly democratising countries to follow. For example, Peter Merkl argues, “it appears that the only trail to a democratic future for developing societies may be the one followed by Venezuela...Venezuela is a textbook case of step-by step progress” (1981, 127). However, this ignores the reality of “elite variability,” outlined by Mosca (1939) and Pareto (1935), that every nation is unique and carries a distinctive agenda, as does every individual elite member present at the transition negotiating table. History has shown that nations attempt to follow the trails other nations have journeyed. Yet, no trail can be exactly replicated and some may be far bumpier than others.

Pacts in Latin America

Naturally, political pacts held special appeal in Latin American transitions to democracy (1973-1990) as they provided potential to induce the military to return to the barracks and, in the long term, to break the cycle of military intervention. How new civilian regimes should deal with the military perpetrators of state terror, especially when those forces still wielded preponderant power, became a big issue throughout the region as transitions began in the 1970s and 1980s. Common in much of the literature on democratization is the idea that in order to be responsive to citizens, elected government must be conducted without undue influence from the coercive branch of the state – the military. Pacts were seen as a way to depoliticise militaries by offering them enhanced resources for fulfilling their professional roles and a promise of noninterference in their

---

24 The term “authoritarian enclave” was coined by Garretón (1989).
25 Although not all work on pacts is as blunt as Merkl (Karl (1986) admits that the choices and strategies of political actors can seldom be superimposed), most do talk about how developing nations can learn from the lessons of nations where pacts occurred.
own institutional affairs. In many Latin American nations, the negotiation of impunity for the military at the point of transition served the purpose of protecting them from accountability afterwards. By offering concessions to elites who are either lukewarm in regard to democracy or who have contributed to its breakdown, it is hoped that pacts can diminish the appeal of military rule and stimulate support for the democratic project (Przeworski 1991, O’Donnell 1979). Guillermo O’Donnell and Philippe Schmitter, who favoured the negotiation of political pacts for precisely these reasons, would argue in 1986 that the democratic regimes in Colombia and Venezuela, both brought into being by political pacts, have been more stable and enduring than any other in Latin America, save Costa Rica (1986, Part IV, 39-40).

Later in this study, I will analyse in detail the pact experience in Chile, but at this stage it is worthwhile to provide an outline of the Latin American transitions to democracy that have been described in the literature as being “pacted”. Who were the key players and what were the important events and time periods for each case? Coverage of each Latin American pact serves to clarify some of the murkiness over exactly what should be considered a pact, as well as the different types of pacts that have occurred (see Table 1). Indeed there is a debate in the literature over whether the transition in certain countries can actually be classified as a pact, and what separates the notion of an “elite settlement” from an “elite pact”.

The concept of pact making emerged rather early in the discussions about possible transitions from authoritarian rule in Latin America. As mentioned in the introduction, “a pact can be defined as an explicit, but not always publicly explicated or justified, agreement among a select set of actors which seeks to define (or, better, to redefine) rules
<table>
<thead>
<tr>
<th>Country</th>
<th>Type of Pact</th>
<th>Current Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bolivia (1985)</td>
<td>Excluding. Implicit pact between parties of centre-left to right</td>
<td>“Parliamentarized presidentialism”. Recurrent necessity for negotiation has allowed for a degree of democratic stability</td>
</tr>
<tr>
<td>Chile (1988-9)</td>
<td>Excluding. Implicit pact between Concertación and Right</td>
<td>Unraveling. Pinochet stripped of immunity. Disappearance cases being brought before Chilean courts</td>
</tr>
<tr>
<td>Nicaragua (1990)</td>
<td>Including. Implicit pact between Sandanistas and UNO</td>
<td>Abortive pact – collapsed</td>
</tr>
<tr>
<td>El Salvador (1992)</td>
<td>Including. Explicit US brokered agreement</td>
<td>Currently being implemented</td>
</tr>
</tbody>
</table>

**Note:** Including Pact – all major elite groups were party to the pact.  
Excluding Pact – some elite groups were excluded from the pact.  
Explicit Pact – detailed terms and conditions for the pact were documented.  
Implicit Pact – no formalised documentation of terms for transition.
governing the exercise of power on the basis of mutual guarantees for the ‘vital interests’ of those entering into it” (O’Donnell and Schmitter 1986, part IV, 37). There has been a broad acceptance of this definition in much of the writing on the pact making process. Transitional pacts, however, have varied according to who participated in them and the range of issues governed by them. The broadest type of political pact has been called in the literature an “elite settlement” (Burton, Gunther and Higley 1992). This type includes all, or almost all, of the significant national elites and addresses all the major issues among the elites, either by resolving them or by making an agreement to suspend any kind of conflict over them. If the outgoing political elite remained politically significant, it would be included in the elite settlement.

It is probably fair to say that the pacts to occur in Uruguay and El Salvador approached this ideal type, the “elite settlement”. In Uruguay, two of the three major political parties negotiated the Naval Club Agreement with the military regime after the latter was defeated in the constitutional referendum in 1980. The agreement carefully specified and controlled the process, in order that, for example, the parties were able to reestablish the former electoral law whereby no parties were excluded from the democratic arena, and the armed forces were provided with guarantees that they would be protected from facing prosecution for their crimes against humanity. Indeed, the Naval Club Accord in Uruguay is a pact which could be said to closely follow Adam Przeworski (1991, 67-79) and O’Donnell’s (1979) model of negotiated military “extrication”. When the Blancos, who had initially boycotted the negotiations finally

26 For a more in depth analysis of the Uruguayan transition than this study will provide, see Gillespie (1991); Gillespie (1992); Gonzalez (1995).
27 Both O’Donnell and Przeworski provide a model of removing the military from the political arena, whereby the opposition soft-liners are required to reach a deal with the regime moderates, and thereby
accepted the terms of the agreement, it become the foundational pact for the Uruguayan transition to democracy accepted by all elite groups.

In El Salvador a decade long civil war followed the 1979 overthrow of Carlos Humberto Romero’s authoritarian government. During this period, a US backed attempt to complement the war against the marxist insurgency established a minimally democratic regime based on the centre-right Christian Democrats and the far-right National Renewal Alliance (ARENA). Leftist parties were either in rebellion or were repressed. After 1989, however, with the Cold War waning, the US (and also the Cuban and Nicaraguans in the insurgent Farabundo Marti Front for National Liberation [FMLN]) started to push for a negotiated settlement. This was achieved in 1992 and is currently being implemented. The FMLN has, therefore, been able to achieve access to the political process. The armed forces and ARENA have been forced to give up their aim of destroying the Left and accept a broadening and deepening of political participation. What makes this an “elite settlement” is that all significant elites were parties to the US brokered agreement.

The transitions in Brazil and Peru are the topic of debate in the literature over whether they should be categorised as pacts. In regards to the Brazilian case, Hagopian (1990) makes the argument that it was a pact negotiated between military and civilian personnel, whereas Karl (1990) argues that it was a transition imposed by the military. In
both Peru and Brazil, the democratic transition was certainly not shaped by “behind closed doors”, small group, elite negotiations like in Uruguay and El Salvador. Rather, they stemmed from highly public, massive constituent assemblies (1978 in Peru and 1987 in Brazil). The assemblies were undoubtedly representative of all significant sectors of the respective countries, and they did lay down definitive constitutional rules for the emerging democratic regime. In these respects they were similar to pacts, but I would argue that they should be classified as a different kind of phenomenon. For example, elite pacts in Uruguay, El Salvador, Venezuela and Colombia involved detailed documents intended to be implemented by elites, whereas the constitutions created in Peru and Brazil were largely mere public, symbolic statements of aspirations. They were more in step with the long Latin American tradition of laws as statements of values rather than as governing rules (see Peeler 1998, chapter 1).

The cases of Chile, Venezuela, Colombia, Bolivia, and Nicaragua are correctly classified as pacts, but I would suggest they are not of the “elite settlement” type. This is primarily because not all elites were included, or in agreement with the result of the pact. In Chile, groups on the right participate in the post-Pinochet constitutional regime primarily to defend the authoritarian features of that regime that limit the maneuvering space of the elected governments. Similarly, groups on the left, although they tacitly cooperated with the Concertación during the 1988 referendum campaign, have stated their rejection of the legitimacy of the post-Pinochet regime. In terms of the non-inclusion of certain elites, in Venezuela and Colombia the Communists were excluded from any kind of involvement with the pact.

must be given that restrict democracy. The radicals, however, prefer full democracy and oppose any negotiation with the regime (See Przeworski 1991, chapter 2).
In Bolivia too, pacts among elites have been vital to the democratic transition. But they have not been “elite settlements” as, like Venezuela and Colombia, they have stemmed from the exclusion of the Left. At the end of the Banzer regime in 1979, the elites were so deeply fragmented that no elected government could be produced until three years later. Even then, disunity among different political groups was such that it appeared unlikely Bolivia would be able to have stable governance. The government of Siles Zuazo (1982-1985), with its fragile unity and narrow parliamentary base could not complete its term and had to agree to early elections. It was the debacle of the Siles Zuazo administration that led to the parties of the center-left to right agreeing to a pact that alienated the Left and allowed for government focusing on pragmatic matters of patronage, rather than ideological policy matters. Without the radical and alternative vision posed by the Left, it was possible for Bolivian politics to gain a certain stability through a pattern of shifting presidential coalitions in Congress. René Mayorga termed this new pattern “parliamentarized presidentialism,” and he argued that it is the recurrent necessity of negotiation among rival elites that is the most important key to the new found stability of Bolivian democracy.

Nicaragua’s transition was conceived as an elite settlement involving all elite groups, but failed to become one. After the surprise victory of UNO (National Opposition Union) candidate, Violeta Barrios de Chamorro, in the 1990 presidential election, Chamorro engineered a pact with the defeated Sandinistas. Although as a party the Sandinistas would move into opposition, the pact provided that command of the armed

---

28 For a deeper analysis of the Bolivian experience with pacts, see Gamarra 1994; Gammara and Malloy 1995.
29 This term from Mayorga is quoted in Peeler (1998), 87.
30 For more on the Nicaraguan pact see LaRamée (1995).
forces and police would remain with the Sandinista incumbents. The Sandinistas in turn committed themselves to loyally serving the president and discouraging their supporters from pushing agitation to the point of destabilizing the new government. This pact collapsed however, as Chamorro proved unable to keep the majority of UNO members from becoming opponents of her government. The defections by UNO members would erase Chamorro’s fragile majority by the next election in 1995. Although this was an abortive elite pact, it proved to be very important to the Nicaraguan transition. Although not achieving a great deal during her presidency, Chamorro did manage to complete her term and hand over power to an elected successor. The real choice, as John Peeler argues, “was between a truly counterrevolutionary government that could not govern and a compromise government that could govern at least minimally” (1998, 88). The latter, which Chamorro achieved, would have been considerably less likely without the Sandinista pact. Had the UNO remained united and carried out a counterrevolution against the Sandinistas, it might easily have led to a renewal of civil war and would undoubtedly have pushed even more Nicaraguans to desperate poverty.

*Flaws within the Literature*

The irony of pact making is that it moves the polity towards democracy by undemocratic means. Pacts by definition seek to limit any kind of accountability to wider publics in that they are negotiated by elites with no direct input to the process by the people. I should make clear that I am not contending that elites are socially disembodied. Structural, economic, and cultural conditions within which elites operate, may not determine but do shape the calculations and strategic preferences of elites during the pact.
negotiation process, as they bargain over the terms and conditions of the democratic institutions and procedures to be adopted (see, for example, Haggard and Kaufman 1999, Collier and Mahoney 1999, Bermeo 1999). The point is, however, that the elites present at the negotiating table have no official mandate to represent the people via a democratic process, like an election. Additionally, by often providing impunity to elite groups like the military, pacts deliberately distort the principle of citizen equality. Nevertheless, they have the potential to alter power relations, set loose new political processes and lead to different, if often unintended, outcomes that affect the entire society (O’Donnell and Schmitter 1986, part 4, 38). Despite these blatant undemocratic features, pacts have been considered a desirable element of the transition as it has been argued that they enhance the probability that the process will lead to a viable political democracy. Rustow (1970) argues that democracy advances “on the installment plan” as collective actors, each preferring a different mode of governance or a different configuration of institutions enter into a series of more or less enduring compromises.

Given the notion that “how regimes are born sharply influences their present and future character”, it seems to me that a major shortcoming of the pacts literature is its underestimation of the importance of the undemocratic nature of pact making. Considering that much of the literature on transitions talks of “birth defects” that can hinder the future of democracy, it appears somewhat surprising that not explicitly addressed in the literature on pacts (initially anyway) is the idea that political pacts may actually impinge on democratisation.\(^31\) As already mentioned, pacts are undemocratic and

---

\(^{31}\) There are exceptions. Karl wrote that “the cost of the stability of pact making has been the abandonment of greater democratization” (1986, 218). Hagopian also adds a sceptical voice to the consensus on pact making. In reference to Brazil, which she considers to be a pacted transition, she argues that “The Brazilian
by design subvert the notion of majority rule. There is also much evidence that the political systems of pacted democracies may have been compromised.

In Venezuela, the signatories of the Pact of Punto Fijo of 1958 agreed to exclude the Communist party from the agreement and hence from effective participation in politics. The political parties also negotiated to divide government posts among themselves regardless of the election results. Resulting from this was an extremely uncompetitive system that fostered complacency and corruption and was unresponsive to change – factors that would ultimately lead to the collapse of the pact after the economy began to decline in the late 1980s. Similarly, in Colombia, the consociational National Front, installed in 1958 to end la violencia, conspired to strip elections of most of their meaning. The Liberal and Conservative parties agreed to share until 1974, regardless of the vote totals, all legislative and administrative posts equally while altering the presidency. This parity between the parties was constitutionally guaranteed. Through pact making, politicians of these two parties resurrected a system in Colombia of restricted, oligarchical democracy, and superimposed it on a society ravaged by civil war and that had undergone significant structural changes (Wilde 1978, 59-62).

Although I am not contending that had the Communist Party been included, the pacts in Venezuela and Colombia would have endured. Quite the contrary: inclusion of the Communists would have contributed to greater instability and to no elite agreement at all. I am arguing, however, that in both the Venezuelan and Colombian cases, pacts experience suggests that it may even be appropriate to reexamine the assumption that pact making leads to more stable democratic regimes” (1990, 165).

32 “Consociational” captures the main features of Colombia’s National Front pact. The consociational literature studies countries in which conflict across major sectors of society have been resolved within the context of open political regimes via elite cooperation. “In Colombia, the consociational National Front regime established in 1958 was an elite response to a perceived crisis stemming from the fear of exclusion...”
served to institutionalise the practice of political clientilism within the state. The institutionalisation of these practices has led to situations in both countries today that continue to hinder democracy. For example, Chávez was able to point to corruption of the pact as a mechanism for cementing his current popular pseudo-autocratic rule. In Colombia, despite the new constitution of 1991 that eliminates all vestiges of party parity, the government remains plagued by problems of eroded state authority masked by chronic political violence, corruption and difficulties in governance.

Any process which puts restrictions on participation or predetermines electoral results violates the most fundamental norms of the most broadly accepted definitions of modern democracy. It is often the case, however, that pacts settle political conflict in ways that appear to less radically distort democracy. For example, the Colombian and Venezuelan pacts also had dimensions that appeared to be less of a threat to the basic features of polyarchy – dimensions like restricting the policy agenda, dividing the spoils of the state’s wealth, and conceding control of the political parties that serve as vehicles to allocate these spoils. It appears to me that in analysis of the Venezuelan and Colombian cases, scholars have focused more on these aspects than the fundamental distortions of polyarchy, like political party exclusion, predetermined electoral results, or the violation of the separation of powers. Yet, in my opinion the more subtle methods mentioned above, which less radically distort democracy, nonetheless do jeopardise the

---

33 Schumpeter and Dahl provide the classic, what have been deemed “minimalist,” definitions of democracy. Joseph Schumpeter's famous definition of the “democratic method” is: “that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote” (1950, 242). “The kind of competition for leadership which is to define democracy,” consists of “free competition for a free vote” (1950, 217). To reiterate from earlier, Dahl’s criteria for “polyarchy” are: 1) elected officials; 2) free and fair elections; 3) inclusive suffrage; 4)
democratisation process. I would also suggest that their effect is likely to be more severe where existing democratic institutions are weak. A major failing of the literature on pacts is a lack of recognition of the long term damage that these seemingly less destructive aspects of the pact making process have on a state’s democratic prospects.

Indeed some scholars have even suggested that the pact making process should not actually be classified as undemocratic. Burton, Gunther and Higley (1992) refuse to accept that elite settlements create democracy by undemocratic means, which is the contention of Karl (1990), O’Donnell and Schmitter (1986) and Hagopian (1990). They argue that “private negotiations among elites are an acceptable, even routine feature of democratic governance, as long as the elites involved are held publicly accountable through elections and other processes” (1992, 34). Burton, Gunther and Higley however, fail to acknowledge that the elites who negotiate transitions have so far not been held publicly accountable. That is the fundamentally undemocratic nature of the pact making process – human rights-violating elites of the past are not held to account. Although civilian negotiators will have to face the electorate in the post-authoritarian elections, the elites from the previous authoritarian regime (who the civilians negotiated with) invariably walk away from the process to an early retirement lived out on the golf course, cushioned by a generous pension. If they do not like golf, they can perhaps take the route Pinochet (initially) followed. Rather than fleeing Chile in disgrace to a life in exile, when Pinochet packed his desk at La Moneda (the presidential palace) in 1989, he simply moved across Santiago’s main street to a different office in the ministry of defense. The

---

the right to run for office; 5) freedom of expression; 6) alternative information; and 7) associational autonomy (1971, 3).
“undemocratic” part of the pact making process is that most of “the authoritarian elite” receive impunity for any crimes they may have committed whilst in office.

Certainly, the granting of impunity to military leaders for their human rights crimes is another common facet of the pact making process that is fundamentally undemocratic. Impunity means, literally, freedom from punishment. To act with impunity means to act with the knowledge that one is above the law. In the Latin American context, impunity has come to mean that acts of repression and abuse of power by the state against its citizens are protected from judgement or accountability before the national law. “This has taken place via military self-amnesties, various amnesty laws, pardons granted by new civilian governments, or other mechanisms” (McSherry 1992, 470). A fairly isolated voice in the literature, J. Patrice McSherry makes the case that far from being “desirable”, pacts of impunity have invariably created a renewed climate of fear in society, and an overwhelming sense of injustice and hopelessness. By rewarding the military with impunity, the forces most dangerous to democracy are provided with no deterrent for additional abuse of democratic structures. Further, “citizens become resigned to the fact that justice is beyond reach and dangerous to demand; impunity limits the horizons of what is possible. Simultaneously, impunity engenders a bolstered sense of power within the ranks of the military, and new rationalizations for terrorist methods” (1992, 471).

McSherry also suggests that the argument for absolving or forgetting military crimes in the interests of reconciliation, is based upon an assumption of ends and means (1992, 488). The end of stable democracy and social peace is said to depend on the means
of impunity. Yet it is important to remember, in her view, that the end of any process is
created within and moulded by the means employed. Impunity actually creates attitudes
and structures antithetical to democracy and stabilizes the forces least committed to it.
The phenomenon of impunity tends to institutionalize the power and autonomy of the
military, and perpetuate the imbalance between military and civil society. This has
certainly been the case in Chile, as evidence in the next chapter will prove. Embedded
authoritarian structures – which occur when any members of society are above the law –
only serve to restrict the possibilities for substantive social change. Far from being
beneficial to the democratisation process, pacts carry the potential to compromise and
hinder the process they seek to establish.

Perhaps the most important flaw within the pacts literature lies in its inability to
explain what distinguishes successful from failing pacts. The literature has certainly
attempted to characterise successful and unsuccessful pacts, noting, for example, that
successful pacts protect each participant’s “vital interests” (O’Donnell and Schmitter
1986, part 4, 37). But why are only some pacts successful at doing this? In the end, the
pact that Pinochet negotiated has been unable to protect his vital interests and prevent
him from facing a potential prosecution in his homeland. Why have some pacts been
unable to reinforce themselves in the long term? In Venezuela and Colombia, pacts have
for several decades protected, via clientilism, the vital interests of several elite groups,
but have in recent years collapsed due to their inability to adapt to changing
circumstances. I should make clear that analysis of what constitutes a successful from an
unsuccessful pact is not the purpose of this study. I merely wish to draw attention to this

34 Most works on transitions have seen the granting of impunity to be a necessary sacrifice for stability in
the democratic transition. One work which takes up this issue and outlines the debates on both sides is
flaw and to suggest that future work on pacts should attempt to rectify it. Barry Weingast (1997) has argued that studies of pacts should investigate their self-enforcing properties. A pact can be classified as successful, in his opinion, if it is self-enforcing. Self-enforcement comes into play when elites consider it to be in their interests to abide by the terms of the pact. Yet Weingast does not account for the unforeseen international contextual change that has been so important to the unraveling of pacts in the three cases of Chile, Venezuela and Colombia. Scholars must recognize that changes at an international level present an independent variable in democratic transitions that can have important consequences for pacts, indeed for any kind of transition process. Chapter four will look to the post Cold War international context and make the argument that it has been a vital factor in the collapse of pacts. Indeed, changes at an international level have called into question the necessity of granting amnesties, for the sake of a stable democratic transition, to human rights violators at all.

**Conclusion**

It is highly debatable whether the post-pact situation in each of the three nations mentioned above has created the stable democracy that was intended. In Colombia, the political stability provided by the pact – in terms of the peaceful turnover of elected governments since 1958 – has not been accompanied by any reasonable degree of social

---

35 Weingast contends that “the pact constructed [in England] during the Glorious Revolution created a focal solution to the coordination problems facing the English elites. By permitting elites to act in concert, the pact raised the penalties for royal transgressions, making it in the interests of the sovereign to honor the pact. In other words, the new limits on the crown became self-enforcing” (262).

36 See Przeworski et al (1996). In this study of the wide range of factors that make democracies endure or collapse, it is argued that “international conditions predict regime survival better than does the level of development...the larger the proportion of democracies on the globe and in the region during a particular year, the more likely is democracy to survive in a particular country.”
stability. Quite the contrary: it is violence and social exclusion that most seriously threaten democracy in Colombia, which remains wracked by a thirty-seven year guerrilla war that denies the state control over as much as one third of the state’s territory. Chávez has successfully attacked Venezuela’s pact and its parties and now presides over a country whose military is no longer non-deliberative. In Chile, undemocratic elements, due to the terms of the pact, remain enshrined in the constitution (and in some segments of public opinion as well), and, as indicated by the arrest of Pinochet, the country remains bitterly divided over its past.

It is important at this point to restate that I am not taking issue with the idea that pacts may be necessary and desirable under certain conditions. I am suggesting, however, that they have unraveled in a number of countries in the region, and in ways that suggest deeper problems than the literature acknowledged. What is most disturbing is that they have come under increasingly heavy fire from regime opponents who see these pacts as fundamentally undemocratic and exclusionary. In the case of Venezuela, for example, Chávez rode to power in 1998 on a wave of discontent directed in large measure against the politicians whose modus vivendi was enshrined in the Pact of Punto Fijo.

Thus far, this study has looked at what elite pacts are. The remainder will look to the case of Chile and ask: what has been the result of the pact? This will serve as the method for dealing with a central aim of this study – namely, calling into question the consensus that political pacts may be an undemocratic means to settle conflicts in a transition from authoritarian rule, but they provide the basis upon which a new and more democratic order may be implanted. The newness and democratic nature of the order implanted in the Chilean case is contentious to say the least.
CHAPTER 3: THE CHILEAN EXPERIENCE

The transition to democracy in Chile in the late 1980s offers an example of a “pacted” democratic transition. A pact was agreed despite the fact that alternative models of regime transition were clearly articulated in Chile, and were backed by powerful and well organised social and political forces. Kenneth Roberts argues that the process of transition in Chile passed through two highly divergent models of political change. The first stage lasted from May 1983, with numerous protests against the Pinochet regime, until the middle of 1986, a time when protests began to sharply decline. This first stage was marked by failed attempts by mass social and political actors to negotiate a framework for regime transition, and a number of insurrectionary strategies seeking to break with the political and economic project of the military regime (see also Oxhorn 1994, 51-52). The second stage took place from late 1986, when opposition elites made efforts to remove Pinochet within the institutional constraints established in his 1980 constitution and to negotiate a process of transition with supporters of the military regime (Roberts 1998, 118-119, see also Ensalaco 1994, 409-410, Oxhorn 1994, 53-54). This latter type of elite-led pacted transition would ultimately prevail and set the tone for the political dynamics of the new democratic regime of the early 1990s. The postauthoritarian administration that took shape, until the Pinochet arrest in London in 1998, would make only minor adjustments to the political legacies of the previous regime.

As with many military regimes that have attempted to protect themselves from any kind of post-transition accountability, the Pinochet dictatorship took care to create “reserve domains” of authoritarian influence that were protected from any kind of
democratic contestation. Whilst in office, the Pinochet government designed a system of elaborate interlocking institutional checks against the exercise of popular sovereignty. Furthermore, they were also able to structure the regime transition in a way that ensured Chilean government remained within the boundaries of the institutional structures they had created. Gerardo Munck and Carol Skalnik Leff argue that the “incumbent elites may well have exerted more control over the transition” in Chile “than in any other case of regime change” (1997, 346). In Argentina, the military was so discredited by the defeat in the Falklands War that their control of the transition process was undermined (Hunter 1998, Cavarozzi 1992, Vacs 1987, 29). In Brazil, important sectors of the business community broke with the regime to support redemocratisation, contributing to the crumbling of the authoritarian coalition (Skidmore 1988, 250). These cases contrasted with Chile where the military remained largely cohesive, and retained strong support from economic elites who had become staunch advocates of the neoliberal model implanted by the regime’s Chicago school technocrats. 37

A common feature in most of the pacted democratic transitions in Latin America has been that the military is in a position of relative strength. Indeed, this is often one of the main reasons why pacts occur. In Colombia, Venezuela, Uruguay and Chile the pacts have involved civilians providing military personnel with certain guarantees that their

---

37 Trained at the University of Chicago, the “Chicago Boys” were a group of Chilean Economists who advocated neo-liberal economic theories that envisioned the state having no overt role in the economy. The Chicago Boys believed that the threat of socialism in Chile was linked to political and economic institutions dating back to the 1920s and 1930s. They blamed the 1925 constitution, the political party system and state sponsored import substitution industrialisation (ISI) policies for the growing role of the state in the Chilean economy. They believed that only a radical opening of the economy to international competition and a reduction of the role of the state and politics in society would “free” the economy and liberate Chile from the threat of Marxism. By 1965, the Chicago Boys controlled the Catholic University’s school of economics. By 1975, two years after the coup, they had convinced Pinochet of their beliefs, and displaced the nationalist sector of the right, which sought a resurrection of traditional agriculture and industry. Sergio de Castro became Minister of the Economy in April 1975, and the neoliberal counterrevolution in Chile began. For more on the “Chicago Boys” see, Valdes (1995).
interests would not be touched. Although, by definition, pacts are not necessarily fundamentally centred around civil-military relations, in the Latin American context, civil military relations have often been the key element of the agreement. If the military is overly weak and disunified, as happened in Argentina, then the civilians are in a position of power in the transition process and do not necessarily have to provide wide ranging amnesties of appeasement to seduce the authoritarian rulers from office. When the military is weakened, civilians are able, to a greater extent, to dictate the direction of reform. In the case of Argentina, democrats rejected military requests for immunity from prosecution for human rights violations (Vacs 1987, 30, O’Donnell 1992). Argentina was actually one of the few Latin American nations to try to imprison its former military leaders. In Chile, institutional restraints, military unity and economic elite support for the Pinochet regime combined to prevent the democratic opposition from deposing Pinochet and dictating the terms of the regime transition. Even though Pinochet was politically defeated in the 1988 plebiscite – which was the event that forced the democratic transition: 56% of Chileans voted to end his regime and return to democratic and civilian rule – this defeat occurred within the regime’s prescribed constitutional framework. Consequently, the “transition adhered to the timetable and the core of the institutional blueprint elaborated by Pinochet’s political advisors” (Robert 1998, 142).

38 For example, England (1688-9) and Sweden (1809) had pacts that were not contingent on establishing workable civil-military relations.
39 Argentina’s transition from authoritarianism came about rather abruptly, due to the collapse of its military regime. Consequently, as the authoritarian coalition completely unraveled, no elite agreement was required to pave the way for the transition. As a result, the tone of the transition was one of confrontation, as opposed to the compromise in Chile, between the two main forces that opposed the military regime – Radicalism and Peronism. For more on the nature of the transition to democratic governance in Argentina, see Cavarozzi (1992).
40 It is important to point out, however, that the threat of military insurrection persuaded successive democratic governments to pardon or provide an amnesty to most of those responsible for the crimes committed under military rule in Argentina.
Chile's transition was produced by political deadlock, rather than the clear defeat of the dictator or an institutional earthquake creating an alternative political system (Roberts 1998, 142-143). No set of actors involved was able to impose its will completely upon another (Casper and Taylor 1996, 144-146). It could be argued that the transition closely adhered to Rustow's (1970) model - whereby democracy is likely to occur in response to a deadlock between contending forces, none of which is capable of imposing their preferred choice. Pinochet was unable to win the plebiscite to extend his political mandate, but popular movements were also unable to defeat his regime and impose unrestrained democracy due to the constitutional straitjacket imposed by the outgoing regime. The outgoing elites were able to tightly control from above the transition from military rule to what would initially be a limited democratic regime. The transition to this limited democracy emerged as a compromise solution to a political stalemate, a type of conflict resolution that relied on negotiated pacts to create terms that could be accepted by both sides. The elites from the previous regime were keen to avoid any attempts by new civilian leaders to bring the perpetrators of repression to justice, and sought to limit the maneuvering space for the democratic grouping of the *Concertación*. On the other hand, the *Concertación* entered into negotiations with the political Right and the military regime determined to modify some of the blatantly obvious authoritarian features of the constitution. They were forced, however, to accede to many of the other restrictions that the authoritarian regime had placed on the democratisation process.

The consequence of the negotiation process was a package of fifty-four constitutional reforms to the 1980 Constitution that were ratified in a plebiscite before the

---

41 Turnout in the election was exceptionally high with 90% of eligible voters exercising their right to vote. See Constable and Valenzuela (1989, 170).
1989 national elections\(^\text{42}\) (Roberts 1998, 143, Riquelme 1999, 33). "The most important of these reforms eliminated the constitutional proscription of Marxist parties; allowed union members to hold party affiliations; limited the emergency powers of the state; prevented the president from dissolving the lower house of congress; enhanced civilian representation on the National Security Council; increased the number of elected senators; and relaxed the requirements for future constitutional amendments"\(^\text{43}\) (Roberts 1998, 143).

Although some of the constitutional reforms proposed by the *Concertación* were adopted in the 1989 plebiscite, Chile's democracy remained tainted by authoritarianism in several ways. Negotiations undertaken protected the previous regime via the maintenance of systemic, institutionalised, nondemocratic practises enshrined in the 1980 Chilean constitution.\(^\text{44}\) This constitutional hybrid of authoritarian and democratic elements, was originally intended to be a transitory set of institutions, but it has proven extremely difficult to transform\(^\text{45}\) – due mainly to the need for overwhelming legislative majorities for constitutional reform. The 1980 constitution is a legal reflection of the military government's negative view of the capacity of democratic practises to resolve the problems facing Chilean society.\(^\text{46}\) This political model, which was largely inherited by the Aylwin administration of 1990, was designed both to protect the economic legacy

---

\(^\text{42}\) In the plebiscite of 30 July 1989, 85.7% of the Chilean electorate ratified the constitution as amended, paving the way for the election of Aylwin on 14 December 1989 (Valenzuela 1999, 231-232).
\(^\text{43}\) For an analysis of these constitutional reforms, see Ensalaco (1994).
\(^\text{44}\) With the approval of the constitutional reforms, Chile's transition became, in Linz's terms a "transición pactada" (a transition by agreement), rather than a "transición por ruptura" (a sharp break with the previous order), see Linz (1978, 35).
\(^\text{45}\) This reality was predicted by pact theorists, who made the argument that despite the uncertain, opportunistic, and often hurried and confused nature of the pact making process at the moment of transition, the results of the negotiations have the potential to produce a "lasting," "semi-permanent" effect on the political landscape. See, for example, Karl and Schmitter (1991, 270).
\(^\text{46}\) For an analysis of the foundational and corrective aims of the Chilean military regime, see Garretón (1989). For the evolution of military ideas throughout the region, see Loveman 1999.
of the Pinochet government and to prevent the re-emergence of what the military perceived to be the dynamic of polarisation and instability that was characteristic of the early 1970s. Military authorities argued that the succession of events leading up to the military coup provided sufficient evidence of the irresponsibility of civilian leaders.

According to the military, democratic structures in Chile had allowed the country to be held hostage to the interests of self-serving political parties. Statements made by the military immediately following the coup outlined their motives for assuming control: party leaders had used their power as elected officials to mobilise popular support, resulting in the ideological polarisation of Chilean society and the corruption of democratic institutions.\(^47\) The goal of the military-designed constitution of 1980 was to restrict the power of civilian elites and political parties in order to prevent the recurrence of the polarisation of the early 1970s.

Consequently, blatant authoritarian elements remained in place after the pact had been negotiated. The president was still allowed to designate senators and magistrates; the president could not remove military leaders and senior officers from their ranks after their nomination; Pinochet remained Commander in Chief of the armed forces; all former presidents were entitled to permanent Senate seats provided they served a minimum of six years (which would allow Pinochet to serve in the upper chamber when his term as armed forces commander expired); as a consequence of Pinochet implementing the Amnesty law in 1978 to pardon military officers responsible for crimes committed from

\(^{47}\) These attitudes are clear in post-coup military statements and in the declaration of principles made the following March. See República de Chile, *El Pronunciamiento Militar del 11 de Septiembre de 1973*, and the *Declaración de Principios de la Junta de Gobierno*, March 1974. See: [http://www.geocities.com/CapitolHill/Congress/1770/declaracion-de-principios.html](http://www.geocities.com/CapitolHill/Congress/1770/declaracion-de-principios.html)
1973-1978, perpetrators of political repression could not be tried; the Supreme Court was packed with new conservative supporters; and, although easier, it was still very difficult to alter the constitution. Additionally, the binomial-majority electoral system that was introduced, works in a way that over-represents the largest minority, the Right, and under-represents the second largest minority, the non-Concertación Communist Left.

In sum, the army and political elites from the previous regime remained powerful political players in the aftermath of the pact, virtually unaffected by the transition due to their establishment of daunting barriers to any kind of further constitutional changes—barriers attempting to “ensure the permanence of the military’s revolution” (Ensalaco 1994, 412). Given that constitutional amendments are necessary to transform the status of the armed forces, it is difficult to quell the constitutional power they hold. These constraints have obviously placed major obstacles in the way of democratic reform.

---

48 For an excellent discussion of the issue of impunity in the Chilean transition, see Pearce (1995). In this article, both sides of the debate in Chile are detailed as Pearce asks if impunity was a “necessary or fateful compromise.” She makes the case that “justice has been seriously compromised in the negotiated transition, and this fact influences the new political order and affects people’s perception of their rights in that order” (54). This is a similar argument to the one outlined by McSherry (1992) above.

49 Constitutional change can only result if there is two-thirds support in both chambers. This is very difficult as senators nominated during the military regime are likely to block any attempts at democratic reform.

50 The binomial electoral system is one of the most important limitations on fair representation of the electorate. Military reformers contended that Chile’s historical proportional representation (PR) electoral system aggravated and magnified divisions within society and was instrumental in the creation of a partidocracia characterised by ideological polarisation, given the electoral system’s representation of small parties. Military leaders thus sought to design a system that would help create a two-party system, which they believed was the most desirable option for Chile. The second aim of military reformers was an electoral formula that would benefit the Right and guarantee their representation. As a result, districts were gerrymandered to favour parties of the right. However, the main feature of the electoral system that benefits parties of the right is the procedure for allocating seats. In order for a party or coalition to win both seats in a district, it must double the vote of its nearest rival. If there are two coalitions competing in a particular district, a party needs to attain 33.4% of the vote to win one seat, but must win 66.7% of the vote to win two. Therefore, if the most popular party or coalition wins 66.6% of the vote and its nearest rival wins 33.4%, each wins one seat, or 50% of the total seats in the district. Consequently, in a two-party competition, any support a party receives above 33.4% and below 66.7% is effectively wasted. This system clearly favours the second largest party or coalition, which in many cases has been right wing parties or
consolidation. Chile scores badly when held up against the basic definitional features of polyarchy outlined in chapter one.

The constitutional provision that allows for the designation of Senators, which embodies "Pinochet's vision of a 'technified democracy' in which the voice of experts would enjoy a privileged hearing," (Ensalaco 1994, 419) contradicts my definitional precept that in a democracy, officials should be elected. The impunity that the authoritarian elites have enjoyed in postauthoritarian Chile is a violation of another feature of polyarchy that I set out below: namely that there is equality for all before the rule of law. The democrats that negotiated the transition with the military concluded that the new order could only be preserved if it sacrificed this principle. Further, the role of the military in the postauthoritarian political arena contradicts my defining notion of democracy whereby civilian authorities have control over a non-deliberative military. Indeed, the military in Chile have successfully turned the non-deliberative military criteria for democracy on its head. Instead, the armed forces have managed to impose powerful checks on civilian authorities and political parties through the manipulative and ingenious combination of presidential domination (which I will outline in detail below), and electoral and institutional engineering.  

In entering the negotiating process with the outgoing regime, the Concertación were presented with a conundrum that underlines the basic strategic dilemma faced by pact-makers in terms of reconciling the tensions between the deepening and stabilising of democracy. Pinochet's civilian and military supporters were extremely wary of Chile's coalitions. For more details on how this system works, see Siavelis (2000), 31-35. This skewed electoral system is also analysed by Ensalaco (1994, 420-421).  

For an interesting discussion on constitutional engineering and the variables that can be manipulated to carry it out, see Sartori (1994).
democratic majority and were keen supporters of the neoliberal economic model. “The tacit acceptance of a regime transition by the political and economic Right was thus highly contingent on the maintenance of the ‘protections’ against the exercise of popular sovereignty that was built into Pinochet’s institutional formula” (Roberts 1998, 144).

Although the Concertación would ideally have chosen to put pressure on the Right to accept democratic reforms, they were aware that such a strategy risked provoking an outright abandonment of the democratic arena by the Right. The alternative, which the Concertación decided to pursue, was an attempt to build consensus for reforms via negotiations with the Right – despite the institutional constraints of this path providing very little democratic leverage in terms of eliciting concessions from Pinochet supporters.

The civilian government that came into power in March 1990 chose to prioritize democratic and macroeconomic stability rather than risk endangering the Right’s contingent acceptance of the democratization process. Perhaps understandably, stabilising, rather than deepening, of democracy was seen as the safer option. Structural and institutional constraints created by the Pinochet regime certainly imposed limitations on the options of civilian elites.

The 1980 Chilean Constitution

What were the more specific aspects of the 1980 Constitution that remained in place in the post-authoritarian government? What aspects of the constitution were the military unwilling to allow civilians to alter during the negotiated transition? A closer
look at the 1980 Constitution serves to portray the often overlooked and more subtle threats to Chilean democracy.

*Strong presidentialism* was the cornerstone of the military's political formula for Chile. During negotiations for the democratic transition, military leaders successfully argued that the positive economic legacy of the authoritarian government could be better guaranteed by handing over the political and economic administration of the country to a president with a wide range of powers. This, they believed, would prevent the Congress from falling victim to the excesses of populism and personalism.

One of the most important powers held by Chilean presidents lies in the wide range of areas in which they have exclusive initiatives. Article 62 of the constitution states: 

"[the] President of the Republic holds the exclusive initiative for proposals of law related to changes in the political or administrative division of the country, or to the financial or budgetary administration of the state." The same article goes on to specify in detail a series of areas in which the executive has exclusive initiatives, including "establishing, amending, granting or increasing remunerations, retirement payments, pensions," and "widows’ and orphans’ allowances" (No. 4); "establishing the norms and procedures applicable to collective bargaining and determining the cases where bargaining is not permitted" (No. 5); and "establishing or amending the norms on or regarding social security of both the public and the private sector" (No. 6). These areas of exclusive initiative expand the legislative power of the president compared with earlier Chilean constitutions of 1823, 1828, 1833, and 1925.

*(1999, 60-65)* suggests that many of the electoral democracies in the region are illiberal, which they see as being indicative of a more global undercurrent in the third wave of democratisation.
The president also has almost exclusive control of the budgetary process, leaving little scope for legislative input on fiscal matters. If the budget is not approved by congress within sixty days, the president’s proposals become law. This effectively gives the president decree powers over the imposing of the national budget. Military thinking behind this presidential power was that it would prevent budgetary deadlock and the emergence of clientelistic legislation. Significantly, this measure imposes important limitations on the scope of congressional power over national level policy matters, which are inevitably linked to monetary spending.

It is not unusual for Latin American presidents to have areas of exclusive initiative. However, most constitutions that have these mechanisms also have provisions for a low veto override threshold that serves to introduce a degree of legislative control over presidential actions – for example, the Colombian and Brazilian constitutions have absolute majority override provisions. Unlike these and other cases, in Chile the executive areas of exclusive initiative are not counterbalanced by a low threshold for veto overrides – a two-thirds majority is necessary in Chile to override a presidential veto.54

Another mechanism for executive strength and legislative weakness lies in the ability of the president to control the legislative process and agenda via the use of declared executive “urgencies”. The president may declare a proposal urgent in any one or all stages of its consideration, regardless of its governmental branch of origin. Congress then must act on the president’s declarations within thirty, ten or three days, depending on whether the proposal is designated as a “simple urgencia” (simple

53 All quotes from Constitution, see Constitución Política de la República de Chile, 1980. Available at: http://www.urich.edu/%7Eijpiones/confinder/Chile.htm (English); and http://www.georgetown.edu/LatAmerPolitical/Constitutions/Chile/chile97.html (Spanish).
urgency), a “suma urgencia” (high urgency), or for “discusión inmediata” (immediate discussion), respectively (Constitution 1980, Article 71). If a proposal is considered urgent, then consideration of all other legislative proposals is put on hold. Although designed as a measure to be employed only in extraordinary circumstances to enable the passage of key legislation, the use of this mechanism has become a standard operating procedure in order for presidents to accelerate the consideration and legislative passing of proposals. This gives a preponderance of weight to the legislative initiatives of the president and ensures that legislation proposed in the congress is often delayed – due to the fact that congress does not have a provision for declaring urgencies. Further presidential control of the legislature stems from his/her ability to call the legislature into extraordinary session. During these sessions, the congress can only consider proposals introduced by the executive (Constitution 1980, Article 52). Together, provisions allowing the president to declare urgencies and call extraordinary sessions give the executive highly effective agenda-setting powers. Siavelis is correct to argue that although the Aylwin and Frei administration used the “urgency” and “extraordinary session” powers in a responsible and flexible manner, there is nothing to stop future presidents from abusing them (2000, 19).

The strength of the Chilean president is another feature of the postauthoritarian political landscape that violates basic notions of polyarchy. Liberty, as I, echoing

---

54 For a fuller discussion of the override provision for areas of exclusive executive initiative in different Latin American countries, see Mainwaring and Shugart (1997, introduction).
55 This mechanism was used at some point in the approval process in 59% of the proposals that were sent to congress during the Aylwin administration (Siavelis 2000, 18). One deputy, Deputy Juan Antonio Coloma, interviewed by Siavelis, went so far as to say that the use of the presidential urgency had become the “forma permanente de legislar en Chile” (the permanent way of legislating in Chile), see Siavelis (2000, 18).
56 In each of the four congressional periods of the Aylwin administration and during the first four years of Frei’s government, the congress was called into extraordinary session by the president.
Montesquieu, said earlier, may be threatened when power is centralised in the executive branch of government. Siavelis makes the persuasive argument that it is Chile’s strong presidentialism and weak congress that provide the most important obstacles to long term democratic consolidation. His work provides numerous additional examples of presidential power in Chile. Although the administrations of Aylwin and Frei were characterised by excellent relations between the branches of government, there is no guarantee that this will always be the case. Because of the strong presidential powers that I have mentioned above, it is perfectly reasonable to suggest that a future president may exploit the system at his/her disposal to rule in a pseudo-authoritarian manner. Siavelis argues that the success of the first two presidents in avoiding executive/legislative conflict and deadlock has been more of a result of the context and nature of the pacted transition, rather than a result of the democratic nature of Chile’s institutions. In a way, the context of the pact provided a substitute, albeit a far less effective substitute, for

57 Other constitutional sources of power held by the president can be added to what has already been presented. The executive can declare states of Constitutional exception, emergency, and catastrophe without congressional approval (Constitution 1980, Article 40). As in most presidential systems, the Chilean president has the right to veto legislation. The Chilean president also has powers which extend to the actual designation of a part of the assembly and the appointment of other authorities. In addition to the thirty-eight elected members of the Senate, there are also nine appointed senators, of which two are appointed by the president. However, due to the fact that the president also influences the appointment of, and in some cases, names the officials who fill the institutions that designate the remaining appointed senators, executive influence is more far reaching than it may appear. The president also names the comptroller general of the republic, the commanders of the armed forces, and the judges of the Supreme and Appellate Courts. This differs from the 1925 constitution where diplomatic appointments by the president were subject to senatorial approval – in the 1980 constitution, the role of congress in the appointment of diplomatic posts was removed. Also, the range of the president’s implied constitutional powers is fairly broad in Chile. The president has the right to “exercise statutory authority in all those matters which are not of a legal nature, without prejudice to the power to issue other regulations, decrees or instructions which he may deem appropriate for the enforcement of the law” (Article 32, No. 8). Siavelis (2000, 20-25) outlines non-statutory sources of presidential power which although not specifically outlined in the 1980 Constitution, “do result from the overall framework of presidentialism set out in the document and grant the president increased influence and lawmaking capabilities” (20).

58 Riquelme (1999, 33) argues that “The liberal principle of checks and balances has been distorted in Chile, establishing in practice a form of differentiated citizenship, with special rights of representation for the social and political sectors which monopolized power during the military regime.”
institutionalised checks and balances between government branches. As the negotiated pact fades in the memory, the potential is there, due to the authoritarian enclaves still present in Chile, for conflict between branches of government, social polarisation and regression in basic features of polyarchy. Indeed, Siavelis points to signs of this conflict already rearing their heads in today’s Chile. This reality would surely not have been predicted by reading the work of pact theorists. For instance, Gretchen Casper and Michelle Taylor (1996, 14) make the claim that countries, due to the divisions within them, which adopt “intense negotiations” during the transition process are more likely to make progress toward democratic consolidation. Democracy is more likely when negotiations during the transition process are difficult rather than easy. Thus, in the Chilean example, major divisions at elite and mass levels allowed for some significant compromises among elites that have helped Chile move toward democratic consolidation, and serve as a model for other countries to follow.

Signs of Conflict in Chile

This section will point to a variety of signs in contemporary Chile that can be examined to suggest that executive/legislative conflict in Chile is perhaps not too far away. Given the fading of the special context of the transition, and a return to what could be labeled the “normalisation” of political interaction, demands for a more equitable

---

59 Despite my emphasising the strength of the presidency, it would be wrong to ignore the role of the legislature in the Chilean political process. Article 48 of the constitution does say that an exclusive attribute of the Chamber of Deputies is to oversee executive actions. The Chamber of Deputies can exercise its oversight function by 1) forming commissions to investigate specific acts; 2) submitting oficios (official requests for information) to the executive branch; and 3) the initiation of constitutional accusations against the president, ministers of state, or other officials. Siavelis (2000) argues that, in the years since the transition, the Congress has not been able to effectively carry out its oversight functions, undermining it role as a check on presidential authority (see, 26-31).
sharing of the economic success\textsuperscript{61} of the nation are bound to grow more vocal. In my opinion there are still important divisions within Chilean society, but these sources of conflict have been masked by the recent transitional context. While I am not suggesting that the factors to be outlined below are extreme divisions likely to lead to the kind of brutal dictatorship Chile experienced in the 1970s and 1980s, it seems that they could further distort basic features of polyarchy in Chile and undermine any chance of a better quality of democracy emerging in the future. They point to qualitative difficulties within Chilean democracy and to the difficulty in improving the functioning of the system within the confines of a negotiated pact that agreed to maintain the authoritarian enclaves of the 1980 Constitution. They also present channels that could potentially be manipulated by future presidents who once elected, proceed to distort polyarchy, perhaps with widespread public support. Again, these are factors that were not accounted for in the pacts literature.

The first sign of potential conflict that one can use as evidence of disagreement and the continued salience of politics in Chile, lies in the significant role that class conflict still plays. A study, cited in Siavelis (2000), aimed at measuring the type and extent of tension between different groups in Chilean society, found that “conflict between the rich and poor” was considered the most significant in a list of ten categories. In fact, 55.9\% of those surveyed in 1991 rated this as a “gran conflicto” (a large or important conflict), and in 1992 that number had grown to 58.9\%. This category polled

\textsuperscript{60} See especially Casper and Taylor (1996, chapter 6). Here Chile is held up as an example of an “intense negotiation path” to a consolidating democracy.

\textsuperscript{61} Chile’s 1998 GDP was US\$74.3 billion, ranking it 40\textsuperscript{th} in the World. Yet wealth in Chile is very unevenly distributed, with the richest tenth of the population receiving 46.1\% of the national income and the poorest tenth receiving just 1.4\% of the national income. From Latin American Bureau (LAB) website. Available at: http://www.lab.org.uk/countryprofiles/index.html
higher than "conflict between the government and armed forces," which received 44.3% and 51.6% in these two years respectively.\(^{62}\)

Certainly, it appears that the likely reason behind these results is the growing economic disparity between rich and poor. A recent World Bank report, for example, found that within South America, income inequalities in Chile are second only to Brazil.\(^{63}\) Economic restructuring over the last twenty-five\(^{64}\) years has transferred national wealth and power to a small group of Chilean grupos (conglomerates) who dominate the economy. The top six grupos (as of 1997) own more than 20% of Chile's capital stock, and from 1990 to 1995, the total assets of the top six grupos grew from an equivalent of 54.2% of GDP to 55.8% (Rosenfeld and Marre 1997). Poverty in Chile has also risen. In 1994, 28.4% of Chileans lived in poverty, compared with 17% in 1970.\(^{65}\) In a 1998 address to the Organization of American States (OAS), Jose Antonio Ocampo, Executive Secretary of the UN's Economic Commission for Latin America and the Caribbean, called Chile's income distribution problem "quite intractable" (Ellison 1998).

Additionally, it is common for Chileans of all classes to complain about crime, which has increased quite notably since the dictatorship ended (Ellison 1998).

---

62 This data is quoted in Siavelis (2000, 98-100). Participants in the survey were asked to respond to the following statement: "Some people believe that in Chile there exist diverse types of conflict between groups; others believe that these conflicts are less important or do not exist. For each case that I give you, tell me if you believe that today in Chile there exists a great conflict, a lesser conflict, or if no conflict exists". From Participa, Estudio sobre la democracia y participación política, (Santiago: Participa, 1993), 36.

63 From LAB website. Available at: http://www.lab.org.uk/countryprofiles/index.html

64 Neoliberal economic reforms initiated by the Pinochet regime under the influence of the Chicago school economists resulted in extremely uneven distributions of wealth. For example, in the years from 1978-1988, the income of the richest 10% of the population grew by 83%. From LAB website, available at: http://www.lab.org.uk/countryprofiles/index.html It is widely accepted that neoliberal economic policies (initiated under Pinochet) have continued in the postauthoritarian era. See, for example, Larrain and Labán, (1997) who, in analysis of Chile's economic policies of the last twenty years, argue that there has been a great deal of continuity in the post transition period. Larrain and Labán paper available at: http://www.hiiid.harvard.edu/pub/pdfs/612.pdf
This evidence suggests that the Chilean economy does not benefit everyone. Perhaps it might be said that Chile’s highly praised “jaguar” economy is actually less like the “wild cat” and more like the British car – a symbol of luxury and unreliability. “In 1970, Chile was well known for its public health and education systems, had a substantial professional middle class and a stable working class….But free-market reforms were used to radically concentrate wealth and power in the hands of a few, destroy labor’s bargaining power by undermining its base in traditional industry and the state, and strip away existing social guarantees” (Rosenfeld and Marre 1997).

Perhaps the most damaging consequence of these economic disparities is that Chileans, once some of the regions most faithful democrats, have largely lost their faith in the system. A major survey in 1996 by respected polling firm, Latinobarómetro, found that 35% of Chileans answered “no” when asked: “Would you be ready to defend democracy if it were threatened?” This was the worst showing out of 17 nations where the question was asked (Ellison 1998). The most recent 2001 Latinobarómetro survey found that only 45% of Chileans considered democracy to be preferable to any other kind of government, down from a high of 61% in 1997. This figure ranked Chile in a mere 9th position out of the 17 Latin American nations surveyed. Chile’s percentage is fairly low considering that the level of satisfaction is about the same as nations with much less favourable economic and political situations.67 The region wide average was 47%. The survey also found that 19% of Chileans believed that an authoritarian government was

---

65 Data quoted in Rosenfeld and Marre (1997). 1994 data, from the 1994 Survey of National Socioeconomic Characterization (Encuesta CASEN), (Santiago: Mideplan, 1995); 1970 data from the UN Economic Committee on Latin America (ECLA), Division of Statistics and Projections.
67 Argentina, Bolivia, Costa Rica, Honduras, Mexico, Peru, Uruguay and Venezuela all had rates of satisfaction higher than Chile.
preferable to a democratic one under certain circumstances, again placing Chile in 9th position.

These sentiments are manifested in a startling drop in electoral participation in Chile. In the December 1997 parliamentary elections, the sum of non-registered voters, abstainers and “voters for nobody” came to about 40% of those eligible to vote68 (Riquelme 1999, 31).

In addition to popular dissatisfaction and disillusionment with Chilean democracy, one can point to further signs of conflict that have not been put to rest via Chile’s pacted transition. Additional signs of conflict come from unresolved political issues that continue to haunt democratic leaders. In May 1995, a severe political crisis hit Chile over the conviction of General Manuel Contreras and Brigadier General Pedro Espinoza. This event created an impasse between civilian leaders and military authorities and served as a stark reminder that the authoritarian period in Chilean history had not been laid to rest. Contreras was convicted for his role in the Washington D.C. bombing assassination of former Foreign Minister Orlando Letelier in 1976, and was eventually jailed after several months of stalemate during which the General refused to submit to civilian authorities. Contreras commanded the full backing of the army and Pinochet who, in very strong terms, reminded Chile’s democratically elected authorities that “our people remain members of our institution forever” and “the army never abandons one of its men who is in trouble.”69 This event highlighted the unresolved political questions facing Chilean democrats and the prickly question of how far civilians should go in

---

68 Riquelme (1999) traces the decline in electoral participation since the transition.
finding justice in human rights cases (not subject to the 1978 military proclaimed amnesty) involving the previous regime.

Additionally, although the question of ideology has narrowed in Chilean politics, both within parties (Roberts 1998, see especially chapter 2) and among the electorate, party attachments remain quite strong in Chile. Indeed Samuel Valenzuela and Timothy Scully (1997) argue that there is a great deal of continuity in the electoral preferences of Chileans both before and after authoritarian rule. They contend that the traditional pattern in Chilean politics of *tres tercios* (three thirds)\(^70\) endures. It appears that although the meaning of “Left” and “Right” in Chile has undoubtedly changed, the terms remain valid in categorising the continuing fundamental divisions among Chilean voters. Arturo Fontaine (1995) argues that there are three basic ways in which people’s political preferences can be divided. One is socioeconomic (development versus equity), the second is political (order versus democracy and civil rights), and thirdly there is historic (Pinochet versus Salvador Allende). He presents evidence of links between a person’s ideological self-placement (Left, Right or Centre) and the side that they come down on in expressing their views on a number of controversial questions. For each question, people identifying themselves as supporters of parties of the Right expressed support for the first item in each of the above dichotomies. People on the Left, chose the latter, and people in the Centre expressed an opinion somewhere in between. Those who describe themselves as identifying with the Left, expressed much greater levels of support for state attempts to promote equality and ensure individual rights. They were much less concerned with the issue of public order, and more likely to have a favourable opinion of the Allende

\(^{70}\) *Tres-tercios* refers to the three way competition that exists in Chile between the Centre, the Right and the Left.
administration and a negative opinion of the Pinochet regime. Those on the Right, believed economic development to be more important than equality, and were more preoccupied with order than human rights. They favoured Pinochet’s rule and had negative associations with Allende’s government. People placing themselves in the Centre, had a mixed evaluation of both the Pinochet and Allende Administrations and expressed concerns that were somewhere between those expressed on the Left and Right.71

Fontaine's data suggests that quite distinctive political sectors remain in Chile, with programmatic, indeed ideological differences between them. His central contention is that when it comes to certain controversial issues, partisan differences remain, and are contained within the traditional notions of Left, Right and Centre – furthermore, the people continue to define themselves in these terms.

**Conclusion**

Profound economic and distributive difficulties still need to be tackled in Chile. The hope for many of the elites at the negotiation tables in the late 1980s would have been that the “forced consensus” would help brush divisions under the carpet. But, the reality is that the consensus in Chile is much thinner than analysts writing in the wake of the pact suggested.72 Although the context of the transition served to band-aid some of the wounds of the past, the lack of consensus cannot be ignored forever in a complex society, composed of diverse groups with distinct interests and demands. Chile remains a

---

71 The findings in Fontaine’s (1995) work are quoted in Siavelis (2000, 101).
72 Convinced by the scholarly consensus that pacts were a beneficial route to stable democracy, many works written in the wake of Chile’s transition lauded it as an exemplary case for other nations to follow.
society that is divided politically, both at an elite and at a mass level. Justice and impunity along with continued social and economic inequality are issues that still limit the effectiveness and meaning of democracy in Chile for a large number of its people.

Perhaps the most dramatic manifestation of the divisions facing Chilean society came in the form of the extra-territorial arrest of Augusto Pinochet in the United Kingdom in October 1998. It is to this specific case, which has done more than anything else to affect the internal structure of Chile since the transition, that the next chapter will turn. The Pinochet saga has highlighted the most important and difficult issue facing Chile’s democracy: how to deal with the crimes of the previous regime. Despite the attempt of the pacted transition to close this chapter of Chilean history, international events and the unmet yet increasingly vocalised demands of the thousands of Chileans adversely affected by Pinochet’s brutal regime, ensure that countless pages have yet to be written on this damaging period of Chile’s history.

They seem to overestimate the degree of consensus within Chilean society. See Tulchin and Varas (1991), Boeninger (1991) and Cavarozzi (1992).
CHAPTER 4: CHANGES IN THE INTERNATIONAL CONTEXT: THE PINOCHET SAGA AND THE COLLAPSE OF PACTS

Writing over twenty-five years after the publication of "Transitions to Democracy", Rustow acknowledged an important omission from his clairvoyant article of 1970: namely the importance of the international context.

It certainly remains true that domestic factors provide the crucial setting for the emergence of democracy and that democratization is a political rather than an economic or psychological process. Nevertheless, a quarter century later, I would emphasize the interaction between economic and political factors and also the importance of international relations in making 'the world safer for democracy,' as Woodrow Wilson put it (in Anderson 1999, 13).

The Pinochet case highlights the flaw I mentioned in Chapter two with regard to the pacts literature – its failure to account for the phenomenon of international level change having an impact at the national level. Given the context in which he was writing, it is understandable that Rustow (1970) would not place too great an emphasis on the importance of international level pressures for national democratic transitions. Yet, later scholarship on the phenomenon of pacts has been conspicuous for its non-recognition of international level influences on negotiated transitions (O’Donnell and Schmitter 1986, Karl 1990, Higley and Gunther 1992, Casper and Taylor 1996). Looking to the recent unraveling of pacts in Latin America provides evidence that international level change has been a crucial factor in altering the domestic conditions for democracy.

It was the arrest of Pinochet in a foreign land that fundamentally altered the internal structure of Chile’s politics. It ruptured the pact made between civilian democrats and the military, altered legal structures within Chile, and highlighted the country’s skewed democracy and consequently, forced increased pressure for further constitutional
changes. International level change also contributed to the collapse of the Venezuelan and Colombian pacts. They had been systems of rule that shared power between the two dominant parties in each country at the expense of Communists who were excluded from the political arena. Yet in the post Cold War context, a US foreign policy built on anti-communism was no longer relevant. Consequently, the Venezuelan and Colombian elites started to lose national level support and justification for maintaining their oligarchical and exclusionary form of democracy. This study will now look specifically to the case of Pinochet, and its implications for pacts.

To briefly reiterate what was noted in chapter two, the terms of the pact negotiated between the Pinochet regime and the Concertación, established that democratic procedures, like elections, would become “the only game in town.” In return, the Right managed to maintain guarantees for impunity provisions for human rights crimes, as well as the preservation, minus 54 reforms, of the 1980 Constitution. Pinochet remained Commander in Chief of the armed forces, and peacefully moved out of the presidential palace to another office in the Ministry of Defense. These new rules became the guide for Chilean democracy. They were rules that were established in an international environment where the Cold War, although in its final days, was still a reality. This international climate strengthened Pinochet’s hand in the negotiation process after he lost the plebiscite of 1988. He successfully made the case that attempts to prosecute military personnel for “political reasons” (Henriquez 1999) risked returning

---

73 During the Cold War the ideologically polarised world did little to foster global democracy. Major powers were more likely to throw their support behind non-democratic, yet loyal regimes.

74 In the late 1980s and throughout the 1990s, the US have reversed their previous Latin American policy – whereby they accepted and even encouraged military regimes that repressed potential communist insurgencies. With the collapse of the Soviet Union, the US felt able to promote democracy with confidence that the resultant governments would not pursue economic policies that would go against US interests.
Chile to what he considered the polarised chaos of the early 1970s. A speech made by the General in the wake of the pacted transition to civilian government made clear that he was still thinking in terms of ideological warfare: the nation versus Marxism. Anti-communist rhetoric remained part of the military justification for their amnesties, with Pinochet claiming that the “general law of amnesty” should be “rigorously” upheld to avoid any form of “class struggle” (Henriquez 1999). After the pact was established, Pinochet clearly felt secure. He thought that he had negotiated an air-tight agreement that would allow him to live out the rest of his days in peace.

Yet, as recent events have shown, the rules negotiated were not so rigid as to prevent their adjustment over time. Scholars who hailed the “successful” Chilean transition as being an exemplary case for others to emulate, failed to recognise that pacts may not be permanent. The elites who negotiated what they considered “case closed” amnesties, designed for “perpetuity,” underestimated the power of changing international law and global mobility around the issue of humanitarian justice. They overestimated the inviolability of sovereignty and non-intervention in other states’ affairs. The changing post Cold War international environment has altered the terms of Chile’s Cold War driven pact.

On October 16, 1998, General Pinochet was arrested in London by the Metropolitan Police at the request of Spanish Magistrate, Baltasar Garzón. This event represents the first serious attempt anywhere in the world to bring to justice a former head of state for crimes allegedly committed in the country of which he was head of state. Pinochet was arrested on the basis of two provisional arrest warrants issued by UK
magistrates, at the request of Spanish courts,\(^75\) pursuant to the European Convention on Extradition.\(^76\) The former General was accused of having authorised (or at least knowingly permitted) the torture, disappearance, and taking hostage of thousands of people. According to the second warrant, his victims included not only Chilean citizens, but also citizens of other countries, including the United Kingdom and Spain.\(^77\) Thus began a saga that will have profound implications for the future, not only of Chile itself, but of numerous legal areas, including international criminal law, human rights, state immunity, jurisdiction, extradition, and the relationship between international law and domestic legal systems.\(^78\)

*Pinochet in International Context*

The arrest of Pinochet in Britain would have been inconceivable during the Cold War, but was able to occur due to changes in the international environment that now deem arguments of “noninterference” to be less compelling. I would argue that there has been a gradual shift in this direction going back to the late 1940s, but that the overarching

\(^{75}\) The first provisional warrant had been issued, on the basis of the 1989 Extradition Act, by Nicholas Evans, a Metropolitan Stipendiary Magistrate on 16 October, 1998. The allegations concerned the murder of Spanish citizens in Chile, offences that were within the jurisdiction of Spain. The second provisional arrest warrant was issued by another Stipendiary Magistrate, Ronald Bartle. This time more offences were alleged, including conspiracy to commit acts of torture, hostage-taking and conspiracy to murder.


\(^{77}\) His crimes were alleged to have formed part of an international conspiracy to track down and murder opponents of his military regime in Chile, the United States, and elsewhere. In his arrest warrant, Garzón asserted that Pinochet was “in charge of creating an international organization that carried out a systematic plan of illegal detentions, abductions, tortures, murders and/or disappearances of peoples from Argentina, Spain, the United Kingdom, the United States, Chile and other countries...in order to exterminate political opposition.” From, *Washington Times*, 11 December 1998, sec A, p17, “Judge in Spain Charges Pinochet, Seeks Assets Frozen”.

\(^{78}\) For a more in depth legal analysis than this study will provide, see generally Bianchi (1999) and Byers (1999).
strategic constraints of the Cold War era prevented any broad movement away from
traditional notions of sovereignty protection.

Since the 1648 Treaty of Westphalia, international relations have been organised
around the principle that states are sovereign within the international structure and that
there is no higher authority. The principle of state sovereignty is about non-intervention
in the affairs of other states. Consequently, the idea that a former head of state could be
placed before the courts of another state and held to task for violations of human rights
was almost inconceivable. Because the worst crimes against humanity were often
committed (or at least permitted) by heads of state, or other regime members attempting
to quash opposition, the actual enforcement of international criminal law was
problematic.

This has changed somewhat since the Second World War. In the post war years,
individuals, NGOs and other international bodies have emerged as international actors,
participating in an international discourse, and gaining important rights, such as the right
of individuals not to be tortured. Since 1945, international law has shifted away from its
19th century role of being a "law between states only and exclusively" (Bull 1977, 145). It
is now widely held that individuals are subjects of international law, on the evidence of

79 The Westphalia settlement was based upon a recognition of, and respect for, differences among states.
The fundamental principle rule of Westphalia, *cujus regio, ejus religio* (where you live you adopt the
religion in force), allows for that. Each sovereign was to determine the religious affiliation of his subjects
free from external constraints from whatever source. The principle of sovereignty, also enunciated in the
Westphalia settlement, meant that the domestic arrangements of states were no longer to be the subject of
judgement, interference, or coercion by any other state or any trans-state authority, like the Holy Roman
Empire or the Pope.

80 On the right not to be tortured, see the “International Covenant on Civil and Political Rights”, December
16, 1966, article 7; also “Declaration on the Protection of All Persons from Being Subjected to Torture and
Other Cruel, Inhumane or Degrading Treatment or Punishment”, General Assembly Resolution 3452, UN
such charters as the Nuremberg$^{81}$ and Tokyo War Crimes Tribunals$^{82}$, the Universal Declaration of Human Rights (UNDHR) of 1948, the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights of 1966, and the European Convention on Human Rights of 1950. In addition, the 1984 UN Torture Convention – ratified by 112 countries, including Chile, Spain, and the United Kingdom – requires that states try or extradite alleged torturers found in their territories. The status of subjects of international law has also been given by many authorities to groups other than states: the United Nations and other universal or near-universal intergovernmental organisations, regional intergovernmental organisations, non-governmental organisations and multinational corporations.

Despite these legal mechanisms introduced after 1945, the post war international context prevented their broad implementation. Few states had the courage to put lofty legal principles like the 1984 Torture Convention into practise. Until the waning of the Cold War in the late 1980s, the international normative consensus around human rights was thin. Certainly, human rights were on the international agenda, but they were largely submerged into Cold War ideological rivalry. Soviet bloc states, along with repressive third world regimes, formally endorsed internationally recognised human rights, but were

$^{81}$ A well known quote from the Nuremberg judgement provides evidence of individuals being held accountable to international laws. “The principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings...individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law” (22 Trial of the Major War Criminals Before the International Military Tribunal (1949) 466).

$^{82}$ The Nuremberg and Tokyo War Crimes Tribunal together convicted more than 3,600 German and Japanese officials and executed 1,019 of them. From Amstutz (1999, p318). Although, it is important to note that Tokyo and Nuremberg left little by way of sentencing guidelines applicable to cases of war crimes and crimes against humanity. Thus there was little by way of precedents to assist the creation of the international tribunals for Rwanda and the former Yugoslavia.
able to frequently violate them with impunity. Instead of advancing human rights concerns, third world states advanced claims for the priority of economic and social rights, self-determination or development, and did nothing to discourage the neglect of human rights causes. This was acceptable in an international context that deemed the principle of “non-intervention” to be sacrosanct. Third world states emphasised the inviolability of sovereignty and the primacy of the norm that states ought to be immune from interference in their affairs. When great powers did intervene, as in the Soviet invasion of Czechoslovakia in 1968, or in the US involvement in Vietnam, care was taken to provide a covering rationale by arguing that great power intervention had been invited by some legitimate national authority.

With the collapse of the Soviet Union, the changed international power balance allowed human rights to come to the fore. In recent years, the principle that there is no immunity for any individual with respect to crimes under international law has been incorporated into the statutes and decisions of the International Criminal Tribunals for the former Yugoslavia and Rwanda. Moreover, in July 1998, 120 states adopted the Rome Statute of the International Criminal Court with jurisdiction over war crimes and crimes against humanity, including those committed during peacetime (See von Hebel (1999), Lee (1999)). The Rome Statute explicitly provides that heads of state have no immunity

---

83 The International Criminal Tribunal for the former Yugoslavia (ICTY) in Furundzija held that the principle that individuals are personally responsible for acts of torture, whatever their official position, even if they are heads of state or government ministers, is “indisputably declaratory of customary international law”. Prosecutor v. Anto Furundzija, supra note 32, at paragraph 140.


85 Seven nations voted against the Rome Statute. Among the nations opposing the Statute were Iraq, Libya and the United States. The ICC will come into being when 60 nations formally ratify the treaty, a process that may take years.
with respect to crimes under international law. These are all indicators of the extent and
direction that the changes in international law have taken: changes that have somewhat
eroded traditional notions of state sovereignty. The notion of human rights protection has
penetrated contemporary international society with sufficient depth that standing by in
the face of gross human rights atrocities seems increasingly unacceptable to a growing
number of actors.

There is no shortage, therefore, of substantive content to human rights and
international criminal law, nor is most of the substance new. However, the UNDHR and
the subsequent human rights treaties failed to provide any mechanism for the
international prosecution of those accused of crimes under international law.86 Until
recently, national courts have provided the only enforcement power over international
criminal law. Some human rights treaties stated that the violation of certain crimes
allowed for the “universal jurisdiction” on the part of national courts, and universal
jurisdiction over at least some crimes is largely regarded as existing under customary
international law. Several countries have implemented these international enforcement
powers into their national legal systems, as the United Kingdom did with regard to torture
in its Criminal Justice Act of 1988. Chile also ratified the Torture Convention in 1988.87

86 A number of relatively effectual treaty-based mechanisms do exist, including the Optional Protocol to the
International Covenant on Civil and Political Rights, UN OPI/598 (March, 1976), the European Court of
Human Rights and the Inter-American Commission and Court of Human Rights. Having said that, these
mechanisms only provide for complaints against states, and not for the prosecution of individuals. Also, the
application of these mechanisms all have a limited scope, whether geographically or in terms of the refusal
of many states to ratify their constitutive treaties.

87 Given what has recently happened to Pinochet, a salient question to ask regarding Chile’s 1988
ratification of the Torture Convention is: why did Chile ratify this convention when they were continuing to
violate it? I have searched in vain for evidence of a conversation, at the time of the transition to democracy,
regarding the potential vulnerability of Chile’s torturing elites to the implications of this convention. The
conclusion I have derived from the lack of evidence is simply that human rights abusing elites from the
Pinochet regime, including the General himself, never foresaw a situation arising where they would be
vulnerable to any kind of legal trouble. Confident in the unquestionable nature of Westphalian sovereignty
norms, and given the Cold War context of the late 1980s, the Pinochet government probably never
But most national courts have been reluctant to exercise this universal jurisdiction, other than to war crimes committed during WWII. Consequently, many victims of serious human rights violations have been left with little more than empty promises, and scant protection in the face of military brutality.

The most obvious factor that explains the reluctance of national courts to apply this universal jurisdiction lies in the notion of sovereignty. According to society of states sovereignty norms, whose foundations were laid at Westphalia, non-intervention in the affairs of other states is the norm and it is acts of intervention in other states that must be justified. In short, the notion that if states mind their own business, they have the right to be left alone: laissez faire. The idea of national courts having the right to intervene in another state’s affairs in the wake of human rights violations is subversive to the whole principle that man should be organised as a society of sovereign states. As Hedley Bull puts it: “if the rights of each man can be asserted on the world political stage over and against the claims of his state,...then the position of the state as a body sovereign over its citizens, and entitled to command their obedience, has been subject to challenge, and the structure of the society of sovereign states has been placed in jeopardy. The way is left open for the subversion of the society of sovereign states on behalf of the alternative organising principle of a cosmopolitan community” (Bull 1977, 152). Since international law is about the way in which nations generally behave towards one another, the notion of sovereign immunity is a rule of international law par excellence.

Yet several interventions at the end of the twentieth century indicate that the grounds of legitimate and lawful intervention in sovereign states is being expended. What imagined a situation where national courts would be willing to exercise universal jurisdiction over the crime of torture within Chile. Having negotiated a domestic amnesty, elites clearly were not concerned that
is more, these interventions are being justified, the question is: should they be? There is a large body of international law, aided by the conventions of the international society of states, that concludes that international communities do not have the right to intervene, that sovereignty is inviolable and not open to qualification. At the same time, there are a number of precedents (like, among others, the above mentioned Tribunals created for crimes committed in the sovereign states of Rwanda and Yugoslavia) which suggest otherwise, and point to an erosion of sovereignty which is being accepted without vigorous protest. James Rosenau makes the argument that irrespective of the prevailing legal order, the odds are against international law retaining its viability with respect to the prerogatives of statehood. "The legal status of sovereignty rights is bound to be subverted by the transformative dynamic currently at work in world politics." The sensitivity to human rights concerns that we have witnessed more and more of in the 1990s, according to Rosenau, is not confined to publics and non-governmental organisations. "So many governments have evidenced a readiness to adhere to minimal standards of human rights that the emergent norms in this area come close to having the clout and prestige of law" (Rosenau 1995, 221).

If world politics operates with a doctrine of humanitarian intervention, then states and their leaders are no longer protected, normatively speaking, by their sovereignty. International society, to borrow Robert Jackson’s term, would be a universitas in that regard (2000, 251). Post Cold War experiences offer concrete evidence that in certain circumstances, humanitarian considerations come before sovereign rights in the justification of intervention in a state’s affairs. One can point to the arrest of Pinochet, the international legal mechanisms would challenge them.
prosecution of Hissein Habre, the “African Pinochet”\(^\text{88}\), and the current extradition of Milosevic in the aftermath of the UN intervention in Kosovo as indicative of an international wake-up call for tyrants and victims alike. It seems that citizens, for so long trampled upon by blood-thirsty dictators, are achieving a new standing in contemporary international society. Stemming from this emerging reality, a salient question will be addressed in the following chapter: is there still a need for pacts protecting the “vital interests” of outgoing autocrats?

**The Arrest of Pinochet**

On October 16 1998, as Pinochet was recovering from back surgery in a London hospital, he was roused from his sleep by a Scotland Yard official who declared the surprisingly simple terms of the arrest warrant: it alleged that Pinochet, between 11 September 1973 and 31 December 1983 “did murder Spanish citizens in Chile within the jurisdiction of the government of Spain” (Brody 1999, 18-19). It has been reported that at this point, Pinochet’s mind sunk into a haze, and that for several days he could not comprehend what was happening to him. Pinochet was clearly bemused. For so long he had seen everything from the lofty heights of a great statesman who believes himself to be beyond the reach of human justice. It was he, after all, who had established the rules for what many pundits were hailing as “the exemplary Chilean transition.” It was he who had completely transformed Chile’s economic system, leaving an imprint on every aspect of Chilean life. Driven by a false sense of his own importance and his belief that he was

\(^{88}\text{In a case largely undocumented in western media, in February 2000, a Senegalese court indicted Chad’s exiled former dictator, Hissein Habre, on torture charges and placed him under house arrest. It was the first time that an African had been charged with atrocities by the court of another African country. Habre ruled Chad from 1982 until he was deposed in 1990 by Idriss Deby and fled to Senegal. Since Habre’s fall,}\)
immune from arrest due to the impenetrable nature of state sovereignty and non-intervention, he ignored advice that a determined Spanish judge was investigating humanitarian crimes in Chile and Argentina, and that according to extant rules, he might be vulnerable to arrest. He only wanted to come to England for a bit of surgery, a shop around Harrods and a nice chat with his old and ever grateful friend, Mrs Thatcher. By travelling to Britain, Pinochet showed that he did not foresee a situation where the amnesty he had negotiated in Chile could be challenged. He made a serious error of judgement.

The second arrest warrant issued against Pinochet included more offences, for example, conspiracy to commit torture, hostage taking and conspiracy to murder. Some of the crimes, notably the torture, were “crimes under international law” – perpetrators of which may be prosecuted by any state regardless of their nationality, the nationality of their victims, or the country in which the crime was committed. For this reason, at the time of his arrest, there appeared to be no obstacle to his extradition nor any apparent impediment to his prosecution in the UK. However, Pinochet’s lawyers argued that, as Chilean Head of State during the period in which most of the alleged crimes were committed, Pinochet was immune from the jurisdiction of the British courts, including its extradition procedures. By doing so, the lawyers forced British judges to choose, in the

Chadians have sought to bring him to justice. It was the Pinochet precedent that motivated the eventual indictment. For more of the details of this case, see: http://www.hrw.org/campaigns/chile98/precedent.htm

Thatcher remains grateful for Pinochet’s help to Britain during the Falklands war with Argentina; he had saved gallons of British blood, even as Chilean blood spilled freely to save the nation from Communism. Thatcher was quoted as saying, Chile had been a “good friend to Britain”, giving it invaluable help in the Falklands War against Argentina in 1982. “Pinochet had quietly authorised the Royal Air Force to have landing rights at a number of Chilean airfields during the conflict. British troops operated from Chilean territory in Tierra del Fuego and the intelligence given to the British from the Chilean radars – which in any event constantly monitor Argentine air force bases – was a great asset. It was even said by some military men that the largest single loss of British troops, when Argentine air force Mirages and Skyhawks raided Bluff Cove on 8 June 1982, had been due to the fact that Chilean radar coverage had momentarily faltered” (from O’Shaughnessy 2000, 4).
most direct way, between two competing views of the international legal order in the society of states. On the one hand, there was the traditional idea that only states can be relevant actors in international law, and that a sovereign head of state could do what he liked and rely, for the rest of his life, on the fact that he had immunity before any national court of law. On the other hand, there is the international law that has been evolving since WWII that posits that the international community comprises not only of states, but also of individuals, peoples, intergovernmental organisations, NGOs and corporations. In this latter view, former heads of state are not immune from claims brought by, or in relation to, crimes committed on innocent victims.

The final decision of the House of Lords on 24 March 1999\(^{90}\) ruled that Pinochet should be extradited to Spain to stand trial.\(^{91}\) The ruling of the Lords, however, never came into force as Pinochet was considered too ill to be extradited to stand trial in Spain.\(^{92}\) Nevertheless, it appears that the case will have a legacy of vital significance for Chilean national politics. Prior to the General’s arrest, elites from Pinochet’s regime had been legally untouchable in Chile due to the institutional constraints they had erected. There have already been signs that the General’s arrest in London has slowly altered this long-standing situation. It also appears that the case will have an impact on politics at an

---

\(^{90}\) An earlier decision on 25 November 1998 had also ruled that Pinochet should be extradited to Spain to stand trial. However, on 17 December 1998, in an unprecedented move, Britain’s highest court set aside its own ruling against General Pinochet because one of the judges, Lord Justice Leonard Hoffman, failed to disclose his ties to the human rights organisation Amnesty International. Citing an appearance of bias, Pinochet’s lawyers argued that Lord Hoffman should not have been allowed to sit in judgement on the case because Hoffman was a volunteer fundraiser for the organisation, which had appeared in court during the oral arguments before the Law Lords. Hoffman had voted with the majority in the Lords’ 3-2 ruling on November 25, holding that Pinochet did not enjoy immunity.

\(^{91}\) A reconstituted judicial panel of the House of Lords, in a 6-1 judgement, ruled that Pinochet was not entitled to immunity from prosecution as a former head of state. This ruling cleared the way for the General to be extradited to Spain to face trial on human rights charges.

\(^{92}\) British Home Secretary, Jack Straw, concluded from medical reports he had received that Pinochet was unfit to stand trial. The irony was crushing: Pinochet’s international trial was prevented by a “humanitarian” clause in extradition cases that deems ill health a reason not to try a person.
international level. Indeed, it is tempting, as many have already done, to hail the case as a further giant step towards the universal enforcement of international human rights and international law in general.

*National Implications and Lessons of the Pinochet Case*

The news of Pinochet’s arrest polarised opinion in Chile. It was greeted with relief and delight by human rights movements who believed that now justice would be forthcoming. Others moved to support the former General. Some wanted to defend Pinochet’s integrity and diplomatic immunity while others were interested, not necessarily in defending Pinochet, but in defending Chilean national sovereignty, arguing that it was a matter for Chile to resolve. But as human rights groups and international lawyers quickly pointed out, the Spanish initiative recognised that the amnesty laws in Chile prevented a trial of the General. Even if, in theory, Chile could put Pinochet on trial, the chances that he could actually be punished, they argued, were zero. If justice was to be found it had to be found abroad—unless of course, fundamental changes were made to the Chilean legal structure.

Not surprisingly, the arrest of Pinochet came as a great shock to Chile’s political elite, which was in the midst of preparation for an upcoming presidential election campaign in December of that year. It had the effect of hardening an already fairly

---

93 Moulian captures the contradictory emotions among Chileans evoked by Pinochet. “Pinochet is viewed in the Chilean imagination as a criollo Superman. According to some, he acted in the service of good, taking on the role of exterminator of the Marxists and modernizer of Chilean society. Others consider that he acted in the service of an evil so radical and immense that it could only be attributed to the Devil. He was seen either as one of those Greek Gods with human passions and interests or as the devil himself...This superman aroused the reverential admiration of his followers, who walk through the streets of Santiago with placards proclaiming his immortality. At the same time he produced in his enemies the paralyzing fear that is felt when faced with someone endowed with diabolical powers” (1999, 13).

94 The amnesty granted to Pinochet applied in Chile, but had no effect under international law.
reactionary Right, which cloaked itself in the banner of Chilean nationalism, decrying the arrest as an international socialist conspiracy. The leaders of the two right wing parties – the Independent Democratic Union (UDI) and the National Renewal (RN) – jumped to the defense of the General, contending that this was a gross violation of national sovereignty. Prominent figures from Chile’s Right began to organise demonstrations in Santiago and make plans for Pinochet supporters to travel to London to challenge the anti-Pinochet demonstrators on the streets. No Rightist politicians expressed anything other than unconditional support for Pinochet. In fact, the leading figures within the Right who were running for the presidency, began to openly compete among themselves to demonstrate their loyalty to the General. The behaviour of these politicians highlighted once again the limits to the liberal postures within the Chilean Right.

The ruling *Concertación* coalition – “the principle architects of the ‘new Chile’ which to function requires that the unpleasant past remain dead and buried” (Moulian 1999, 13) – was divided in the wake of the arrest. The Centrist wing of the coalition, the Christian Democrats, found themselves in the extremely uncomfortable position of defending their former dictator and urging the British government to put an end to the saga and send him home. The Socialist party, reflecting their more mixed composition of people linked to Allende and those linked to the Chile of today, split on the issue.

The Centrist *Concertación* government of Eduardo Frei made the sovereignty argument that Pinochet should be released on the grounds that Chilean citizens should be

---

95 Moulian (1999, 13) tells of how the General’s inner circle hatched the idea of a “socialist conspiracy”. Pinochet, they claimed, had not made an error of judgement by travelling to the UK, he had been set up. He was the target of the “ruthless persecution of Spanish judge Baltasar Garzón, who could count on the support of the British Labour government, the Spanish Socialist Party and Chileans acting behind the scenes.”

96 For analysis of the recent history of the Chilean right and their reaction to the arrest of General Pinochet, see Volk (1999).
judged only by Chilean courts. This is very much the reaction of people still influenced by an implicit pact designed to protect Pinochet and his military friends. Indeed some pundits argued that the Frei government reacted as it did out of fear of a possible adverse reaction from the armed forces (Moulian 2000). Yet in Tomás Moulian’s opinion, the government overestimated the threat posed by the armed forces. “The Frei government acted in almost knee-jerk fashion to the Pinochet arrest, repeating the same pattern of fearful behaviour that marked the administration of Patricio Aylwin when it faced saber-rattling from the army” (14). This appears to be a valid assessment. It is understandable that the government would initially act out of fear of military reprisals. The impunity enjoyed by armed forces personnel would perhaps make them believe that society was not going to make them accountable for anything that they did. However, as time passed, the objective limits of military pressure should have become obvious, but still the government did not change its stance. Instead, the government further involved itself in events taking place in the UK, and made an argument before the Law Lords on Pinochet’s behalf during the second round of proceedings. The Chilean government claimed it was defending the “principle” of the absolute territorial sovereignty of criminal law. But as Moulian correctly argues, “in a democratic society, that principle [absolute territorial sovereignty of criminal law] should be subordinated to the principle of universality for the crimes of kidnappings, genocide and torture. By first defending Pinochet’s diplomatic immunity and later the immunity of the Chilean state as an extension of the General, the government ended up defending his impunity. This is because even if, theoretically, Chile could put Pinochet on trial, the possibility that he would actually be punished is, for all practical purposes, nonexistent” (2000, 14).
The reaction of the *Concertación* Frei government, in their defense of Pinochet, shows that “pact mentalities” remained a powerful influence among Chilean elites a decade after the plebiscite to end military rule. The Pinochet arrest provided them with an opportunity for a grand act of reconciliation by taking steps to distance themselves from notions of impunity. Their active defense, therefore, of the General in front of the Law Lords was a huge disappointment to many. But, human rights groups in Chile, with the support of many groups throughout the world, were not willing to passively sit back and allow this political moment to pass them by. The arrest of Pinochet provided them with a renewed sense of legitimacy and an opportunity to press for renegotiation of the terms of Chile’s “transición pactada”.

Under intense pressure from national and international social movements, the Chilean government agreed to establishing channels of communication between representatives of the military and human rights movements – this process was known as the *mesa de dialogo*. In agreeing to participate in this dialogue, the military were careful to declare that they were not acknowledging responsibility for crimes. Rather, they stated that their participation was to help find information about any pending cases. Nonetheless, the collaborative process involving the armed forces did represent a significant domestic transformation in Chile as a consequence of the Pinochet arrest. Previously, the military had outright denied any knowledge concerning the unresolved disappearances.

The *mesa de dialogo* initially showed encouraging results. In June 2000, those participating in the meetings revealed that the army had officially agreed to investigate and provide all available information, regarding the pending cases of disappearances, to
the government. The importance of this development was that for the first time the military recognised the very existence of the people, mainly opponents of the Pinochet regime, who had been detained and never seen again. The military report – stemming from the auspices of the mesa – delivered to Ricardo Lagos on 5 January 2001 admitted, for example, that 151 murdered prisoners were dumped in the ocean and lakes of Chile.

Yet the Introduction to this report makes President Lagos’ public recognition of the armed forces’ contribution to reconciliation seem premature and misplaced. There is no hint, in the Introduction, of an apology to the victims for the atrocities documented in the pages that follow. The explanation provided by the military for their conduct is strikingly similar to the defiant response they gave to the Rettig Commission’s damning report of a full decade before. “Most of the disappearances took place after September 1973 and over the following months, a period in which the country was experiencing a critical state of internal convulsion” [my emphasis], provoking acts, behaviour, and victims

---

97 Reported in El pais, 14 June 2000.
99 The creation of the National Truth and Reconciliation Commission on 25 April 1990 was one of Aylwin’s first acts as President. The eight member commission was headed by attorney, Raúl Rettig. They were able to document 2,279 cases of human rights victims who died as a result of official actions by government agents or people working for them. 957 of these victims were made to “disappear”. Many thousands more were tortured and imprisoned and/or forced into exile. The three volume report was published in 1991. See Informe Rettig (1991, Vol. 2, 883-886); see also: http://www.lakota.clara.net/derechos/rettig.htm and http://www.dfn.org/voices/chile/cases.htm The military response to Rettig was to state that the actions were justified in the context of the early 1970s, a time which they likened to “civil war” in Chile.
100 This assessment of Chile in the months following the coup of 1973 contradicts with the Rettig Commission (1991) which concluded that the armed forces were in full control of the country within a few days of the coup.
typical of irregular armed conflict. This situation placed limits on the institutions' ability to clarify the cases which were the subject matter of the task before them. The Rettig Commission report provides ample evidence to prove that Chilean armed forces were not "provoked" by convulsion or armed conflict. In reality, their atrocities were committed against defenseless people, many of whom had given themselves up to the authorities in the mistaken belief that their army would treat them fairly. Yet, after a decade during which these facts have been known to every reader of the Rettig report, the military continues to shift the blame onto the deposed Allende government, with the Introduction reiterating that "the events that led [my emphasis] to the political violence must never be repeated in our country". The armed forces' report contains no critique of military doctrine, and no mention of the Geneva Conventions, which would have been applicable had there really been an armed conflict. The military's logic, after months of negotiations in the mesa de dialogo, was hardly different from General Pinochet's scathing attack on Rettig back in 1991: "from the point of view of any serious armed institution, when one is faced by a situation of war, the only possible objective is total victory." Although the mesa was progress in that it led to the military admitting that disappearances had occurred, their continuing rhetoric, that the "war" context of the 1970s gave them no choice but to repress, is depressing.

In an interview in El Mercurio, in the light of the mesa de dialogo, army chief Ricardo Izurieta was asked if there were now two armies in Chile: the army of the 1970s

---

101 The Rettig Commission report also states that armed actions by supporters of the deposed government were "minimal". The supporters of Allende were, "irregular in terms of place, kind, and armaments used, uncoordinated and without the least chance of success, even at the local level."
which abused human rights, and today's force. "That's a fallacy," Izurieta replied. "Whoever says that does not know the army. The army of Chile is one, and one alone. The army that lived through the experience of the military government is the same one as today's. It just had to live through different times, that's all. Throughout our history, the commanders have had a common thought, to act in benefit of the country. It's also true that the army is made up of human beings and human beings make mistakes, and can be wrong." Unfortunately, there has been more continuity than change within the Chilean armed forces. This fact alone represents a major hurdle still facing democrats.

Despite the reality that widespread justice and "reconciliation" remains a long way off, the publishing of the military report (mentioned above), and the tireless work of human rights activists in keeping human rights atrocities on the national agenda, does contribute to increased military transparency. It also adds informational support to help incriminate military officials. For example, relatives of the disappeared conducted a study on the role of military and DINA (Pinochet’s secret security forces) personnel in the disappearances, which made it clear that members of the military still clearly remembered the whereabouts of the regime’s victims. The release of such information is clearly a threat to the military, who realise that in today’s Chile, outright denial of the disappearances is no longer an option.

It is fair to say, therefore, that when Pinochet returned to Chile on 3 March 2000, he landed in a country very different to the one he had left. The former leader quickly learned on his return that he no longer held the power and standing that he once had. In June, three months after his return, the Court of Appeal in Santiago voted to strip him of

the immunity from prosecution that he held as a “Senator for life”. The decision was ratified by the Supreme Court in early August. The importance of this is that it made it possible to deal with charges against Pinochet within Chilean courts. Depriving him of his immunity from prosecution paved the way for, in November 2000, Chilean judge Juan Guzman to formally charge Pinochet with kidnapping during his 1973-1990 dictatorship. He was charged with masterminding the so-called “Caravan of Death” in which more than 70 political prisoners disappeared shortly after the 1973 coup. The amnesty law decreed by the military government in 1978 prevents the criminal prosecution of crimes committed from 1973-1978. But, in cases of “disappearances”, where the bodies of the victims have never been recovered, the Chilean courts have ruled that the victims must be considered still “disappeared”, and hence victims of an ongoing crime. Accordingly, the amnesty law does not apply. The bodies of 19 of the 72 prisoners executed by the “Caravan of Death” have never been found. It is their cases that were taken up by Guzman.

Although recent events make the actual trial and sentencing of Pinochet very unlikely, perhaps the most important phenomenon arising from the saga is that a

107 In late July 1999, the Chilean Supreme Court ruled that retired and active duty officers could be tried in cases involving “kidnapping” from the pre-1978 period, where the kidnapping had not resulted in death or where their existed no concrete evidence that the victim was dead. According to the court’s decision, since the crimes were “ongoing,” no amnesty could be applied. “This legal theory had been advanced in the early 1990s but had usually been rejected by military courts, appeal courts, and by the Supreme Court, which applied the amnesty decree to “close” the cases that came before it or rejected the human rights organizations’ legal pleas to reopen cases on procedural grounds. Almost all Chileans believed that the “disappeared” were dead; the legal theory resurrected by the Supreme Court in 1999 invited the armed forces to acknowledge the crimes and, most importantly, indicate what had happened to the victims’ bodies” (Loveman 2001, 328).
107 On 9 July 2001, the Santiago Appeals Court deemed that Pinochet was too ill to face trial, citing mental incapacity as their reason – dementia and memory loss were the official explanations given for the decision. Opponents of Pinochet accuse him of feigning illness in an attempt to influence the course of justice. Recognising the inflammatory nature of the case, President Lagos, himself jailed by the Pinochet regime in 1987, was quick to call on his fellow Chileans to respect the ruling, saying that the judges had acted
situation developed for the potential prosecution of the former dictator within his homeland. Indeed, had it not been for the recent decision, deeming Pinochet too ill to face trial, it is very likely that Pinochet would have been found guilty in Chilean courts. Such a situation would have been unimaginable three years ago. The pervasive atmosphere of unconditional impunity in Chile has undergone dramatic change in recent times as, bit by bit, the series of agreements negotiated in Chile’s transición pactada have begun to unravel.

*International Implications and Lessons of the Pinochet Case*

The catalyst for the Pinochet saga, as I have already mentioned, was international level change: namely, and generally, the end of the Cold War allowing for extant international laws to be more easily carried out. Yet, the case has also had an effect on the very international environment that allowed the case to happen. I have already mentioned the prosecution of Hissein Habre, but overall, the precedent created by the Pinochet case will have implications that will likely effect further international change in the future.

Looking first at the Latin American regional level, one can point to examples of knock-on effects already having occurred. In Argentina, judges made the decision to reopen the cases of military officials responsible for human rights crimes. Following the *Punto Final*, these cases had already been considered closed and the condemned

---

108 In December 1986, after the highest military officers had been convicted and sentenced, a new law, “el Punto Final” (the final point), was enacted and approved by Congress. This law stated that all those in the military or police that were not yet charged for crimes during the 1976-1983 dictatorship, would not be
individuals granted amnesty by the Argentine state. But motivated by the Pinochet precedent, Argentine judge Claudio Bonadio, in November 1999, reopened investigations on 15 disappearance cases as well as requesting the arrest and extradition of 98 Argentine military officers implicated in cases of disappearances of Spanish citizens. In Uruguay, like Argentina, human rights questions had since 1989 been dealt with via a law pardoning military officers for their crimes. But, also like Argentina, the impact of the Pinochet arrest led to the issue of human rights resurfacing on the political agenda. The November 1999 election campaign, for example, saw presidential candidates start to use the issue of human rights as a vote winning tactic, despite the fact that the 1989 Impunity law forbade judicial prosecution against military officers. Presidential candidate, Tabare Vazquez promised in his manifesto to initiate investigations to gather information on the fate of the disappeared. Indeed, a commission has now been established in Uruguay to find out what happened to the people who went missing during the country’s years of military rule.

Outside of Latin America, the arrest of Pinochet has also had an impact. Generals throughout the world, who previously felt themselves to be legally untouchable, have started to rethink their status. International repercussions were immediate in the wake of Pinochet’s arrest. Current and former officials from Yugoslavia, and Africa were reported

brought to trial. Menem took this further in 1990 when he granted an amnesty to all imprisoned military officers, in the name of “national unity.” From http://www.vendor.com/vanished/uprisings.html

109 The Economist, “Argentine Political Crimes”, 6 November 1999, 34. Former members of the military junta have now been placed under arrest. They are accused of taking part in a plan to kidnap babies born to political prisoners, and the case of these retired officers is now proceeding, albeit at a very slow pace.

110 In April 1989, a referendum was held over the issue of upholding the Amnesty Law for human rights crimes during the military dictatorship. 55.4% of the nationwide Uruguayan electorate favoured retaining the law. See Gillespie 1991, 248. Also, for a detailed analysis of the debates that took place over whether to forget the past or uphold the principle of human rights, see Weschler, 1990.

111 Vazquez lost the presidential election to 72 year old, Jorge Batlle in November 1999.
to have “rethought” travel plans.\textsuperscript{112} When Mengistu Haile Mariam, the former dictator of Ethiopia, now in exile in Zimbabwe, visited South Africa for medical attention, human rights campaigners inspired by the Pinochet case, argued that the South African authorities should arrest the former dictator. Mengistu did manage to make a safe return to Zimbabwe before legal action could be taken, but the fact that his potential arrest was even raised as an issue was an important development. Pinochet’s detention in London ended old certainties that ex-dictators were legally untouchable.

Indeed NGOs argue that there is sufficient evidence to the claim that national sovereignty is now less important an obstacle to curbing serious human rights crimes than it has been in previous years. Executive Director of Human Rights Watch, Kenneth Roth, said in the wake of the Pinochet arrest and the UN intervention in Kosovo: “we will remember 1999\textsuperscript{113} as the year in which sovereignty gave way in places where crimes against humanity were being committed...Ordinarily we depend on sovereign states to defend human rights...But sovereignty cannot be used as an excuse to avoid human rights commitments.”\textsuperscript{114} Also, the Pinochet arrest in London and the request for his extradition to Spain shows that people are being tried outside their native countries – are we watching the triumph of the principle of \textit{universal jurisdiction}?\textsuperscript{115} International War Crimes Tribunals for Rwanda and the former Yugoslavia have a growing number of people in custody. The Tribunal also took the significant step of indicting a sitting head


\textsuperscript{113} Roth noted that in 1999 sustained international pressure forced the Indonesian government to consent to the deployment of troops in East Timor, after the Indonesian military failed to stop the bloodshed there. He claims that the national sovereignty claims of the Indonesian generals, like those of Yugoslav President Slobodan Milosevic in Kosovo, lost their legitimacy in the wake of gross human rights crimes.

\textsuperscript{114} From “Human Rights Watch World Report 2000” Available at www.hrw.org/press/1999/dec/wr2keng.htm

\textsuperscript{115}
of state, Slobodan Milosevic. Does the Pinochet saga indicate the demise of absolute national sovereignty? Are we witnessing what Stephen Krasner termed “punctuated equilibrium” – a fundamental alteration of sovereignty norms in the society of states? Just as absolute monarchy gave way to constitutional or limited monarchy, is absolute national sovereignty giving way to what one could label constitutional or limited national sovereignty? The Pinochet saga raises these questions of international society and, as people like Rosenau have argued, provides evidence that nation states are increasingly subject to international political norms. Pinochet, and other dictators like Milosevic, sacrificed thousands on the alter of national sovereignty, but generally evoke little sympathy in the international community.

With regard to the specifics of the Pinochet case, however, a degree of caution is required in order to avoid the mistake of overstating the impact of the decision. Whether the Pinochet decision will be a landmark depends on the extent to which other courts in different jurisdictions will follow it. The decision serves as a legal precedent only in the UK – no other state is bound by the decision. What can be asserted is that the decision by the highest court in one of the foremost western states is of persuasive authority for courts in other jurisdictions, particularly, one could argue, Commonwealth states and the United States, which share a common legal heritage with the UK. However, even this claim could be exaggerated. The Lords’ decision was very much dependent on its facts.

115 General Pinochet is the best known example, but many other people accused of participating in the Bosnian and Rwandan genocides have also been indicted outside their own countries.
116 Indeed on 31 March, 2001, Milosevic was arrested in his home in Belgrade by Yugoslav authorities, largely as a result of international pressures. He has since been extradited to face trial under the auspices of a UN court in the Hague.
117 Europe has led the way on this matter with the Council of Europe, which holds member nations to human rights standards codified in the European Convention on Human Rights. Since 1998, citizens of European countries have had the power to appeal directly to the European Court of Human Rights whenever they believe that their rights have been infringed upon by their national governments.
and contained idiosyncrasies that suggest it is a legal precedent that will not easily "travel". Also the fact that none of the seven judges in the case agreed entirely with one another as to the precise details of the decision,\textsuperscript{118} is evidence of the divergence of opinion which could be exploited by lawyers in subsequent cases.

Another argument that has been contributed to the debate relates to the internal political stability of Chile – specifically, the right of outside courts to involve themselves in trying Chile's former ruler against the wishes of the Chilean state. The pact made between the incoming civilian government with the outgoing military regime at the time of Chile's democratic transition, was a conscious choice made by Chilean elites. It was decided that greater internal stability would be achieved in Chile if steps were not taken to prosecute the previous regime. Many have argued that this should have been the end of the matter, arguing that the amnesty the General negotiated in his homeland should put him beyond the reach of courts elsewhere. Normally, this would have been the end of the matter, given the importance placed by international law and international relations in general, on the rights of states to determine their own internal matters. However, in the case of Chile this argument does not apply. Chile had already restricted its sovereign rights by, in 1988, signing and ratifying the Torture Convention that specifically provides for the possibility, indeed the requirement, of universality with regard to the alleged crimes. This consequently allows for the exercise of jurisdiction by Spain and the UK over Chilean officials, including their former head of state.\textsuperscript{119}

\textsuperscript{118} The specific disagreements of the judges and the debates undertaken during the case can be found in the judgement of 24 March 1999, reported as \textit{R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3) in [1999] 2 All E.R. 97}. The judgements of the House of Lords can also be found at: \url{http://www.parliament.uk}

\textsuperscript{119} However, such jurisdiction can only exist in respect of crimes which occurred at the earliest after the date at which Chile entered into the regime governed by the Torture Convention (1984), otherwise there
An additional argument says that even if a relevant body of international law exists, there are human and practical reasons why it is seldom enforced. The General’s arrest not only disturbed the delicate political balance inside Chile, but sent the wrong message to other dictators. In many parts of the world, despots have been eased bloodlessly from power only after being promised immunity from punishment. Without such a promise, it is argued that dictators would have every incentive to hang on to power violently until the bitter end. This is a valid point as many nations have had little option but to negotiate a pact that provided amnesties to the leaders of the previous regime. But in the case of Chile this is beside the point. It is still open to countries to offer amnesties as they make the transition to democracy – indeed pacts will likely still occur in the future. Pinochet, however, hit trouble not because Chile broke its promise to him, but because the General made the mistake of swanning around the world on what turns out to have been the mistaken assumption that the decision of Chile’s polity would bind the rest of the world’s courts. This is a positive development. It may be necessary for unfortunate nations to promise former dictators safety at home. But coaxing them from power does not require adding the bonus of a safe cup of tea with Lady Thatcher in London.

Pinochet’s arrest marked a step towards the sort of world in which powerful people have to think twice before they carry out human rights atrocities.

Regardless of the legal implications of the Pinochet decision, the political implications of the outcome give rise to further consideration in relation to the exercise of jurisdiction by national courts – namely, are national courts the appropriate forum for cases of this nature? The first aspect of the case to take into account is the fact that it was would be a direct attack on Chilean sovereignty. Both the UK and Chile ratified the Torture Convention on 8 December 1988. Consequently the number of charges against Pinochet were greatly reduced.
extremely random and was related to many political as well as legal factors. Neither the UK nor Spanish governments were responsible for bringing legal proceedings against Pinochet. The action was started by a Spanish judge and responded to by the British judicial system. Although the UK government had the opportunity to end the proceedings against Pinochet, the political costs of doing so would have been high, what with the sizable levels of public support for the actions against Pinochet and the Labour Party manifesto promise of having an “ethical” foreign policy. The sheer arbitrariness of the entire affair bothered a number of commentators. Why arrest Pinochet and not Idi Amin, former bloodthirsty dictator of Uganda, living quietly in Saudi Arabia? Why indict Pinochet and not current [at the time of Pinochet’s arrest] ham-fisted tyrants like Congo’s Laurent Kabila or Yugoslavia’s Slobodan Milosevic? Writing in the French newspaper, Liberation, Jacques Amalric pointed out:

Reasons of state have never gone hand in hand with human rights...Our expectations in the face of France’s determination regarding Pinochet is all the greater because French officials, who care very little about Saddam Hussein’s crimes and who accept that Milosevic not be tried by the international tribunal, are today welcoming a dictator who probably has more blood on his hands than the Chilean dictator: Laurent Desire Kabila. Could it be that for our leaders these are two categories of international criminals –those who are without power, therefore useless, and who should be tried for their crimes; and those who are useful because they remain in power and whose defense is based on political diplomatic or commercial reasons? The answer is definitely yes.¹²⁰

Certainly the randomness and inconsistency of the upholding of human rights, exemplified by the Pinochet arrest, proves the case involving Chile’s former dictator was unique.

In addition to the randomness of the arrest, the debates and divides among the Law Lords over the details of the Pinochet trial accentuates the problem with national
courts handling cases of this kind. For example, the Law Lords had lengthy debates and disagreements over which values and principles ought to be given priority in contemporary international law. Lord Goff, in his speech to the Lords, highlighted the political difficulties that might exist if state immunity were not to exist in cases such as those involving Pinochet. He said that:

If immunity *rationae materiae* was excluded, former heads of state and senior public officials would have to think twice about travelling abroad, for fear of being subject of unfounded allegations emanating from States of a different persuasion.\(^{121}\)

This opinion went against the consensus, in that the Lords decided that Pinochet could be extradited. Yet, these kinds of differences of opinion are inevitable in a case taking place in a national court where no established rules exist to “provide the rule of decision in a case and [when] courts have to make recourse to general principles to fill in the lacunae or to interpret controversial points of law” (Bianchi 1999, 260).

The Pinochet case, therefore, highlights the importance of the successful establishment of the potentially more consistent and less random International Criminal Court (ICC).\(^{122}\) The statute of the court explicitly provides that there will be no immunity from the jurisdiction of the court. This reflects the fact that the court will act as an international tribunal, in respect of which the doctrine of *par in parem non habet*


\(^{121}\) See Lords’ Judgement. Available: www.parliament.uk

\(^{122}\) The ICC meets the dual objective of curtailing impunity on serious human rights violations and, at the same time, of ensuring just and fair processes that are subject to clear rules accepted voluntarily by all signed up nations. The provisions of the ICC statute contain numerous safeguards to ensure that cases brought before the court are neither frivolous nor politically motivated. An independent prosecutor will be empowered to conduct an investigation not only on the basis of referrals from members of the UN Security Council, but also on the basis of recommendations from NGOs and victims of purported crimes. The prosecutor must inform sovereign states that he or she is investigating a crime within their borders and must allow those states the option of investigating the crimes themselves. Even more significantly, a third country cannot hand over accused victims to the court unless the country where the crimes were committed has also ratified the treaty. From Lagos (1999).
imperium (an equal has no dominion over an equal), the foundation of the doctrine of state immunity, will not apply. Again, as with treaty law, the key is the consent of states who ratify the Rome Convention. Each state that signs the Rome Statute will do so in the exercise of sovereign authority which will have the effect of reducing the sovereignty of the state in respect to matters brought before the ICC. \footnote{123} The intention is that the ICC will provide an impartial international forum for hearing politically sensitive cases. While some states, like the US, have balked at the thought of any court other than its own deciding the fate of US citizens, it seems that the ICC would provide a more effective forum than national courts in deciding cases like the Pinochet one.

The Pinochet case, although a legal precedent only in the UK, is likely to have an international impact in that it has established a precedent of extradition procedures for people who have violated human rights in the past. Similar cases to the Pinochet one will, in all probability, occur again in the future. But is it likely that a less powerful nation would attempt to indict a former official, from a state like the US, who they consider to have violated human rights? The question that should be addressed is: whose values and interests are being represented when it comes to enforcing the sanctity of human rights? \footnote{124} A true test of the “globalisation” of human rights will come when a warrant is

\footnote{123} It is worthy of note that the Rome Statute envisages that the ordinary national courts will still play an important role in dealing with breaches of international law by individuals. However, where issues of state immunity arise in national courts, extradition can take place to the ICC which will have jurisdiction to hear such cases without the barrier of state immunity.

\footnote{124} See, for example, the argument forwarded by Christopher Hitchens (2001), who makes a case for the “trial of Henry Kissinger.” He believes it is imperative that a system of international law does not emerge whereby only human rights violators from “weaker” nations facing justice. “A failure to proceed [with the trial of Kissinger] will constitute a double or triple offence to justice. First, it will violate the essential and now uncontested principle that not even the most important are above the law. Second, it will suggest that prosecutions for war crimes and crimes against humanity are reserved for losers, or for minor despots in relatively negligible countries. This in turn will lead to the paltry politicization of what could have been a noble process, and to the justifiable suspicion of double standards.....His [Kissinger’s] own lonely impunity is rank; it smells to heaven. If it is allowed to persist then we shall shamefully vindicate the ancient philosopher Anacharsis, who maintained that laws were like cobwebs: strong enough to detain only
issued for the arrest of, say, Henry Kissinger or George Bush on charges of crimes against humanity. Is it thinkable that the US would surrender one of its own citizens to be tried by an international tribunal? Until it is, unfortunately for those who argue that we are heading in a cosmopolitan and universal direction, state power will continue to rule the roost, and global civil society will remain a secondary player at best.

Given the important and positive effect of the Pinochet arrest, it seems inappropriate to be overly pessimistic. Pinochet’s arrest in London has inalterably changed the course of Chilean politics, and, contributed to the long-term cause of efforts to promote respect for human rights in the international community. Although it is currently unlikely that former government personnel from powerful nations like the US will face arrest, Pinochet’s plight has nonetheless caused alarm with people like Henry Kissinger.125 Reading between the lines of a Kissinger comment made in the wake of Pinochet’s detention in Britain, one gets the impression that the extraterritorial arrest of the former Chilean head of state made Kissinger question his own immunity. “I would be happy,” he told the London Observer, “if Pinochet was allowed home. This episode has gone on long enough, and my sympathies are with him.”126

The international changes mentioned above have altered the environment in which democratic transitions of today are occurring. Schmitter is correct to argue that the “relevance of the international context tends to increase monotonically and to change in intensity with each successive demise of autocracy. The democracies that arrive late are

---

125 See the anecdote presented in the introduction to Hitchens (2001). See also Kissinger’s (2001) thinly veiled effort to protect his own legal interests in his Foreign Affairs article, “The Pitfalls of Universal Jurisdiction.”

destined to suffer more external influence than their predecessors” (1995, 35, see also Drake 1998, 70-86). Changes in the international context have been so great since the
wave of democratisation that followed World War II that contemporary democratisers
cannot rely on the strategies of consolidation that were then relatively successful. With
the end of the Cold War and the collapse of the Soviet Union, the ideological formulas
and partisan confrontations of the past are no longer convincing. Evelyne Huber, Dietrich
Rueschemeyer and John Stephens argue that:

> Developments in the geopolitical situation, particularly the end of the Cold
War, have been conducive to the survival of democracy both directly and
indirectly. Directly, they have reduced the tendency of the two superpowers
to support nondemocratic but loyal regimes. Indirectly, they have eliminated
the perception of a Communist threat among economic elites and thus the fear
of potential weaknesses of democratic regimes in the face of such a threat or,
even worse from their point of view, of potential complicity of democratic
governments with Communist forces (1999, 179).

Latin America in the 1990s has found itself in an international and ideological
context that is much more hostile to political solutions, and capable of placing barriers in
the way of institutional experimentation. Traditional protestations of “noninterference in
domestic affairs” have become less persuasive, and the line between the realms of
national and international politics has become increasingly blurred. More significant in
the future will be the use of international organisations to bring pressures to bear on the
remaining autocracies and recidivist democracies. The combined impact of this new
environment has had an effect on the legitimacy, the durability and even the necessity of
pacts. Seeing Pinochet in legal trouble not just in Britain, but also in Chile, seems to have
altered perceptions in Latin America and internationally. Political actors are facing the
reality that offering concessions to autocratic elites need not be a necessity for
consolidating institutional democracy. Analysis of the most recent Latin American
democratic transition provides evidence of the altered regional and international context.

Transition in Peru – Lessons from Pinochet?

The Peruvian transition differs from the one in Chile in that it was catalysed by
high levels of corruption, culminating in intelligence chief, Vladimiro Montesinos, being
captured on video bribing an opposition member of Congress. The scandal surrounding this
incident and the overall exposure of mafia-like governance weakened the position of the
Fujimori administration. Unlike the Pinochet regime, Fujimori’s government ended
with political elites being removed from office in disgrace. The weakness of the outgoing
regime, and the resulting strength of incoming democrats, made pacting improbable. The
opprobrium surrounding the Fujimori government has allowed newly elected President
Toledo to state that a “very high priority” for his administration is the return of Fujimori,
currently in exile in Japan, to face justice in Peru. President Aylwin was afforded no
such luxury regarding his predecessor when he assumed office in Chile. Circumstances
leading to democracy in Peru, therefore, have differed to the Chilean case. Yet, while
watching events unfold over the last year, one is struck by what appears to be an
awareness of the Chilean experience on the part of those involved.

Take, for instance, a conversation prior to the fraudulent 2000 Peruvian
presidential election, between Montesinos, the man widely regarded as the architect
behind the Fujimori mafia, and powerful banker, Dionisio Romero. In one of the many

---

127 On 21 November 2000, the Congress of Peru voted to declare Fujimori “morally unfit” to govern and
removed him as head of state. This is the first time that such a censure has occurred in Peruvian history.
128 See: http://news.bbc.co.uk/hi/english/world/americas/newsid_1471000/1471099.stm
released “Vladivideos” that have exposed the extent of corruption in Fujimori’s Peru, Montesinos talks of the need for a Fujimori victory in the upcoming election. He points to the experience of Pinochet, the man he claims saved Chile from the “quagmire of Salvador Allende,” and who now faces prosecution in his homeland. “Pinochet went out” he says, and “lifted the Chilean economy and gave her [Chile] a constitutional government... only to suffer under the disgrace that we now see.” Montesinos goes on to express his determination that members of the Fujimori mafia avoid a Pinochet-style domestic trial. Regarding the upcoming Peruvian election, Montesinos states that, in light of the Pinochet precedent, he believes there are “two formulas” available to prominent members of the Fujimoro regime: either “to win or to leave. There is no alternative.”

Looking to exogenous factors, it appears that the international community is keen to see a smooth transition in Peru, and contribute to strengthening institutions capable of bringing justice to criminals in the previous regime. This was made clear by the report written by the Organisation of American States (OAS) after their “Mission to Peru” which took place from 27-30 June 2000. The proposals made by the report, designed to ensure the “continued strengthening of democracy in our hemisphere,” cover five areas: 1) reform of the administration of justice, strengthening the rule of law and ensuring the separation of powers; 2) freedom of expression and the media; 3) electoral reform; 4) supervision and balance of powers, and; 5) civilian control of the activities of the intelligence services and the armed forces. These OAS priorities, particularly reform of the judicial process and civilian control of the armed forces, show that lessons have been learned from the Chilean experience. The report suggests that the OAS is keen to avoid a

130 From www.oas.org/en/pinfo/week/WeeklyReport/Press2000/july2000/E139.htm Also see this site for details of the proposals made after the mission.
situation whereby the military remains a powerful player in the post-transition context and where immunity prevents countless human rights violators facing justice. Indeed, if the newly installed government of President Toledo fails to jail members of the Fujimori government for their crimes, the international community will look disapprovingly upon the new administration. In sum, support from an encouraging international community, and the lack of institutionalised authoritarian enclaves from the previous regime, create the potential in Peru for the implementation of an effective “truth commission” with penal powers.

Additionally, the plight of Montesinos provides evidence of altered international norms. After being exposed for corruption, the intelligence chief fled to Panama in search of asylum only to be expelled after a month. The response of Panama’s government is indicative of what I have termed the international punctuated equilibrium. In the past, Panama has granted asylum to fleeing dictators, like the Shah of Iran, (Raoul) Cedras from Haiti, and the former right wing leader of Guatemala (Jorge Serrano). Yet, when Montesinos arrived last year, many Panamanians were indignant about being recast in this old sordid role.131 The fact that Montesinos was ultimately accepted in Venezuela is indicative of the degree to which the Chávez government is out of step with the emerging regional consensus.132 Changing international norms have resulted in most countries being increasingly unwilling to face the international shame of giving shelter to deposed dictators, indicted war criminals and exposed murderers on the run. However, it is not only international shame that countries like Panama have to consider before going against

131 A former adviser to Panama’s President Rodriguez, was quoted as saying, “once again Panama has been used as a garbage dump and latrine for this kind of rat.” From http://www.crsp.org/cmte/makeover-nov00.htm
the grain of the international normative consensus. Recent years have seen an increase in political conditions being placed on the behaviour of nations.

Regional Conditionality

One can point to evidence that “political conditionality” has taken a place alongside the “economic conditionality” practiced for so long by institutions like the IMF. Today, free and fair elections are a pre-requisite for membership-in-good-standing in the international community. There was certainly an awareness of this international reality on the part of Montesinos, who in the above mentioned discussion with Romero, also states that “to win [the 2000 presidency for Fujimori], is to win in a decent fashion, doing a clean job.” He was clearly aware of Peru’s image abroad, and the need to at least be perceived to have won the election in a free and fair manner.

Political conditionality has long been a norm for European Community membership, but is also, as I will mention below, slowly becoming a reality in the premier regional club of the Americas, the OAS. Global and regional organisations often make provisions of credits, the negotiations of commercial agreements and membership requirements contingent on a nation taking steps to reform political institutions, holding free and fair elections, respecting human rights and the safety of ethnic, linguistic or religious minorities. In some cases, like the transitions to democracy in Southern Europe, the different forms of bilateral and multilateral conditionalities for European Community membership combined in a way that placed considerable restrictions on the margin for maneuver available to new democratic regimes. In the Soviet successor states established

\[132\] Despite managing to find refuge in Venezuela, on 25 June 2001 Montesinos was handed over by Venezuela to the Peruvian government. He is now due to face a domestic trial.
since the fall of the Berlin Wall, leaders seeking membership of the European Union have actively sought to be subjected to political conditionality in order to inform the people that they had no choice but to take certain unpopular measures.

Although the European Union has led the way in terms of placing political conditions on membership and the benefits that come with that, the OAS has recently positioned democracy and human rights more prominently at their April 2001 Summit in Quebec City. The result of this meeting of regional leaders was a “Declaration and Plan of Action,” which proposed an “Inter-American Democratic Charter” designed to build on “existing OAS instruments for the defense of representative democracy.” Consequently, any “unconstitutional alteration or interruption of the democratic order” will be deemed an “insurmountable obstacle to the participation of that state” in the Summit of the Americas process – in short, states which violate the proposed Democratic Charter will be excluded from the Free Trade of the Americas (FTAA). Such steps provide evidence that pressures for democratisation are emanating increasingly from Latin American countries themselves – indeed, it was the transitional government of Peru who proposed the Democracy Charter in the first place. The widespread regional endorsement of the “Declaration and Plan of Action” suggests that democratically elected governments in Latin America have developed a sense of there being a strong self-interest in ostracising neighbours deviating from formal democratic features.

133 The following quotes from the 2001 OAS, Quebec City Summit, “Declaration and Plan of Action,” are taken from Cameron (2001).
CHAPTER 5: CONCLUSION – RETHINKING PACTS

The altered world to have emerged since the fall of the Berlin Wall begs important questions regarding pacts. Will pacts that protect vital elite interests, and at the same time violate widely held definitions of democracy, become less probable? What does the evidence I have provided from the Chilean experience and the Pinochet arrest tell us about the phenomenon of pacts as a whole? What has changed as a consequence of recent events? Before answering these questions, a brief summation of the central negative and positive arguments of this work is useful. It appears timely to rethink the earlier scholarly consensus on the purportedly positive role of political pacts in stabilising democracy.

Employing the Chilean case and the recent events involving Pinochet as its focus, this study contends that there are two fundamental flaws present in much of the literature on pacts. One is that it does not pay sufficient attention to the poor quality of the emerging democracy. The deficiencies in contemporary Chilean democracy (outlined in detail in chapter three), and the problems in Colombia and Venezuela, have not been properly accounted for in the literature. Work on pacts has placed emphasis on stability rather than quality, when indeed the poor quality of the emergent democracy where pacts have occurred has proven extremely damaging in the long-term. The lack of attention to the quality of democracy in the pacts literature is manifested by the extremely narrow definition of democracy that the work has provided. No pact theorist has outlined a definition of democracy that significantly goes beyond the classic minimalist definition provided by Dahl. For example, Przeworski states that “democracy is a system in which
parties lose elections. There are parties: divisions of interests, values, and opinions. There is competition, organized by rules. And there are periodic winners and losers. Obviously not all democracies are the same; one can list innumerable variations and distinguish several types of democratic institutions. Yet beneath all the institutional diversity, one elementary feature – contestation open to participation (Dahl 1971) – is sufficient to identify a political system as democratic" (Przeworski 1991, 10).135 In my view, a broader definition of polyarchy is necessary to bring attention to the damage a pact can have on a nation’s chance of developing democracy of any quality. Such a narrow definition fails to highlight the more subtle damage a pact can cause democratic prospects. By measuring contemporary Chile against my four additional criteria for polyarchy (from Defining Democracy section), I have attempted to stress the importance of the absence of any mention of democratic quality in the pacts literature.

I am not arguing that there was an alternative to pacts in places where they have occurred. Where the outgoing authoritarian elites are in a position of strength, then pacts, providing non-democratic concessions like impunity, have been a necessary feature of establishing any kind of civilian rule. I am arguing however, that the literature should have shown greater awareness of the long-term damage a pact can cause a polity. A more demanding definition of democracy would have helped achieve that increased awareness. I am not suggesting an alternative path that elites in Chile, Venezuela and Colombia

134 When talking about the literature on pacts, I am referring to the major works that have emerged on the subject: namely, O'Donnell and Schmitter 1986, Karl 1990, Przeworski 1991, and Higley and Gunther 1992.

135 Burton, Gunther and Higley state that there is broad scholarly consensus that democracy can “best be defined and applied in terms of the procedural criteria that Robert Dahl (1971) has specified: a political regime characterized by free and open elections, with relatively low barriers to participation, genuine political competition and wide protection of civil liberties” (1992, 1). Karl adds “civilian control over the military” to set her “definition apart from Robert Dahl’s classic notion of a “procedural minimum”” (1990, 2). O'Donnell and Schmitter (1986) provide no formal definition of democracy in their analysis of pacts.
could have followed. I am suggesting however, that scholars could have been more
critical in their analysis and, by placing more emphasis on democratic quality than
stability, developed a typology to distinguish between a successful and unsuccessful pact.

The second flaw within the pacts literature is its lack of recognition of the
important role that international factors can play in democratic transitions. By placing the
Chilean national picture within an international frame, I have attempted to highlight the
importance of this omission.

Throughout Latin America there is evidence that the Pinochet saga has changed
attitudes regarding the necessity, legitimacy and durability of pacts. Pinochet’s loss of
immunity in Chile contravened an important condition of Chile’s transición pactada and
this has had an important “knock-on” effect throughout the region. As cases once
considered closed have been reopened, doubts have been raised about the ability of
outgoing dictators to lay long-lasting conditions for a transition. In Chile, Peru, Argentina
and Uruguay there is evidence that the rule of law is being strengthened as those who
have committed crimes in the past are beginning to face justice.

The transition in Peru (summarised above) provides recent evidence of a domestic
situation being influenced by international factors. In another time and context, Fujimori
might have been able to negotiate a transition that would have left the key interests of his
regime (like the power of Montesinista generals, and perhaps the Fujimori and
Montesinos bank accounts) untouched. The new international environment, however, has
made it less likely that crimes will go unpunished in Peru than would have been the case
a generation ago. In 2000, Fujimori’s position became untenable when he was bombarded
with criticism not only at home, but also abroad. Developments in Peru contribute to the
positive argument of this study: namely, international factors have an important influence on pacts and democratic transitions in general.

An international critical juncture, in the form of the end of the Cold War, has altered international norms and provided favourable conditions for the democratisation of domestic institutions. This fundamental alteration potentially presents civilians with a greater range of choice as they make future transitions to democracy. In an altered international context, the moral balance for pact-making has tilted in favour of civilian elites.

Pacts protecting the vital interests of elite groups will likely still occur in the future, as mechanisms will be necessary to seduce strong and united authoritarian elites from the political arena. When authoritarians command 43% electoral support, as the Pinochet regime did in the 1988 plebiscite, civilian offers of appeasement may well be necessary to get them to step aside. Indeed, the plight of Pinochet could result in military regimes being unwilling to give up power for fear that what happened to Pinochet may happen to them. But, the importance of the Pinochet case has been that it has served to change attitudes. As can be seen by the OAS statement regarding Peru, the international community is now broadly in favour of accountability for all, and the ICC serves as a promising channel to ensure that accountability and break old cycles of impunity.

Pacts of the future have the potential to be less generous to human rights violators, forcing today’s leaders to think twice before committing human rights atrocities. Granting impunity to abusers of human rights risks alienating a country in the eyes of the international community. Such a reality creates potential for civilian pact makers to feel more confident that they need not be overly accommodating to the
previous regime. From now on, civilian negotiators may not be so fearful that the military will resort to repression if their vital interests are not protected. There is a suitably large global consensus that violating human rights is wrong. Military repression is more likely to end in international isolation. Present and future dictators will be insecure in the knowledge that mechanisms in international law are more likely to be utilised against them if they violate human rights. This reality should not be forgotten in future work on pacts.
REFERENCES


*Constitución Política de la República de Chile*, 1980. Available at: http://www.urich.edu/%7Eipiones/confinder/Chile.htm (English); and http://www.georgetown.edu/LatAmerPolitical/Constitutions/Chile/chile97.html (Spanish).


Websites:

http://www.bbc.co.uk
http://www.crsr.org/cms/makeover-nov00.htm
http://www.dfnt.org/voices/chile/cases.htm
http://www.findarticles.com
http://www.georgetown.edu/pdba/
http://www.geocities.com/CapitolHill/Congress/1770/declaracion-de-principios.html
http://www.hartford-hwp.com/archives/
http://www.hiid.harvard.edu/pub/pdfs/612.pdf
http://www.hrw.org/campaigns/chile98/dispatches.html
http://www.hrw.org/campaigns/chile98/precedent.htm
Newspapers and Magazines: