10

Transitional Justice in Argentina and Chile

A Never-Ending Story?

Carlos H. Acuña

INTRODUCTION: TRANSITIONAL JUSTICE AND THE POLITICAL DILEMMAS OF DEMOCRATIC TRANSITIONS

For years we have inquired whether constitutional rulers can punish past human rights violators who still are the armed "guardians" of the country, or whether impunity is the price for democratic stability.[1] When do democracies risk their stability: when they punish or when they pardon human rights violators? In transitions from a repressive authoritarian regime to a democratic one, the dilemma about how to place the guardians under democratic rule becomes more acute: will the guardians accept being punished for the crimes they committed while in government without revolting against the newborn regime? On the other hand, can democracy survive without demonstrating that all citizens are equal before the law? The ethical foundations of democratic rule establish that all criminals should be brought to justice, particularly if they were part of an authoritarian strategy and the crimes were massive. Nevertheless, covering up crimes against humanity has been a generalized practice to achieve democratic stability, particularly in those cases in which past criminals have had relevant

[1] This chapter stems from the results of two original research projects we carried out with Catalina Smulovitz at CEDES, Buenos Aires, some years ago: "Human Rights and the Consolidation of Democracy: The Trial of the Argentine Military," with the support of the John D. and Catherine T. McArthur Foundation and the Ford Foundation, and "The Military as Political Actors in the Latin American Southern Cone," with the support of the North-South Center of the University of Miami. As such, it includes and expands arguments and part of the historical reconstruction already developed in other papers (notably "Adjusting the Armed Forces to Democracy: Successes, Failures and Ambiguities in the Southern Cone," in E. Jelin and E. Herschberg, eds., *Constructing Democracy: Human Rights, Citizenship and Society in Latin America* [Westview, Boulder, Colo., 1996]; and "Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts," in J. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* [University of Notre Dame Press, Notre Dame, Ind., 1997]).

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

political functions in the transition to democracy.[2] Therefore, where do we stand? What do recent and present experiences teach us about the relationship between the treatment of past human rights violations and its effects on the legitimacy and stability of emerging democratic regimes?

The similarities and differences between the Argentine and Chilean cases make them particularly suited for a comparative approach to these questions. Both Argentina and Chile show dictatorial processes that started around the midseventies (1973 in Chile and 1976 in Argentina). Their authoritarian regimes were governed by military who shared the "National Security Doctrine" as their ideological framework, implemented neoliberal socioeconomic policies, and collaborated in exchanging intelligence information and carrying out common operations in their mutual crusade against the Left and popular organizations in general. Moreover, both military governments aimed their strategies at building future political regimes under their long-term tutelage.

Beyond these similarities, and in the Latin American context, the Argentine democratic transition has been exceptional: the trial and conviction of the main officers responsible for human rights violations are a first sign of this singularity. In spite of a political process that, in successive stages, limited the reach of the legal sanctions and ended in the pardon and liberation of those condemned, the distribution of political costs and benefits that resulted from the trials could not be totally reversed. Once the judicial intervention transformed historical facts into evidence, proven guilt, and sentences, neither a pardon nor an amnesty could revert to human rights situations similar to those cases in which a law of "oblivion" or an anticipated amnesty blocked investigation and judgment. The second sign of this singularity is that Argentina is the only Latin American case in which the military leadership has publicly recognized the illegitimate character of repression and systematic human rights violations it carried out during the military dictatorship: it was not until April 1995 that the Argentine armed forces formally recognized the illegitimacy of the repressive methods used during the dictatorship. In a public document of April 25, 1995, the chief of staff of the army finally recognized that the armed forces had tortured and murdered during the 1970s confrontation and stated that whoever "commits a crime against the National Constitution . . . gives immoral orders . . . follows immoral orders . . . to achieve ends believed to be just employs unjust, immoral means."[3] Moreover,

[2] Examples come to mind immediately when we recall just the last five decades of world history: the Western Allies' decision not to punish most of the Nazis responsible for human rights violations during World War II justified by the need to maintain a functioning state bureaucracy in West Germany; the U.S. government decision not to punish members of the Japanese royal family for their role in the genocide of Chinese civilians in order to take advantage of the symbolic force of the emperor and his family as a legitimating resource for the new democratic order; or the all too common support by Western democracies of authoritarian regimes that systematically violate human rights with the excuse of preventing the advance of "anti-Western" movements.

[3] This document had an important domino effect on the navy, air force, and Catholic Church that, although with different degrees of clarity, recognized in their own public documents the role of their members in carrying out or collaborating with state terrorism in the period.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

the detention[4] of the former junta members ex-general Videla and ex-admiral Massera since 1998 has not resulted in military tensions. The bureaucratic character of the way the procedures of their indictment currently unfold goes hand in hand with the long-term subordination of the military to civilian rule.

The Chilean case falls at the opposite extreme of the spectrum. Free of defeat in an external military confrontation and economically successful, the military have been capable of resisting popular mobilizations and with the sympathy of more than 40 percent of the electorate were able to lead a transition imposing their own rules. The outcome not only showed for more than twenty years an effective domestic self-amnesty for their crimes and human rights violations, but also included institutional and economic prerogatives that assure, on the one hand, influence of the armed forces over the Supreme Court, the judicial system at lower levels, the Constitutional Tribunal, and the Senate as well as, on the other hand, veto power over some decisions of the executive and an electoral system that allows a minority with one-third plus one of the votes to control 50 percent of the congressional seats. The Chilean uncompleted transition to democracy was well described by the former president, from 1973 until 1997 commander in chief of the army, and currently senator General Augusto Pinochet Ugarte, when he stated "a esta democracia la tenemos atada, bien atada" (we have this democracy tied up, very well tied up). In this context it is understandable that, when Pinochet Ugarte was detained in Great Britain in 1998 at the request of a Spanish judge, the Chilean political system froze, massive mobilizations of opposition and support for the general spontaneously erupted, and to date the matter constitutes an important source of political cleavage in Chile. The issue of transitional justice reemerged in Chile at the heart of the political struggle.

The object of this chapter is to analyze and explain the particular dynamics assumed by the political process related to the treatment of military human rights violations during the transitions to democracy in Argentina and Chile. This work explains why the actors did what they did as a function of their objectives and the political and institutional constraints they encountered. It analyzes how and why the articulation of the different strategies shaped the political process and, finally, the significance of these processes for the type of democratic regime that emerged in each of these two Latin American cases.

1. The Argentine Case: State Terrorism, Limited Transitional Justice, and Military Subordination to Constitutional Rule

Although the last Argentine dictatorship, which was inaugurated with the coup of March 24, 1976, shows all the features of other authoritarian regimes in Argentina, the nature and magnitude of illegal repression set this case apart from

[4] Both detained for the kidnapping of children, a crime considered by the judges beyond the scope of the presidential pardon of 1991.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

previous dictatorial regimes. The Comisión Nacional sobre la Desaparición de Personas (National commission for disappeared Persons [CONADEP]) in 1984 documented the disappearance of 8,963 people, even as it made clear that it estimated that the number of victims exceeded 9,000 cases. Amnesty International estimated that the number of victims surpassed fifteen thousand, and other human rights organizations have maintained that the victims reached thirty thousand. From 1984 to 1999, the Undersecretariat for Human Rights confirmed the existence of around three thousand new cases, resulting in nearly twelve thousand confirmed disappeared.

After six years of repression, unsuccessful socioeconomic policies, and intramilitary conflict, the government tried to resolve the increasing political and social tensions by invading the Malvinas/Falklands Islands, a long-standing Argentine claim of sovereignty that showed consensus among military and civilians, Left and Right, and others. The military defeat in June 1982 brutally redefined the government's situation: it lost authority vis-a-vis society, and the intramilitary conflicts sharpened. Democratic elections were the only way the military found to retreat to barracks.

1.1. Judicial Autonomy and the Trial of the Members of the Military Juntas as a Frustration of President Alfonsín's Objectives

In October 1983, Raúl Alfonsín, to the surprise of many and with the support not only of the middle classes but also of part of the popular vote that had been historically Peronist, won the presidential elections. To meet the demand for justice that had set the tone of its electoral campaign, the Radical government designed a strategy that simultaneously intended to sanction members of the armed forces who had committed violations of human rights and tried to incorporate the military in the democratic arena. This strategy was based on the pursuit of a limited self-judgment by the military. The self-purge of the military would allow the Radical government to sanction judicially some of those responsible for violations of human rights. In this way, the government would fulfill electoral promises without creating a generalized threat to the armed forces. To assure this, a secret exchange took place between the government and the military leadership: the military would hand in a list of thirty or so names of officers they were willing to judge and convict in exchange for the suppression of what they perceived as a campaign to destroy the armed forces. Another important feature of the exchange was the presidency's determination to pardon those to be condemned for human rights violations before the end of the first term, namely, 1989.[5] The equilibrium attempted by Alfonsín was a

[5] Former chief of staff during the Alfonsín administration, General Ríos Ereñú stated in an interview, "President Alfonsín had promised that before leaving office those that had been condemned would be pardoned. . . . This means that I, the Chief of Staff, knew that the maximum that they would have to endure was six years. That during those six years, if things worked out fine, only the military Junta and some Commanders of Army Corps would be sanctioned and that the

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

limited judgment to fulfill his electoral promises, a low cost for those few who would be condemned (because whatever the sentence they were supposed to remain in jail no more than six years), and a neutralization of the threat to the rest of the armed forces.

The result of this negotiation immediately fell short for both parties. The military handed in only nine names, those of former members of the military juntas that had ruled the country since 1976. While the government delivered on its commitment and intention to close the judicial chapter as soon as possible, the process would soon show that even in a presidential democracy the president faces constraints, checks, and balances. The government's plan included the immediate detention of the former members of the military juntas as well as of some military and police authorities who had become public symbols of human rights abuses, the repeal of the "Law of National Pacification" ("self-amnesty" law), and the enactment of a new law that was to reduce dramatically the scope of penal liability for human rights abuses and the jurisdiction in which the trials were to be held.

Aside from these measures, the initial strategy of the government included the formation of the National Commission on the Disappearance of Persons (CONADEP). This commission was to receive denunciations and evidence of disappearances, send them to the justice system, check on the whereabouts of such persons, and, finally, determine the location of lost children. The constitution of CONADEP allowed the government to block the formation of a bicameral investigation commission, which was sought by most of the human rights organizations. From the government's point of view, such a commission, by granting Congress both a larger say in the formation of a human rights policy and the power to investigate those presumed responsible, endangered the government's goal of limiting the trial and condemnation to a few military chiefs. If indeed these reasons explain why the presidency decided on the formation of CONADEP, it should be emphasized that the effects of the commission's work far surpassed those that the government had hoped at the moment of its creation.

In December 1983 Congress repealed the "Law of Self-Amnesty." Nevertheless, the government's strategy encountered its first problems when it sanctioned the Reform of the Military Code (Law 23,049). This law conferred upon the Supreme Council of the armed forces the initial jurisdiction to prosecute military personnel, something that constituted a governmental success. On the other hand, the opposition managed to include the establishment of a mechanism of automatic appeal in civilian courts for the military court's decisions, and a legal

majority would have no problems" (Norden, Deborah, "Between Coups and Consolidation: Military Rebellion in Post-Authoritarian Argentina," Ph.D. Dissertation, University of California-Berkeley, 1992, p. 256). Joaquín Morales Solá confirms this version when he states, "Ríos Ereñú had become enthusiastic with a promise made to him by Borrás [minister of defense at the time]. The Minister assured him that the President would decide an amnesty before the conclusion of his government and meanwhile only the military Juntas and a small group of commanders . . . would be judged" (Morales Solá, Joaquín, *Asalto a la Ilusión*, Planeta, Buenos Aires, 1990, p. 148).

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

formula that precluded the indiscriminate use of the concept of "due obedience" in cases of infamous and aberrant crimes (*delitos atroces y aberrantes*). This last modification prevented the government from limiting ab initio the scope of the trials. When it became evident that the Supreme Council of the armed forces would not carry out the self-purge of the military, the Federal Appeals Court of Buenos Aires took the case of the members of the military juntas in its hands (September 1984). In June 1985 the trial of the members of the military juntas was initiated, and soon the daily media were flooded by the horrors of state terrorism.[6] From that moment on, and for a few months, juridical logic took primacy over the political logic that had governed the conflict until then.

As a consequence of this trial, former military president Jorge Rafael Videla and former commander in chief of the navy Admiral Emilio Massera were given life sentences, former president Eduardo Viola was given seventeen years in prison, and the junta members for the navy and air force Admiral Lambruschini and Brigadier Agosti were given eight years and three years and nine months, respectively.[7] Juridical logic, openly presented and publicized, gave credibility to the narratives of the past and put beyond suspicion the accounts of the witnesses. The trial turned into an effective mechanism for the historical and political judgment of the dictatorial regime. Furthermore, and contrary to what was expected by the government, instead of closing the "human rights question," it ended up reopening the issue: the court recommended follow-up of all the leads and information gathered about officers and noncommissioned officers (NCOs) accused of any involvement in human rights violations. This was a blow to the government's credibility among the military. The army's chief of staff had been told by members of the presidency that the sentence would foreclose future prosecutions by applying the principle of "due obedience" to all those members of the armed forces and police who had acted under the authority of the juntas.

1.2. The Presidency's Attempt to Curtail Judicial Autonomy

When the trial came to an end, and in a context characterized by increasing discontent and pressure from the armed forces, the presidency started to take action that tended to restrict the scope of the verdict and to ensure military acquiescence. These moves included three measures: the Instrucciones a los Fiscales Militares (Instructions to Military Prosecutors), the Ley de Punto Final (Law of Fullstop), and the Ley de Obediencia Debida (Law of Due Obedience).

[6] The impact on public opinion was such that the government, in an attempt to reduce it, established that all the TV newscasts were to show the images but not the audio portion of the trial, something that was possible because at the time the major networks were state owned. It was assumed that the "cold" description by anchorpersons of what was being revealed in the trial would create less anger than the narration by the victims themselves.

[7] The members of the junta that governed the country between 1979 and 1982 were acquitted because the court considered that the evidence against them was insufficient and inconclusive.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

A few months after the end of the trial, in 1986, *instructions to military prosecutors* were issued by the minister of defense with the intention of radically reducing the number of prosecutions by exempting from accountability the cases in which those accused of torture, kidnapping, and/or murder could prove or the context would lead to the assumption that they had acted according to orders. This first initiative to close the question politically did not succeed, given the mobilized opposition it awoke among the ranks of the Peronist Party, sectors of the governing Radical Party, human rights organizations, and the Federal Court of the Federal Capital.

The Ley de Punto Final, also in 1986, approached the issue from another angle. Instead of considering whether those who violated human rights were or were not liable, it established a deadline for summoning the presumed violators of human rights. This law was approved in December; the deadline was set for February and January, traditionally a month of vacations when most judicial activities are suspended in Argentina. The issue seemed closed by a well-timed unexpected move by the presidency and the majority it finally managed to obtain in Congress. Nevertheless, when the law was approved, seven federal courts suspended their January holidays to work on the pending cases. By February, when the time limit to prosecute determined by the law ended, more than three hundred high-ranking officers had been indicted. Thus, even though the president had managed to pass the Ley de Punto Final, the practical consequences of that law and an autonomous judiciary made this second attempt fail.

The Ley de Obediencia Debida was approved shortly after the April 1987 military uprising, headed by the *carapintadas*[8] in opposition to the prosecutions for human rights violations that they presented as the government's shrewd strategy to destroy the armed forces. During that uprising two major facts came to light. On the one hand, the uprising showed the strength of the military demand and the lack of capacity for command both of civilian authorities and of the army chief of staff. On the other hand, the wide and generalized mobilization of civil society[9] demonstrated the strength of societal repudiation of military impositions and, in the worst case, a military government. The crisis was curtailed, creating the image that the president personally had imposed the democratic will on the rebels. However, shortly after the end of the crisis the presidency submitted to Congress a project for a "due obedience" law, demonstrating that, one way or another, a new exchange had been carried out. The approved Ley de Obediencia Debida established that those individuals who at the time of the events were chief, junior, and noncommissioned officers; soldiers of the armed forces or members of security forces; police and penitentiary personnel, were not punishable for crimes that violated human rights, provided

[8] The rebellious forces were called *carapintadas*, or "painted faces," for the dark camouflage paint these commandos used.

[9] It should be noted that this reaction for the first time in Argentine history included representatives of the major business associations.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

they could be assumed to have acted within the scope of due obedience. The government had finally achieved in 1987 an objective it had sought since 1983, although at the wrong time: the political meaning of this law entailed different costs and benefits form the ones it had intended at the outset of the process. For most of the population, this law was clear evidence that the government was giving up one of the banners that in 1983 had allowed it to become the main guarantee of democracy and of the rule of law, and that the president's word was untrustworthy. Moreover, this law's sanction continued to leave an open flank in the dispute with the armed forces: the political vindication of the military repression from 1976 to 1982.

After the "Easter Rebellion," a new front of conflict opened in the relationship between the government and the armed forces. The human rights dispute overlapped with the conflict over what should be done with the participants in military rebellions, a conflict that in reality hid the struggle over the capacity of the emerging rebel sectors to influence the army's decisions. The preeminence of this new dispute modified the relative weight of the issues being debated. The discussion over how to punish those responsible for violations of human rights was overshadowed by the debate over how to reinstall the chain of command in the army. Even though the government was committed to end the trials of those responsible for human rights violations, neither the government nor important sectors of the army high command were willing to reinforce the political power of the *carapintadas* within the military.

The insurrections of "Monte Caseros" and "Villa Martelli" (both in 1988) and the last uprising of December 1990 were the result of the incorporation of the intramilitary cleavage in the human rights conflict. The three rebellions started as a consequence of the discontent of the *carapintada* sectors with the penalties the military leadership established for them. Nevertheless, after the law of due obedience was passed, the *carapintadas* faced difficulties in finding followers among the officer ranks. With the recurrence of incidents in which the chain of command was being broken to advance interests that were not perceived as related to the "whole" of the armed forces anymore, the sympathy that the *carapintadas* enjoyed among the officer's corps and NCOs started to vanish.

1.3. Menem: A New President Following an Old Strategy

The treatment of past human rights violations and the tensions with the military were not the only problems that the Alfonsín administration had to face. The economic problems proved much more complex than expected and, after the government's third economic plan failed, the Argentine economy collapsed in 1989. The crisis forced Alfonsín to turn over the government to the elected president, Carlos S. Menem, several months before schedule. The speed and uncontrolled nature of the events did not allow the outgoing president to fulfill his commitment to pardon those who had been convicted of human rights violations.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

The 1989 presidential elections created new expectations among the *carapintadas*. They expected that an electoral victory of the Peronist candidate would bring about the dismissal of the sanctions imposed by the Army General Staff, as well as a governmental position for their imprisoned leader, Colonel Mohammed Seineldín. On October 8, 1989, Carlos S. Menem, in power since July, announced a first presidential pardon. Among its 277 beneficiaries were military personnel who were involved in human rights violations, some convicted for their intervention in the Malvinas/Falklands war, others convicted for their participation in the military uprisings during the previous Radical government, as well as civilians who had been condemned for guerrilla activities. The ex-commanders in chief and former junta members Videla, Viola, Massera, and Lambruschini were not included in this pardon; nor were Generals Camps, Richieri, and Suárez Mason nor the former head of the guerrilla organization Montoneros, Mario Firmenich, although a future pardon was announced.

What were the consequences of the pardon for the intramilitary conflict? On a first reading one might believe that the *carapintada* leaders had obtained the results they were after: the imposition of an amnesty for human rights violations during the dictatorship and the political advance of their leadership within the military. Nevertheless, some days later it became evident that the pardon would not reverse the sentences imposed on them by the Army General Staff. The pardon allowed them to avoid being condemned by civilian courts, but it did not allow the *carapintadas* to obtain impunity in the military scene. From then on, they could not legitimate their activity in terms of "institutional" demands. Furthermore, their growing politicization resulted in their increasing political isolation among their military comrades.

Disenchanted with Menem, with some of their own members shifting toward participating in institutional politics, with a dwindling military influence, and with decreasing control over active units, the *carapintadas* made a last effort to gain control of the Army General Staff. The last uprising, on December 3, 1990, was the bloodiest and most violent. This time, there was a forceful repression of the uprising. When the rebellion ended, the *carapintadas* had been defeated in the military field and neutralized in the political arena.

What had changed to produce such a wide and clear defeat? In the first place, with the recent pardon and the imminence of a second one, as well as with the growing politicization of the movement, the support for the *carapintadas* among army officers could only be sustained on the basis of political loyalty. On the other hand, those officers in charge of the army realized that the repeated challenges to the chain of command and the fact that its support was mostly from low-ranking and noncommissioned officers implied a major risk for the survival of the institution.

In January 1991, only a few days after the rebellion and its defeat, a second presidential pardon was announced. This pardon included the first two military juntas as well as ex-generals Camps, Suárez Mason, and Richieri, together with the former guerrilla leader Mario Firmenich and a few other civilians. What reasons did the presidency have to issue a second pardon after the December

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

1990 uprising? Its sanction reaffirmed the Menemist strategy to forgive past crimes while punishing present and future disobedience. At the same time, it strengthened the Army General Staff, preventing the *carapintada* minority from becoming once again the spokespersons for the demands of the military corporation as a whole.

1.4. Reparation of Damages for the Victims, the Search for the Missing Children, and a Return to Prison of Human Rights Violators: 1991–2002

After the presidential pardon of 1991, the process of justice related to human rights violations showed four main areas of action: reparation for damages to the victims of state terrorism, information about the disappeared, the search for and punishment for the kidnapping of children, and, finally, the intervention of foreign courts.

Once the pardons were in place, the executive aimed at reducing political costs by moving forward in a series of human rights aspects that, apparently, would not imply new confrontations, namely, reparation for the victims and the search for kidnapped children. In both these issues the Undersecretariat of Human Rights, at the time part of the Ministry of Interior, played a major role.

With respect to *reparations for the victims*, the government followed the decisions of the Inter-American Court of Human Rights[10] in the sense that it was the state's responsibility to compensate the victims economically for its actions under the authoritarian regime. This was done through a presidential decree, three laws, and the appointment of the Undersecretariat of Human Rights as the institutional body responsible for the implementation of the scheme.

Presidential decree number 70 of 1991 was aimed at those who had suffered illegitimate detention and whose right to claim reparation in the court had expired. By Law 24,043 of the same year, the benefit was extended to all those who had been detained "at disposition of the Executive Power" and all civilians detained by decision of war tribunals; those who had been detained in military facilities without being sentenced by a war tribunal; conscripts who had been sentenced by war tribunals (equating their situation to that of civilians who had been sentenced by war tribunals); children born in captivity of mothers included in this law; and all those detained in clandestine centers. These benefits amount to US$74.60 per day of detention. Illegal military violence and abuses in the detention centers had started before the coup d'etat of 1976. So the problem was to establish a parameter to define the period covered by this right. The decision was to fix it from November 6, 1974, the date the state of siege was declared during the democratic regime, through December 10, 1983, when the new democratic government took office.

[10] Recommendations based on the International Pact of Political and Civil Rights of December 19, 1966, which states in its Article 9.5, "Toda persona que haya sido ilegalmente detenida o presa, tendrá derecho efectivo a obtener reparación."

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

Finally, Law 24,411 of 1994 determined the compensation to be received by parents, children, or the lawful heirs of those disappeared or dead as a consequence of the repression carried out before December 10, 1983. The compensation per person was defined as equivalent to one hundred times the monthly salary of Category A of the National System of Public Administrators, resulting in a total amount of US$220,000 per person. Law 24,499 of 1995 extended the deadline for presenting claims though June 2000. From 1994 through 1997 the families of nearly six thousand disappeared and of twelve hundred individuals violently killed by state agents had filed applications for reparations.

This program implies a significant fiscal burden. The way in which an equilibrium was established between the rights of the victims and the fiscal capacity of the state, something particularly relevant at a time of profound economic reform, was to pay with government bonds that the beneficiaries could choose to obtain in pesos or in U.S. dollars.[11] The figure on the total amount paid as of February 1998 was US$655,574,539, of which US$9,980,000 was paid according to Decree 70/91; US$551,005,428 corresponded to Law 24,043/91, and US$94,589,111 to Law 24,411/94.[12] The estimate is that the total amount for these reparations reached approximately US$750 million by the end of 2000.

In none of the laws mentioned were reparations contemplated for the exiled. Nevertheless, an administrative interpretation of Law 24,043 made by the Undersecretariat for Human Rights included those who were held in administrative detention under the state of siege and allowed to leave the country under Article 23 of the Constitution ("right of option"); in other words, those detained and forced out of the country until a decree allowed them to return or the state of siege was lifted were compensated with the same amount for each day of detention and for each day in exile US$74.60 per day.[13] Those who were released in Argentina and later went into exile or those that went into exile, preempting detention or kidnapping, were not included as beneficiaries because they were nominally free to return. In spite of the fact that without a legal basis it is extremely difficult to establish who did and who did not have good political reasons to leave the country or not to return after some time, during 1999 Congress began a debate over the rights of all those exiled who cannot formally show a legal reason for having left the country. One of the drafts that were discussed establishes half of the original daily amount for these exiles (US$37) and an applicable period from November 1974 to December 10, 1983.[14] If a new law covering this larger group of exiles, who went into exile without making

[11] The beneficiaries also have the option to sell the bonds at market price, at this point covering around 75 percent of their face value, or wait until the bonds mature, when they will be worth the full face value.

[12] *Queselea*, Publicación Bimestral de la Subsecretaría de Derechos Humanos y Sociales, March 1998, pp. 12, 13.

[13] I have to thank both Priscilla Hayner and Juan Méndez for this information. Around 1,000 exiles were beneficiaries of this decision.

[14] See *Clarín*, January 26, 1999, p. 16.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

use of their "right of option," is approved, the final total amount paid for reparations could easily double (some argue that could triple) the projection of a total of US$750 million.

With regard to the *missing children*, the government supported their search after 1991. Some of the disappeared were kidnapped with small children and babies, and others were pregnant at the time of detention. In over 280 cases these children or those born in captivity were not returned to their original family and were either appropriated by the military or members of the police or given for adoption to families, who in some cases were unaware of the children's origin. The search for the missing children and the quest for punishment for their abductors became the central issue for the work of the Grandmothers of Plaza de Mayo. As a response to the request of the Grandmothers, the executive in 1992 created the National Commission for the Right to Identity, an organism that works jointly with the National Bank of Genetic Data. By November 1998, sixty-one youngsters had learned the truth about their parents' fate and reestablished a relationship with their biological family.[15]

The unexpected consequence of this work was that long-standing legal demands related to the issue surfaced during 1998. Two judges decided that the sentences of the members of the juntas and other high-ranking personnel pardoned by the presidency had not included the illegal appropriation of children.[16] Their grounds for this decision were (a) that no sanction was established for the kidnapping of children in their 1985 sentences and (b) that in 1985 they had been tried as members of the governing body of the country, that is, the military junta, and not as commanders in chief of each of the branches. In this sense, and given that the appropriation of children was not the result of a political decision at the national level but of operational strategies of the branches as autonomous actors, their personal responsibility still holds and can be judged. Moreover, for the unsolved cases of missing children the crime is considered ongoing given that the "official documents forgery" embedded in the change of identity that followed the appropriation of the child has not been corrected. The responsibility of the former junta members and other officers is being established by the judges either by proving their knowledge of or direct relationship to specific cases of child appropriation or by assuming that because of their

[15] In cases in which the children had been appropriated in an unlawful way by military or police personnel, their original identity is restituted to the youngster by a judge. On the other hand, in those cases in which the children had been adopted in good faith, and given that the identity is considered to be constituted by name, nationality, and family and social ties, instead of by a mere biological link, the dramatic issue is resolved by consulting the preferences of the victim (even in cases in which the victim has not reached an age of legal independence).

[16] It is interesting to note that the former prosecuting attorneys during the trial of the junta members disagree among themselves in this respect. While the head of that team, Carlos Strassera, considers the position of the judges correct, the lawyer who acted at that time as his adjunct, Luis Moreno Ocampo, holds the position that a systematic plan to kidnap children was considered during the trial, that it was never proved and that, in spite of the lack of conviction in 1985, these crimes have already been judged and, therefore, covered by the 1991 presidential pardon.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

operational responsibilities they were aware of the illegal events and did not take action to prevent them.

In this context on June 6, November 24, December 7, December 9, and December 23, 1998, ex-general, former president and commander in chief of the army Jorge R. Videla; ex-admiral and commander in chief of the navy Emilio E. Massera; retired vice admiral and former chief of naval operations Antonio Vañek; retired rear admiral and former chief of the naval School of Mechanics (the most important illegal detention center under control of the navy) José Suppicich and former president and retired general Reynaldo Bignone were, respectively, detained[17] and indicted for the kidnapping of children and participation in official document destruction and forgery. Former commanders in chief of the army and navy, retired general Cristino Nicolaides and retired admiral Rubén Franco, were also detained and indicted on these charges during 1999. Although this is still an ongoing process, only a few mobilizations of human rights activists have taken place, and the events are followed by the society with interest although without much drama. The general mood tends to consider that what is happening is what is supposed to happen, and except on June 6, 1998, when the public impact of this process erupted, no one worries much about the opinion of the armed forces, nor are they expressing one. On September 9, 1999, the Federal Appeals Court of Buenos Aires ruled that the kidnapping of children is a crime that cannot be prescribed and, therefore, the proceedings by the lower courts were legitimate and should continue.[18]

At different stages the executive, the judiciary, and Congress have all moved in the direction of the *right to truth and information*, sometimes in overlapping ways. The executive, through the work of the Undersecretariat of Human Rights, started the Program of Truth and Memory, aimed at digitalizing the available information in different national and provincial archives of the judiciary and human rights organizations. This is not a minor issue in Argentina given that most of these archives are not computerized and information has seldom been systematically cross-referenced. This work is ongoing, and its result is to be a data bank containing information about victims, perpetrators, and the circumstances of the crimes.

With respect to the judiciary, some Federal Appeal Courts, such as the one in La Plata, Province of Buenos Aires, have ruled in accordance with the Inter-American Court of Human Rights that the right to truth and information of the victims implies that the pardons of those sentenced should not foreclose continued investigation to allow the families of the victims of state terrorism to know the circumstances related to the disappearance of the victims and the location of their remains (Resolution 18 of April 21, 1998). In this sense, this court has requested from the Federal Appeals Courts of Buenos Aires and

[17] Videla was still under house arrest in June 2005, as was Massera when he died that month, as Argentine law establishes this provision for those over seventy years of age.

[18] *La Nación*, September 10, 1999, p. 5. The Appeals Court also established the need to correct some procedural errors that the lower courts had committed.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

San Martín the remission of all the proceedings of habeas corpus and criminal cases initiated in the Province of Buenos Aires's lower courts and used for the trials of the junta members and high-ranking officers who headed operational regions. The La Plata Court has also started to take public testimony of victims and families of victims in order to reconstruct the fate of those killed and disappeared for whom information is still unavailable.

Menem's presidency indeed maintained an aggressive attitude toward those who pursued the objective of reopening cases or confronted the legitimacy of the Law of Due Obedience or the presidential pardons. This strategy was consistent throughout the first (1989–95) and second (1995–99) tenures of his administrations and met with varying degrees of success. The year 1995 started with the shocking public confession of retired navy captain Adolfo Scilingo about the methods employed by the navy to kidnap, torture, murder, and disappear political militants during the seventies and his participation in these activities. The ensuing public uproar was met by the chief of staff of the army's denouncing the illegitimacy of the repressive methods used by the military dictatorship (see the Introduction of this chapter). When matters seemed to have quieted and the scheme of economic reparations was well under way, the issue of human rights violations reemerged for the public eye: in March 1998 congressional representatives of the center-Left opposition Frente para un Pais Solidario (FREPASO) presented a project to repeal the old Full Stop and Due Obedience laws. Although of no major judicial consequence, given that the due obedience criteria legally in effect from 1987 to 1998 allowed the original beneficiaries to avoid bar prosecution under the principle of nonapplication of ex post facto legislation, the proposal had the support of over 80 percent of public opinion and forced all relevant politicians to take a stand on the issue. With the whole matter again in the open and a presidency isolated from its own party's congressional representatives, the law was passed swiftly by both chambers in Congress. After this defeat, those who sought finally to "turn the page" on the human rights violations found themselves, first, with the April 1998 resolution by some federal appeal courts to respond to the right to truth and information by reopening the investigation related to the disappeared and, second, with the process related to the missing children which started with the detention of former president Videla on June 1998 and continues to the present.

Menem's aggressive strategy against those who defied the presidential pardons included confrontations with the actions of foreign courts and Decree 111/98 forbidding all state organs to collaborate with the judicial proceedings by the Spanish courts on these matters. The *intervention of foreign courts* in the Argentine transition is not limited to the recommendations and rulings of the Inter-American Human Rights Court. Major conflicts have occurred when French and Spanish courts decided to judge those responsible for human rights violations of their nationals on Argentine soil, and Italian and German courts have also initiated proceedings for the violation of rights of their nationals in Argentina. In the case of France, ex-navy captain Alfredo Astiz was condemned years ago in absentia for the abduction and murder of two French nuns, Alice

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

Domon and Leonie Duquet. Astiz was a naval intelligence operative who infiltrated the Mothers of Plaza de Mayo and collaborated in the kidnapping and murder of part of its original leadership, with whom the nuns were collaborating. An Italian court is judging ex-general Suárez Mason in absentia and a German court in September 1998 started proceedings related to the disappearance of eighty of its nationals in Argentina. Spain's Judge Baltasar Garzón (who demanded Pinochet's extradition from Great Britain) is in charge of procedures indicting 152 members of the Argentine armed forces for human rights violations and requiring INTERPOL detention anywhere in the world (except Argentina) of eleven of those.[19] In a further move, Judge Garzón required the extradition of ninety-eight military officers from the Argentine government on November 1999, arguing that their crimes fell within the notion of genocide and, therefore, had not been prescribed and could be judged by a Spanish court. This time, not only Menem's government reacted against the requirement; former president Alfonsín and elected (on October 24, 1999) president Fernando De la Rúa (like Alfonsín, a member of the opposition Radical party) considered the requirement of extradition inappropriate and defended the principle of judicial territoriality.[20]

The stand of the Menem government in this respect was consistent in asserting the principle of territoriality for the judicial proceedings, denying collaboration to foreign judges, and pledging support for the constitution of an International Tribunal of Criminal Justice that it hoped would not apply its rulings retroactively. As we saw, this stand was maintained by the incoming government: on December 10, 1999, an alliance between the centrist Radical Party and the center-Left FREPASO replaced Carlos Menem with Fernando De la Rúa in the presidency. The new president made clear that he would try to improve the relationship with foreign courts and strengthen the role of the judiciary vis-à-vis the executive. In this context, the Under-Secretariat of Human Rights was removed from the Ministry of Interior, to be placed under the scope of the Ministry of Justice and the new government derogated Decree 111/98, which forbade all state organs to collaborate with the judicial proceedings by the Spanish courts on local human rights violations. Cosmetics apart, with respect to the role of foreign courts the De la Rúa government maintained the principle of judicial territoriality as well as the support for the creation of an International Tribunal of Criminal Justice. Beyond the internal tensions that this stand created within the governing alliance between the Radical Party and FREPASO, Argentina once again demonstrated a new government that followed an old strategy. This old strategy was maintained beyond the downfall of the De la Rúa government in December 2001 and continued with Eduardo Duhalde's government.

The De la Rúa government was more tolerant toward domestic judicial decisions: on March 7, 2001, the federal judge Gabriel Cavallo abrogated the

[19] *La Nación*, October 18, 1998, p. 9.
[20] *La Nación*, November 4, 1999, pp. 1, 5.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

amnesty laws, declaring the full stop and due obedience laws "unconstitutional, null and void," a decision that allowed the reopening of several cases of human rights violations against the already detained junta members, as well as against former senior officers, such as the former president and commander in chief Leopoldo F. Galtieri, who had managed to avoid detention until mid-2001 and who found themselves indicted and under house arrest at the time of writing.

Conflict and international intervention were present throughout most of the 1990s decade in the Argentine process related to human rights violations, and despite the coming and going of local courts and legislation, domestic criminals learned early on that beyond the national frontiers they faced a more hostile environment than the uneasy, and sometimes even risky, local one.

1.5. Lessons from the Argentine Experience: Other Intervening Variables in the Subordination of the Military to Constitutional Rule (Besides Transitional Justice)

The present position of the armed forces is not only the product of the dynamics that characterized transitional justice in Argentina. On the one hand, the armed forces confronted one of the worst possible scenarios: the trials and the conviction of their leaders for their responsibility in the repression during the military dictatorship. The political costs for the army increased as a consequence of the conflict between the general staff and the *carapintadas*. Even though the general staff succeeded in gaining the benefit of the pardon and was victorious over the *carapintadas*, it could not neutralize the profound redefinition of its relative position before civil society that the trials generated, nor has it been able to eliminate the costs and risks resulting from the politicization of military institutions.

On the other hand, the 1976–83 military regime resulted in a extensive erosion of the military's public image and political legitimacy. In the first place, the systematic violations of human rights gave way to the emergence of strong resentments among the majority of the population against the military. The trial only accentuated a tendency already in place in the Argentine society. In the second place, the deep socioeconomic crisis that resulted from the economic policies implemented by the military produced resentment among the popular sectors, and distanced important groups of the bourgeoisie that traditionally constituted the core of the political and economic alliance that lent social support to military governments. The armed forces stopped being predictable and became a source of uncertainty in relation to the interests of capitalists.[21] Another example of the risks that the military behavior entailed for the bourgeoisie and for traditional international allies such as the United States was the

[21] Acuña, Carlos H., "Politics and Economics in the Argentina of the Nineties (Or, Why the future is no longer what it used to be)," in W. Smith, C. Acuña, and E. Gamarra (comps.), *Democracy, Markets and Structural Reforms in Latin America: Argentina, Bolivia, Brazil, Chile and Mexico*, Transaction, New Brunswick, N.J., 1994.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

ill-fated Malvinas/Falklands adventure. The defeat generated in turn two deep intramilitary cleavages: the breakdown of the relationships among the different forces, on the one hand, and a tension between the generals who had the politicomilitary responsibility and the junior officers and NCOs who were in charge of operational functions.

The internal confrontation that exploded during Easter Week of 1987 unveiled a new scenario for intramilitary conflicts. In contrast with confrontations in the past, in which the institution appeared divided in factions that cut across ranks, this time the conflict emerged as a struggle of low-ranking officers supported by NCOs against "the generals." If the *carapintadas* were not isolated and defeated, the "class struggle" could only end with the destruction of the institution as such, since a potential victory of the *carapintadas* implied the discharge of most high-ranking personnel, and the victory of "the generals" meant the dismissal of the lower-rank officers.

Even though the most conflict-laden aspects of the internal tensions were resolved and the *carapintadas* defeated, the role played by the armed forces during their control of the government caused their social and political isolation and the acute internal crisis that took place in recent years. Consequently, those who defeated the *carapintadas* have a clear choice: if the priority is the survival of the institution, the armed forces cannot run the risks involved in political intervention. Hence as a consequence of the crisis that the armed forces started to suffer during and as a result of their dictatorship, and of the political and judicial results of the struggle over the question of human rights, in the long run the military have lost the incentive to challenge constitutional governments.

The current situation of the Argentine armed forces has been affected also by the transformation of the international scenario and by the fiscal crisis of the state. The end of the cold war resulted in the disappearance of the "Communist threat," eroding one of the traditional arguments used to justify military interventions in politics. The economic integration with Brazil and the frontier agreements with Chile have resulted in the transformation of old hypotheses of conflict and in the conversion of old potential enemies into allies or commercial partners. The political and economic realignment with the United States that took place during the nineties resulted in a dismantling of important military projects, such as the Condor missile and nuclear devices, the last related to the acceptance of the Argentine government of the Tlatelolco Treaty. All these factors have activated the search for new military duties (such as participation in United Nations [UN] peace missions) and have resulted in a profound redefinition of the role of the military in internal politics.

These changes in the national and international context have been reinforced by a series of legal modifications that establish a new political and institutional position for the armed forces. Since 1983 the president has strengthened his formal leadership over the military as commander in chief of the armed forces, by eliminating some prerogatives that historically had endowed the military leadership with large quotas of power and autonomy. The approval of the Ley

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

de Defensa (Law of Defense) in 1988 restricted the duties of the armed forces to defense in cases of external aggression.

The fiscal crisis of the state and economic restructuring have resulted in a significant decrease of military participation in economic activities. During Menem's administration many army quarters were dismantled, nearly all military enterprises were privatized, personnel were substantially reduced, the draft was ended, and military budgets were curtailed dramatically. All these events meant a radical transformation of the power and nature of the armed forces as a political actor[22] and are impossible to dissociate from the process of transitional justice.

2. CHILE: FROM AUTHORITARIANISM TO A DEMOCRACY STILL IN TRANSITION

After long-standing stability of the political regime, Chile suffered on September 11, 1973, the breakdown of its democracy. General Augusto Pinochet, leading a junta consisting of the commanders of each military branch and of the carabineros, took over the political decision-making process. The persecution and killing of those people the regime defined as its opponents were pursued systematically. In some cases, this process took place publicly and on a large scale, with the intention of paralyzing possible reactions. In other cases, it occurred in a clandestine and selective way. The figures of the National Commission of Truth and Reconciliation report (Rettig Report, February 1991) show that during the period covered by the dictatorship (1973–90) 2,095 individuals were killed for political reasons and 1,102 persons disappeared (although some projections of human rights organizations double this number).[23]

The institutionalization that would seriously limit the scope of action of democratic representatives during the transition started in 1978, when a plebiscite was called to support the military government and to condemn the denunciations of human rights violations that had been voiced at the UN. Once the results of the plebiscite strengthened the government's position, an amnesty law was passed in order to prevent eventual trials for those who had participated in the repression. This stage ended in 1980 with the consolidation of Pinochet's

[22] For a comparative analysis of the evolution and significance of the military industry and resources, see Acuña, Carlos H., and Smith, William C., "The Politics of *Military Economics* in the Southern Cone: Comparative Perspectives on Arms Production in Argentina, Brazil and Chile," in *Political Power and Social Theory*, 9, 1995. The data in this article allow us to infer that whereas the average military expenditure as percentage of GDP in the democratic period previous to the military regime was 1.3 (1973–76), during the military regime it increased to 2.8 (1976–83), during the Alfonsín administration was reduced to 1.1 (1983–89), and during Menem's first government fell to approximately 0.9 (1989–95). It should be noted that these percentages do not include the cost of military pensions, which in Argentina represent around a third of total military expenditures.

[23] Although most human rights violations in Chile took place between 1973 and 1978, repression grew significantly at different points in later periods.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

leadership through a plebiscite that ratified the constitution proposed by the military government. Although the Constitution of 1980 contemplated a return to open elections in 1989, it also established a mechanism for succession that ensured the continuity in power of the military leaders, of the judiciary, and of the commander in chief of the army until 1997. In addition, it limited the power of future civilian governments through the creation of nonrepresentative institutions and of a National Security Council that ensured a continued military role in surveillance and repressive functions. This constitution shaped the subsequent dynamics of the Chilean process in fundamental ways. The inclusion of transitional provisions created a time limit for the dictatorship, provided legal mechanisms for its retreat, allowed the military government to constrain the opposition during the transition, and conditioned both the resources and the actions of the postdictatorial government.[24] Thus, the internal consolidation of the regime helped to define the characteristics of the future democracy and of the armed forces' role in the future civilian government, while also strengthening the personal leadership of Pinochet.

The opposition was able to displace Pinochet from the presidency in 1989 at the cost of reducing its future scope of action. In contrast with other transitions, in which military governments had tried to preserve some of their prerogatives through negotiations with the opposition, the Pinochet government avoided discussion of many of these issues in the informal conversations that took place in 1988 and 1989. From the point of view of the military government, the restrictions imposed by the legal framework that the opposition had accepted and endorsed were such that new agreements became unnecessary. Consider, however, the reaction of the Concertación de Partidos por la Democracia, the alliance of Christian Democrats and Socialists that served as a base for President Patricio Aylwin's government.

Confident of its chances to achieve a parliamentary majority sufficiently large to offset the restrictions imposed by the Constitution of 1980, the Concertación chose not to debate these restrictions. The opposition's belief was that by avoiding such discussion, it could avoid compromises that might restrict its future autonomy. In the last months before the transfer of power, the forces of the Concertación agreed to one key point involving the future of the armed forces. When the Organic Law of the Armed Forces was negotiated, the parties agreed to maintain the budgetary autonomy of the military: specifically, the military budget could not fall below its level of 1989, and the military would in addition receive 10 percent of income earned through copper exports. In contrast to the situations in Brazil and Argentina, where crises of the state significantly affected

[24] In this respect, see Barros, Robert J., *By Reason or by Force: Military Constitutionalism in Chile (1973–1989)*, Ph.D. Dissertation, University of Chicago, 1996, and "Dictatorship and Constitutionalism in Pinochet's Chile," Working Paper 14, Universidad de San Andrés, Buenos Aires, September 1998; and Garretón, Manuel Antonio, "Human Rights in Democratization Processes," in E. Jelin and E. Herschberg, eds., *Constructing Democracy: Human Rights, Citizenship, and Society in Latin America* (Westview, Boulder, Colo., 1996).

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

the military budget, the Chilean armed forces were able to isolate themselves from fluctuations of the national economy and to guarantee a budget ensuring operational autonomy and high salaries for their officers.

2.1. Transition and Democracy in Chile: The Aylwin Administration

From the very start of the Patricio Aylwin administration in 1990, the Concertación experienced the limitations imposed by the legal framework it had accepted. What became evident, inasmuch as it failed to obtain a substantial legislative majority, was "that from then on, it would obtain only what was possible."[25] Yet until the constitution and the Organic Laws passed by the military could be changed, the president would not be able to appoint the commander of the armed forces or remove any military commander without the permission of the Security Council; the military budget would not be set by elected civilians; the 1978 Amnesty Law would not be annulled or overruled; and the government would continue to confront nine senators of the forty-five, who are appointed by the military and the Supreme Courts, among others, a number that assures a right-wing veto in the Senate. The balance of forces in Congress has also affected the government's capacity to pass and amend legislation. Even today, now that limited legal reforms have been achieved, the death penalty remains in place for crimes related to state security, military courts have jurisdiction over some crimes committed by civilians, and verdicts issued by the military regime are still in force.

Since those responsible for human rights violations could not be prosecuted, the government in 1990 formed a commission – the Commission on Truth and Reconciliation – to investigate and establish the truth about human rights abuses that resulted in death. But even before the results of the commission were made public, the Unión Democrática Independiente, the Renovación Nacional, and members of the armed forces denounced it. At the same time, the commission report stimulated new demands to modify the Amnesty Law and to bring to trial those liable for crimes, even though they could not be sentenced. Yet General Pinochet and other military leaders repeatedly warned that they would not allow military personnel to be brought to trial, because in such a case the rule of law would cease. For its part, the Supreme Court, made up mostly of judges named by the military government,[26] rejected in August 1990 a motion

[25] Namuncurá Serrano, Domingo, "Derechos humanos en Chile: Tensiones cívico-militares en el camino por establecer la verdad," Mimeo, CEDES, Buenos Aires, 1991.

[26] As Jorge Correa points out, since 1990 the Aylwin and Frei administrations have replaced seven of the seventeen judges of the court, six through retirement and one through dismissal by an impeachment proceeding. Nevertheless, the new judges do not necessarily share the democratic government's stand on human rights. The presidency finds its options restricted by appointing new judges from a list of five that is submitted by the Supreme Court itself ("'No Victorious Army Has Ever Been Prosecuted': The Unsettled Story of Transitional Justice in Chile," in J. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, Notre Dame, Ind., 1997, pp. 138, 153).

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

requesting the inapplicability of the Amnesty Law. In this way, the court ratified the will of the military leadership. Toward the end of 1990, moreover, the army successfully opposed the implementation of measures that could have reduced its prerogatives.

The painstaking detail of the Rettig Commission Report, which was released to the public in February 1991, provided hard evidence in support of widely held suspicions about the extent and brutality of human rights violations during the dictatorship. Eager to make the most of an apparent opportunity to press the need for justice, the government responded to the report by attempting to accelerate the reform of the judiciary. This initiative met strong opposition, however, and was partially aborted when within days (on April 1) of the Rettig report terrorists assassinated the right-wing leader and former constitutional adviser to Pinochet, Jaime Guzmán. The criminal attack allowed the right wing to regain the offensive and started to shift the debate toward the discussion of measures to guarantee internal security and order.

The government also moved forward, following the commission's recommendations, to establish financial reparations. Law 19.123 of January 31, 1992, established the National Corporation for Reparation and Reconciliation as a temporary decentralized state organ, under the supervision of the Ministry of Interior. Articles 17 and 18 consider as victims entitled to reparation all those identified in the Rettig report (disappeared or murdered by state agents) as well as all those declared as such by the corporation itself, and established health and educational benefits, as well as a fixed monthly amount of approximately US$370 per family to be distributed 40 percent to the surviving spouse, 30 percent to the mother of the victim, 15 percent to the father or any natural children of the victim, and 15 percent to each child of the victim up to twenty-five years of age (defining a distributive mechanism in case there were more than one child or any of the beneficiaries dies or voluntarily forgoes the compensation). In addition, the designated beneficiaries collect one (lump sum) compensatory allowance equivalent to twelve months of their rightful annuity. The fiscal outlay for this cause for the year 1992 amounted to US$22 million.[27]

Parallel to the move toward reparation, lower courts increased their investigative activity, even though the judges realized that any accusation would place the case under the jurisdiction of a military court, implying its immediate dismissal under the provisions of the 1978 amnesty. This strategy of information gathering resulted in military unrest, basically because the armed forces believed that, beyond the final outcome of these processes, to require members of the armed forces to testify about human rights violations was to put them on trial before the media. During 1993 two other events strengthened military uneasiness: first, and as a result of pressures from the United States, the 1978 amnesty had excluded the murder of Orlando Letelier, foreign minister

[27] Medina Quiroga, Cecilia, "The Reparations Program," "Chile," in Neil J. Kritz, ed., *Transitional Justice: Country Studies*, vol. II, United States Institute of Peace Press, Washington, D.C., 1995, pp. 502–507.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

of Salvador Allende, and his secretary, Ronnie Moffit, in Washington, D.C., in 1976. In charge of the investigation of these killings was one of the newly appointed judges to the Supreme Court, Adolfo Bañados. Bañados could establish a direct link between the murders and the leadership of the Dirección Nacional de Inteligencia (National Intelligence Directorate [DINA]); the result was the indictment of General Manuel Contreras, former head of DINA, and of Brigadier Manuel Espinoza, his second in command. Second, an arrest warrant was issued for Fernando Laureani, an active-duty colonel, for his participation in human rights violations. In this general context on May 28 the military mobilized fully equipped combat troops, including armored vehicles, surrounding army headquarters. No one in the government had been informed about this display of strength, and it was taken for what it was: an open threat to remind the government that military power was still there and its patience was coming to an end.

The reaction of the presidency was to try to put an end to judicial action (similar to the Ley de Punto Final – Law of Full Stop – in Argentina). This strategy attempted to obtain information in exchange for the assurance to the military that the investigations and potential prosecutions would soon end. The government's strategy did not survive the end of the year. Disagreements within the governmental alliance frustrated Aylwin's course of action in September 1993, and in November Supreme Court judge Adolfo Bañados declared General Contreras and Brigadier Espinoza guilty and sentenced them to seven- and six-year imprisonment, respectively. Although their appeal made fulfillment of the sentence conditional upon the approval of the Supreme Court as a whole, the situation created shaky conditions for the victorious new candidate of the Concertación, Eduardo Frei.

2.2. When the Transition Refuses to End: The Frei Administration

When Eduardo Frei took office on March 1994, he had to come to terms with the fact that the transition had not been completed during Aylwin's administration. The judicial proceedings kept complicating the government's objectives in several ways. On the one hand, crimes perpetrated by military or police personnel after the amnesty's deadline of 1978 were being sanctioned: in March 1994 fifteen members of the police were convicted for the murder of three communist militants in 1985, during 1995 and 1996 other convictions related to crimes also committed in 1985 and in 1986 occurred. Some of these cases resulted in a renewed illustration of the military's defiant autonomy. In his narrative of what happened when the presiding judge suggested to the military court that high police officials were guilty of obstructing justice, Jorge Correa writes:

> Among the officers that he named were former director of the police, César Mendoza Durán, and the individual currently holding the same position, Rodolfo Stange. The judge's report was [the] immediate source of controversy, and on April 5, 1994, the Frei government demanded that the chief of police turn in his resignation. Yet not only

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

Stange refused to bow to this order and rejected the accusations made against him, but the government itself came under severe criticism for asking the director's resignation when he had yet to be charged with a crime. In the end, the Minister of Interior, Germán Correa, was forced to step down as a result of the administration's gaffe, Stange remained in office, and a military court eventually dismissed all remaining charges in the case.[28]

On the other hand, a major political conflict resulted when the Supreme Court finally ruled on the appeal of the former heads of DINA, General Contreras and Brigadier Espinoza. On May 1995 the court upheld the conviction and gave the order to incarcerate them. While Espinoza fulfilled the order, Contreras, from his farm and guarded by military comrades, stated that he was not going to be jailed. It took a tense process, which included his admission to the naval hospital to undergo surgery, before he was finally imprisoned in October 1995. For five months the government was incapable of treating General Contreras as subject to the law on an equal footing with other citizens. As a response to a situation that the government considered highly volatile and out of hand, President Frei reattempted to achieve Aylwin's old failed objective, namely, to pass legislation that allowed the courts to exchange information about the crimes and whereabouts of the missing for secrecy about the informants and the assurance to the military that judicial proceedings would stop. This exchange of truth for justice failed again because of internal opposition in the Concertación as well as from both the human rights organizations and the far Right.

In a stalemate, the institutional process put in place by the military continued to meet its own deadlines: in 1997 General Pinochet was replaced as the head of the army by a loyal successor and in 1998 he became a nonelected senator, presumably for life.

2.3. Taking to Court a Victorious Army: The Unexpected (and Overwhelming) International Variable

The latest events are a matter of yesterday's, today's, and tomorrow's newspapers. The story since October 1998 is roughly as follows: Senator Augusto Pinochet Ugarte decided to visit Great Britain for minor surgery. Holding a diplomatic passport as a member of the Senate, Pinochet was surprised on October 16, 1998, when he was detained by Scotland Yard at the request of Spanish judge Baltasar Garzón. This was the consequence of a demand presented in 1996 to the Spanish courts against Pinochet, Gustavo Leigh, and others by Chilean human rights organizations and victims. Since that date the Spanish judges decided there were grounds to accuse Pinochet of crimes against humanity that affected Spanish nationals in Chile and that have been unpunished in the country where they were committed. Based on international treaties

[28] Correa, Jorge, "'No Victorious Army Has Ever Been Prosecuted': The Unsettled Story of Transitional Justice in Chile," in J. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, Notre Dame, Ind., 1997, pp. 146–147.

https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press
Cambridge Books Online © Cambridge University Press, 2010

and conventions, the judge's request to Great Britain for extradition presented the human rights violations committed by Pinochet as crimes against humanity and, as such, without prescription or the possibility of an amnesty, and subject to extradition as objects of global jurisdiction.[29]

The Chilean government was aware of the proceedings and, as in the Argentine case, hostile to them: an official statement of the Chilean government of May 28, 1997, described the activity of the Spanish judges as "a political trial of the Chilean transition to democracy."[30] Once the general was in jail, the strategies that followed fell one by one. The argument that he enjoyed diplomatic immunity fell through when it became clear that only those who represent the country vis-à-vis other states enjoy the privilege. The argument that the crimes were committed while he was a head of state and, therefore, he again deserved immunity, found a positive response in the British Supreme Court (October 28) but was dismissed by the Chamber of Lords (on November 25 in a split 3–2 vote of the "Law Lords"). The secretary of the interior, Jack Straw, ratified the decision of the lords on December 9, concluding that there were indeed grounds for extradition to Spain, although in his decision the crimes considered were murder, torture, and kidnapping and did not include aggravated murder and genocide. On December 17, 1998, the Appeals Committee of the Chamber of Lords dismissed the decision of the Law Lords because of the participation of Lord Leonard Hoffman, whose ties with Amnesty International created doubts about his impartiality. On March 24, 1999, a new panel of lords concluded that there were grounds for the extradition, and the secretary of interior ratified this new decision on April 15, opening formally the process of extradition. The British court in charge of the extradition trial approved on October 8, 1999, the Spanish court's request for extradition. Beyond the delays promoted by the senator's defense arguing his bad health and age (his eighty-fourth birthday was on November 25, 1999) to stop the proceedings, the next major step was to be the decision of the Supreme Court in regard to the new appeal, at this stage, presented by the defense against the lower court ruling of October 1999. With mounting pressure from other European requests for the extradition of Pinochet (from Belgium, Switzerland, and France), the secretary of the interior decided in the first days of 2000 that a medical examination was needed to assess the general's condition and ability to face a trial. The result of the examination was the British government's decision that Pinochet was not fit to stand trial. After first attempting to avoid making public the content of the medical report and then, forced by the Courts of Appeals to disclose it to the French, Swiss, Spanish, and Belgium courts, the British secretary of interior released

[29] The UN General Assembly, Resolution 3 of February 13, 1946, adopting the principles of Nuremberg as part of the principles of international law; the four Geneva Conventions; the International Pact for Political and Civil Rights of December 19, 1966; the Convention against Torture of December 10, 1984 (ratified by Spain and signed by Chile in 1987); the Extradition and Judicial Assistance Treaty between Spain and Chile of April 14, 1992; and the Convention of Double Nationality between Chile and Spain of May 24, 1958.

[30] *La Nación*, October 18, 1998, p. 9.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

Pinochet to return to Chile on March 2, 2000, after nearly seventeen months of detention. Pinochet Ugarte landed in Chile to be welcomed by a military parade on March 3.

During the process, the Chilean government sided actively with the senator's intention to return home, although with shifting arguments, some of them not acceptable to Pinochet. The original demand for the recognition of immunity by the British was followed by a request to Pinochet for an apology for his crimes and resignation of his post as senator "for the good of the country."[31] The objective was to create political conditions that would influence a favorable vote by the lords. Facing Pinochet's disagreement with this proposal, the government attempted to obtain a decision by the Chilean Supreme Court to judge the senator, replicating the proceedings that took place for the Letelier murder. The objective this time was for the domestic tribunal to demand priority treatment of the case, given that the crimes were committed within its territorial jurisdiction. The Supreme Court did not agree to appoint one of its members to preside over this action, citing previous rulings that considered the crimes in question as covered by the 1978 amnesty.[32]

At the beginning of the process tensions in Chile mounted: the Chilean ambassador to Great Britain was summoned several times to Santiago, the armed forces issued repeated statements about the critical importance of the matter and threatened Spanish shipyards with the suspension of the purchase of submarines that were already being built, demonstrators for and against Pinochet clashed in the streets of Santiago, and the governing Concertación faced important internal tensions. While the Christian Democrats united behind the government's demand for the return home of the senator, the Socialists faced a more complex situation. The members of the government, such as the foreign minister José Miguel Insulza, as well as the party's presidential candidate, Ricardo Lagos, sided with the position that the intervention of the Spanish courts, as well as the decisions of the lords and the British secretary of the interior, were irresponsible and illegitimate. Socialist deputies and party institutions such as the party's Political Commission, on the other hand, issued public statements in support of Pinochet's judgment "wherever." The matter was considered to be related to national security both by the armed forces and by the government, and the National Security Council had several meetings to analyze the situation and design common strategies for the executive, the armed forces, and the courts. The majority of public opinion considered the general guilty of violations of human rights (63 percent), although a majority

[31] *La Nación*, November 5, 1998, p. 6.

[32] *La Nación*, November 15, 1998, p. 7. This argument is debatable even from the point of view of the Supreme Court, taking into account that if Pinochet recognized, as his defense did in Great Britain, that he was the head of the DINA and that Contreras reported to him about the activities of this organization, which the Chilean Supreme Court ruling in 1995 characterized as "criminal" (Ruling of the Supreme Court of Chile, Letelier's Case, May 30, 1995), then at least one of his crimes falls beyond the scope of the 1978 amnesty and can in effect be tried by the Supreme Court.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

also estimated that he should be judged in Chile (57 percent). Two-thirds did not consider democracy in danger.[33]

During the second half of 1999, and in the context of a growing and tight political competition for the presidency, the major presidential candidates, as well as most of the electorate, shifted their attention to more pressing issues: unemployment, recession, fiscal expenditures, and deficit. Even the right-wing candidate, Joaquín Lavín, actively seeking centrist votes, downplayed and portrayed the issue as a matter of the past.[34] The electoral result of the December 12, 1999, presidential elections was a surprising draw between the Concertación candidate, the Socialist Ricardo Lagos, who obtained 47.96 percent of the vote, and the right-wing candidate, Lavín, who managed to obtain 47.52 percent of the votes. Although this was the best election result for the Right in decades, the runoff election of January 16, 2000, was won by the Concertación, which obtained 51.31 percent of the vote against 48.68 percent for the Right. Lagos took office on March 11, only a week after the triumphant return of Senator Pinochet to Chile, in a context filled with tension. In this context the new dynamics of the Chilean courts are creating an – admittedly risky – strategic window of opportunity for a major institutional reform that could result in the completion of the transition to a full-fledged democracy in Chile. Let us take a closer look at this process.

The context of the second half of 1999 and first months of 2000 showed the ambiguities and contradictions that emerge when a tight authoritarian grip loses strength: the old ways coexist with new ones in a puzzling manner. On June 15, 1999, the directors of Planeta publishing house, Bartolo Ortiz and Carlos Orellana, were jailed for the publication of the book *El libro Negro de la Justicia Chilena* (The Black Book of Chilean Justice), in which the author, Alejandra Matus – at the time out of the country fearing repression – analyzes corrupt practices of the Chilean judicial system, paying particular attention to the behavior of the former president of the Supreme Court, Servando Jordán. On the basis of the law of Internal Security of the State, Judge Rafael Huerta first censored the book because it affected "the good image of the Judicial System" and later imposed detention for the author and the directors of the publishing house. At the beginning of 2000 the accusation was still pending for the author (residing in Miami), the directors were free, and the book was still censored.

Also in June, Judge Juan Guzmán Tapia ordered the arrest of retired general Sergio Arellano Stark and of four of his former military aides, for their responsibility in the detention and murder of seventy-two members of the opposition after the coup in 1973, most of whom ended up disappeared (the "Death Caravan"). The judge's argument was that the crimes could be considered against humanity and, therefore, not covered by the 1978 amnesty. On the other hand, the Supreme Court, partly as a consequence of reforms carried out in 1997

[33] *La Nación*, December 3, 1998, p. 4.

[34] Lavín stated that "Pinochet is part of the past" and that it was neither true that Lagos represented Allende nor he the military government (*La Nación*, December 6, 1999, p. 2).

https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press
Cambridge Books Online © Cambridge University Press, 2010

and in 1999,[35] modified its previous stand and ruled at different moments that, first, the amnesty of 1978 could not be applied to homicides until they had been tried and sentenced and, second, the amnesty did not include disappearances because, given that no body had been found, these crimes should be considered ongoing, therefore, present and beyond the 1978 scope. This new development opened a threatening door for the military: in addition to the senior officers already sentenced or indicted,[36] Pinochet himself now faced the possibility of losing his parliamentary immunity and of being indicted for gross human rights violations, as requested also by Judge Guzmán Tapia to the Appeals Court on March 7, 2000, in relation to Pinochet's responsibility for the seventy-two murders and disappearances of the Death Caravan. Pinochet's flamboyant return and Judge Guzmán Tapia's request triggered a landslide of accusations: by May 2000 over one hundred cases against Pinochet had been brought by victims or their families before different Chilean courts.

Pressured from abroad and by local judges, military representatives accepted an invitation of the minister of defense, Edmundo Pérez Yoma, to start a series of discussions with lawyers of the human rights organizations. These meetings, which started on August 7, 1999, had no specific objectives or timetable, beyond a common search for truth and reconciliation. The issue of justice is characterized by controversy as is the goal of the military to achieve an end to what they perceive as systematic political harassment. The organizations of the families of the victims did not agree to participate, arguing that the sole objective of the proposal is to assure impunity to the military. Beyond the clear shortcomings of these meetings, it was the first time that representatives of human rights organizations and of the military sat together with the government in an open dialogue and negotiation. This dialogue lost impulse after the armed forces staged their welcoming parade for General Pinochet in March 2000.

In the international scene, not only Belgium, Spanish, French, and Swiss courts filed requests for Pinochet's extradition; the U.S. Department of Justice also decided to reopen the Letelier murder case to review Pinochet's role in it.[37] Moreover, an Italian court in June 1996 had already sentenced in absentia Generals Raúl Iturriaga Neumann and Manuel Contreras to eighteen and twenty years in prison for the failed murder attempt on (former vice president and one of the founders of Chilean Christian Democracy) Bernardo Leighton and his

[35] Reforms included rules for the appointment of Supreme Court judges, the number of its members, and compulsory retirement at seventy-five years of age.

[36] Senior officers sentenced or indicted include not only the already mentioned Generals Contreras and Arellano Stark but also General Salas Wenzel (indicted for covering up homicides committed by security forces), Ramsés Alvarez Sgolia (former chief of army intelligence, sentenced for the murder of a union leader), Humberto Gordon (former director of the National Information Central, indicted for being an accomplice of Sgolia), and Brigadier Pedro Espinoza (indicted for his participation in the Death Caravan).

[37] The case refers to the 1976 murder of Orlando Letelier and Ronnie Moffit in Washington, D.C. On the U.S. Department of Justice's decision, see *The Washington Post*, March 23, 2000.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

wife, Ana Fresno, on October 6, 1975, in Rome. The impact of this was felt in Chile on March 14, 2000, when a Chilean judge detained General Iturriaga Neumann as a result of a request for extradition by the Italian court. On the other hand, the principle of territorial jurisdiction of the courts that is upheld by the Chilean government in its confrontation with intervention by foreign courts is supported by the neighboring – and also threatened – governments of Mercado Común del Sur (MERCOSUR) (Argentina, Bolivia, Brazil, Paraguay, and Uruguay) who issued a joint statement with Chile on December 10, 1998, in this regard. This position is also supported by Cuba and former heads of state such as the Socialist Felipe González.

As if in response to the judicial threat to remove Pinochet's parliamentary immunity, on March 25, 2000, Congress strengthened his personal immunity as former president. In other words, the potential removal of his immunity as a senator would not affect his immunity as former president.[38] It did not take long for President Lagos to propose a constitutional reform aimed at the possibility of presidential removal of the military chiefs and the modification of a series of functions of the National Security Council and of the Constitutional Tribunal, as well as the derogation of the system of appointed senators. It is not yet clear whether the proposal, made public on April 4, 2000, was part of a tacit exchange or negotiation between the government and the Right, in which the bargaining chips were, on the one hand, Pinochet's freedom and, on the other, the support of the Right for curtailing the political influence of the military on governmental matters.

The major problem that the Chilean transition started to face in this new scenario was not so much Pinochet's future: on July 1, 2002, the Second Chamber of the Chilean Supreme Court ruled to dismiss tha case against Pinochet for his role in the Caravan of Death because he was mentally unfit to stand trial.[39] Only a few days after that decision, on July 10, 2002, the general resigned as a senator, hoping that his immunity as former president would allow him to fade out of public life.[40]

The problem for the Chilean institutional arrangement is that the Spanish, British, Italian, French, Swiss, and Belgium courts' decisions are setting an international precedent that threatens many members of the Chilean armed forces once they step out of the country. And the problem is also that the Chilean court's decisions are, simultaneously and beyond Pinochet's fate, establishing

[38] The project was presented as an act of justice toward former President Aylwin, because his four years in office (instead of the normal six) did not allow him to become a senator, receive a pension for life, or enjoy advantages such as immunity from judicial persecution. The problem arose when the text that was finally approved established these rights for all former presidents (thus including Pinochet) and did not define any cause for the loss of immunity (as it is established for the immunity of members of Congress). The decision was made by a majority of 113 right-wing and Christian Democratic representatives against the opposition of 27 votes from the Socialist deputies.

[39] Amnesty International News Release, July 3, 2002.

[40] BBCMUNDO.com, July 29, 2002.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

a domestic environment that, no matter how well *atada* (tied) the Chilean democracy has been, is becoming increasingly threatening for human rights violators. In that sense, and contrary to what was stated by a former second in command of the Chilean army, General Jorge Ballerino Stanford,[41] we are witnessing a situation in which a locally victorious army is indeed indicted in criminal courts that act accordingly, both in a domestic and in a global setting.

The Chilean government faced during 2001–2 two options: accept the temptation to exchange freedom for the guilty (curtailing judicial autonomy à la Due Obedience Law in Argentina) for a constitutional reform that would prevent authoritarian enclaves in governing bodies or, the alternative, try to achieve this constitutional reform and complete the transition to a full-fledged democracy upholding the rule of law. Whether judicial autonomy shall be curtailed in exchange for a constitutional reform was an open issue for the 2003 agenda, because rulers, even democratic ones, have not shown themselves to be very trustworthy on this matter: their pragmatism distrusts international law as much as it distrusts an independent domestic judiciary.

3. The Military as Political Actors in Argentina and Chile: A Comparative Analysis of Their Political and Institutional Sources of Power in the New Democracies

The institutional role of the armed forces in the new democratic regimes was in both countries a matter of conflict between political and military elites. The principal demands of the military regimes and the armed forces during the transition processes concerned, first, the granting of legal privileges that would protect them from being taken to court for their past actions and, second, the institutionalization of legal prerogatives to guarantee their right to intervene in internal conflicts if a "subversive" threat reemerged. The armed forces' success in obtaining these prerogatives varied. They invariably tried to preserve a tutelary role over the civilian government; but the process of political struggle that took place before, during, and after the dictatorship determined the different ways in which the armed forces were eventually integrated in the democratic system. These different patterns of integration, in turn, had diverse consequences for the resulting types of democracy. Although democracy developed under military tutelage in Chile, struggles over the form and scope of that tutelage are still being waged there. Argentina, meanwhile, has been surprisingly better able to subordinate its armed forces to civilian rule.

In Argentina Congress discusses and approves the military budget, whereas in Chile the armed forces keep 10 percent of the income from copper exports, in addition to their regular budget (which, by law, cannot be less than the 1989

[41] Quoted by Jorge Correa in "'No Victorious Army Has Ever Been Prosecuted': The Unsettled Story of Transitional Justice in Chile," in J. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, Notre Dame, Ind., 1997, pp. 147–148.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

military budget). In Chile, the president cannot appoint or remove military commanders without permission from the National Security Council, whereas in Argentina the Senate approves the promotion lists of high-ranking officers. The Senate acts on the basis of a proposal made by the executive, which in turn considers the proposal made by each of the armed forces. In Argentina, there is a Ministry of Defense led by a civilian. This ministry manages the country's war industry. In the Chilean case, the military presence in the civilian power structure is guaranteed through senators designated by the military, as well as through a National Security Council with the responsibility for guarding and controlling the political process. The Chilean state-owned arms industries are under military administration and enjoy a high level of autonomy from the national authorities.

In Chile, the armed forces have constitutional rights to guarantee law and order. Thus, the possibility of intervention in internal security matters and of a military tutelary role over the constitutional powers is legitimized. In Argentina, the Law of National Defense explicitly states that the mission of the armed forces is to defend the nation in the event of foreign aggression. This rule was maintained in the Internal Security Law, which nevertheless allows for the armed forces to lend logistic support in matters of internal security. Several decrees passed in the last stage of Alfonsín's government and during the Menem administration have, once again, introduced some ambiguity into the scope of the intervention of the military in internal conflicts.

Several distinct features set the Chilean case apart from that of Argentina. In particular, the legal and institutional framework of Chile's transition constrained the democratic governments by legalizing, legitimating, and facilitating continuity of the armed forces' influence over the new regime.

The economic success of Pinochet's administration, combined with the support that the fear of a return to the pre-1973 period generated in significant sectors of the civilian population, restricted the effectiveness of the democratic forces. With the failure of strategies that went beyond the limits imposed by the military legality, the opposition opted for solutions that were based on accepting the boundaries defined by the military model. The Concertación failed to obtain the parliamentary majority needed to overrule the restrictions imposed by the military government. Nevertheless, as Garretón points out,[42] the Concertación government enjoyed sufficient political credibility to allow it to disregard some of these restrictions. Furthermore, given the international context, could the Chilean armed forces plausibly embark on a new reactive coup? The government's choice of a gradualist strategy cannot be attributed to cultural factors alone (i.e., to the Chilean legalist tradition). It is likely that a confrontational strategy would have broken the alliance of forces included in the Concertación. If this is so, the gradualist strategy reflected not only the threat of the armed

[42] Garretón, Mauel Antonio, "Human Rights in Democratization Processes," in E. Jelin and E. Herschberg, eds., *Constructing Democracy: Human Rights, Citizenship, and Society in Latin America*, Westview, Boulder, Colo., 1996.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

forces and their party allies but also the constraints imposed by the composition of the governing alliance.

Compared to their counterparts in Argentina, the Chilean armed forces fared better politically: they left government after a successful economic administration, part of the citizenry endorsed and legitimated a legal framework that placed them at the center of the institutional order, economic autonomy prevailed, internal conflicts were limited, and they did not have to relinquish their right to conduct domestic intelligence activities.

Alfred Stepan has suggested a way to analyze civilian military relations as a function of two variables: the degree and scope (maintenance and variation) of military prerogatives, on the one hand, and the degree and level of military contestation of civilian decisions, on the other.[43] If we adopt a maximalist position regarding the notion of democracy, only those societies with low prerogatives and a low level of military contestation can be considered democracies.[44] However, since many regimes in Latin America have been and still are considered democracies despite medium levels of military prerogatives, we will adopt that intermediate level as our dividing line between democracy and authoritarianism or not fully democratic regimes. That is, in general terms, a regime reaches the democratic condition when it has low or middle levels of military prerogatives. Comparing our two cases in these terms, we can draw the following conclusions:

First, Argentina shifted from low prerogatives and high contestation during the Alfonsín years to low prerogatives and low contestation in the Menem and De la Rúa administrations, implying that the existing de jure control over the military has shifted, resulting in both de jure and de facto civilian control. Argentina has ended up in a nonoptimal equilibrium. There is no doubt that the trial, conviction, the first seven-year detention and the current renewed imprisonment of former military presidents and commanders in chief constitute an exceptional and key element in its process of democratic consolidation. Without an autonomous judiciary willing to defy the political strategies of the presidency, as well as without political parties and human rights organizations willing to push the politically risky rule of law, military subordination to constitutional rule would probably not have come about. In contrast, the presidential pardons have obstructed the completion of the punishment and the "due obedience" law constituted a de facto amnesty that violates the right to justice of the victims and their relatives.[45] The dilemma, therefore, is not only about past

[43] Stepan, Alfred, *Rethinking Military Politics: Brazil and the Southern Cone*, Princeton University Press, Princeton, N.J., 1988, chapter 7.

[44] The level of contestation is not essential to the definition of the democratic character of a regime. However, once a democratic regime has been established, the level and nature of military contestation of civilian decisions and policies become relevant to establishment of the prospects for democratic consolidation.

[45] It also violates Article 2.3 of the UN Convention against Torture of December 10, 1984, and Article 6 of the Declaration of the UN General Assembly about the protection of persons against forced disappearance of December 18, 1992.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

human rights violations but also about present ones; in a nutshell, it concerns not only how a democracy deals with the past, retroactive justice, but how it is able to defend and realize the rights of its citizens in the present. The dilemma concerns the kind of democracy that is being built.

Second, Chile has a high level of prerogatives and a medium level of military contestation of constitutional authorities. Thus, it is a case in which the armed forces have been most successful in maintaining their prerogatives and tutelary role over political matters. Indeed, the magnitude of these prerogatives and the degree of military influence over certain areas of public policymaking put into question the fully democratic character of the present Chilean regime. Chilean democracy can be considered "partial" or "incomplete," or as a representative civilian regime that, despite having a democratically elected government, has yet to complete the process of transition to a fully democratic political order. And at present, the progress toward the culmination of the Chilean political process in a full democracy is tightly intertwined with the kind of transitional justice it will finally adopt.

4. Transitional Justice and Democratic Governments: Common Traits of Argentina and Chile (and of Brazil, Paraguay, Uruguay, and So On)

Finally, what does the analysis of the Argentine and Chilean cases tell us about the role of the judiciary and its relationship to the dilemmas faced by newly emerged democracies?

When democratic politicians face the challenge of human rights violators who still legally bear arms, they tend to perceive in the autonomy of the judiciary a source of potential danger. Courts that serve the law before the political needs of the presidency can, no doubt, become sources of tension in processes characterized by unstable equilibria. In this sense, politicians are right to be careful about the risks entailed by an autonomous judiciary. Their error lies not in being cautious about these risks but in assuming that the problem lies in the judiciary when, in fact, it is inherent in democracy as a regime of governance and conflict resolution. As Przeworski has pointed out, the stability of rules creates uncertainty about the outcomes, a feature inherent in the democratic struggle. To prioritize the achievement of an outcome over the stability of the rules and over the freedom of action of the judiciary opposes the democratic nature of the regime. If democracy is a regime in which all citizens are equal before the law, as a rule of thumb all those responsible for human rights violations should be taken to trial and punished, and all those democratically entrusted with the collective welfare of the society should be willing to face the risks entailed by the rule of law. It is difficult to imagine a process of democratic consolidation and deepening in which politicians and citizens are not willing to face the risk of an autonomous judiciary.

This reconstruction not only showed Argentine and Chilean politicians' sharing uneasiness about the domestic autonomous judiciary. It also showed a

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press

governmental logic that reacts with even more uneasiness if the autonomous judiciary is operating beyond its frontiers. And this is also understandable: for centuries public order has tended to be the result of processes that occur within national limits controlled by the state. External judicial rulings that contradict domestic political arrangements destabilize local equilibria and political order, at least, in the short run. Moreover, external judicial rulings question the limits not only of national sovereignty but also of popular sovereignty. Indeed, the assumption behind international law is that it supersedes the majoritarian preferences of a given polity at a given time. If we believe in international law we must not only accept the uncertainties of outcomes within given rules; we must also accept that certain rules are beyond popular consultation or preference. And this principle necessarily implies a reduction of power for local political representatives as well as the reduction both of national and of popular sovereignty when the dilemma is about applying the law.

Cambridge Books Online © Cambridge University Press, 2010
https://doi.org/10.1017/CBO9780511584343.014 Published online by Cambridge University Press