

The Pinochet Case: 'Forced to be Free' Abroad and at Home

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In part one of this article it was posited that the Pinochet case was best understood not as a harbinger of a borderless world of eroded state sovereignty and universal rights, but rather as an indication that those distanced from popular sovereignty and citizenship by the deals struck in a pacted democratic transition may have found their most potent means of forcing a reopening of the particularist national debate on who belongs to, and in, 'the nation'. Here, two phases of the Pinochet case are examined through this prism. The extradition attempt saw Pinochet's victims 'escape' the legalized confines of domestic space only to shape the understanding of national citizenship from afar. The case's surprising development after repatriation revealed the potential coercive power of the cosmopolitan liberal consensus on 'deserving sovereignty' similar to the conditionality associated with the neo-liberal 'Washington consensus' on economic reform. Three primary lessons are drawn: cosmopolitanism may have to be coerced; pacts are not forever; and place and belonging still matter even as justice is 'globalized'.

The Pinochet case had its dramatic entrance on to the front pages of newspapers world-wide and into the annals of international law in October 1998, when the ailing former Chilean dictator was arrested while recuperating from back surgery in a London hospital on a warrant issued by a Spanish judge for crimes against humanity.¹ The multi-national arrest itself was a stunning move. Less cinematic yet equally stunning were two precedents it set: the successful argument made by Judge Baltasar Garzón of Spain's Audiencia Nacional for his national court's jurisdiction over the case, and the British Law Lords' rejection of Pinochet's claims to sovereign immunity. Taken together, these precedents appear to form a worthy successor to the Nuremberg principles, which established individual accountability for crimes against humanity as a fundamental aspect of universal human rights jurisprudence.²

However, in the Nuremberg process the victorious Allied forces established trials of leaders of a defeated regime on behalf of 'humanity'. In contrast the Madrid-London phase of the Pinochet case was about the international legal empowerment of those who were defeated militarily in

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1973 and again politically and symbolically during and after the transition by the domestic legal continuity that protected and empowered the former leader and his allies. The universal principles and the universal jurisdiction that were upheld in this phase served as the means by which Chilean victims of the Pinochet regime sought justice at home. This form of 'globalized justice' enabled them to do three things. First, they could hold a particular individual accountable and thus symbolically – and geographically – exclude him from the Chilean 'social contract'. Second, they could make their particular moral critique of the pacted transition and its excessively narrow social contract. And third, they could stake their particular claim to their individual and collective place within the heart of the Chilean nation.

Individual Accountability

The principle of individual accountability for crimes against humanity established at Nuremberg and institutionalized via the Universal Declaration of Human Rights and various UN human rights conventions over the past five decades is consistent with the 'cosmopolitan consensus' on liberal values – most notably the emphasis on individual rights and responsibilities under the rule of law. Under what Jack Donnelly calls the 'cosmopolitan' model of human rights, all individuals enjoy a set of inalienable rights that are not contingent upon citizenship in a particular state.³ As such, individuals are the moral subjects of international law, and have recourse to it to defend themselves against state actions. At the same time, such an interpretation also views those state actors not as corporate cogs in a wheel, but rather individuals whose responsibilities are not contingent upon – nor their acts automatically justified by – their position of power within a particular state. In other words, the natural extension of cosmopolitan-liberal thought on human rights is individual accountability for human rights violations perpetrated by individuals against individuals. Thus universalized, the accusations made by the Chilean litigants are elevated from merely a 'private matter' in the closed context of national politics to a universal, humanitarian matter involving the violation of international law that offends all individuals and morally cannot go unpunished.

The challenge, then, becomes less theoretical and more practical: to 'get justice', you have to be someplace, and this raises the basic contradiction between a cosmopolitan view of human rights and the division of the world into autonomous and sovereign national jurisdictions and judicial systems. Legal scholars such as Marc Weller, Anne-Marie Slaughter, and Andreas Bianchi have argued that the key to the globalization of cosmopolitan liberal justice, short of the establishment of supranational institutions, is via a two step process. The steps are effective incorporation of international law into

domestic law, and the accumulation of judicial decisions from municipal and national benches whereby judges cite what Weller calls 'the expanding doctrine of genuine universality' to claim jurisdiction over crimes against humanity no matter where they occur.⁴ This process, however, had by no means fully consolidated by the mid-1990s, when the first extraterritorial judicial actions were taken against Pinochet in Spain.⁵ As Richard Wilson relates, the litigation started by naming only Spanish victims, a nod to the reality that national courts are more open to prosecuting crimes perpetrated abroad by foreigners upon nationals (the principle of passive personality). However, through a 1958 bilateral convention on dual citizenship, Chileans themselves were able to be included in the suit, again indicative of the limitations of ostensibly 'universal' jurisdiction.⁶

This was, in many ways, a shrewd legal strategy. It targeted a special criminal court, the *Audencia Nacional*, which was established to investigate 'transnational' crimes such as drug trafficking and terrorism. But it also recognized that the argument for the Spanish courts to accept universal jurisdiction had to be soundly based upon international treaty obligations regarding the definition and prosecution of crimes against humanity and upon their incorporation into national law. As Wilson notes, the *Audencia* ultimately overruled objections made by public prosecutors regarding Spanish jurisdiction over the Chilean case. It did this by citing Article 23.4 of the Organic Law of the Judicial Branch, which permits (but does not oblige) Spanish courts to accept jurisdiction over cases involving crimes against humanity as defined by international treaties, whether they were committed by Spaniards or foreigners, as long as they can be proven under Spanish law.⁷ As a signatory to United Nations and European Union conventions, and in the absence of an appropriate international tribunal, Spain could legally serve as the venue for such a trial. It was not required to have a political or military stake in the crimes, as the Allied prosecutors had when they tried their adversaries at Nuremberg. Indeed, 'universal jurisdiction' universalizes the crime, the accused and the accusers, as well as the bench and its body of law. It does this in the sense that they are all defined primarily by cosmopolitan liberal views of humanity as autonomous individuals entitled to universal rights, and only after that by their national identities and contexts.

If the second step towards globalized justice consists of the decisions of individual jurists, then clearly the 'adoption' of the Pinochet case by Judge Baltasar Garzón constituted that step.⁸ Garzón, a dashing figure who had made a name for himself as a maverick in the judiciary through his high-profile investigations of covert government funding of paramilitaries fighting the Basque terrorists, ETA,⁹ had originally been in charge of investigating a separate, antecedent case. That case was brought on behalf

of victims of the Argentine junta, while his colleague, Manuel García-Castrellón, was the magistrate in charge of the Chilean case.¹⁰ Though it is a source of speculation whether Garzón sought out that case – either because of his leftist politics or his love of the media spotlight¹¹ – once in charge he pursued the investigation with vigour, taking testimony from hundreds of regime victims. The testimony of one such individual, a woman whose daughter was ‘disappeared’ with her grandchild while in Bolivia, set Garzón on the trail of the infamous transnational Operation Condor, which eventually led him all the way to Paraguay to read through the ‘terror’ archives there.¹² This evidence convinced Garzón that it was not simply the Chilean military government or its infamous intelligence agency the DINA, but Pinochet himself, as an *individual*, who was the architect and coordinator of a vast conspiracy to assassinate suspected regime enemies across national boundaries. From that point, he set aside the Condor investigation as a separate matter. And when the news came on Friday afternoon, 19 October 1998 from London that only an arrest warrant would keep Pinochet from leaving the hospital and returning to Chile, Garzón drafted the detention order sent to Interpol based upon his competency in Condor.¹³ Reaching out across borders to bring Pinochet to justice for Condor seemed appropriate, given that the dictator had reached out across borders to advance his own form of transnationalized law enforcement.

Although it took two warrants and numerous decisions and appeals to the highest court in Britain to place Pinochet squarely on the road to a trial in Madrid, that first arrest warrant stands out both for its audacity and for its pedestrian nature. Garzón has related that he celebrated the fact that British law enforcement and the courts accepted his warrant as merely ‘simply one more case’, rather than blocking it for diplomatic or political reasons.¹⁴ Pinochet, thus, was arrested as an individual with no more and no fewer rights than his victims, with his guilt or innocence to be judged according to universal standards rather than those he made himself. It also inverted the skewed balance of power experienced by Pinochet’s victims within Chile, recognizing that the inability to ‘get justice’ at home could be countered by the potential (though not the guarantee) for recourse to cosmopolitan liberal justice *theoretically anywhere else*. Not surprisingly, this precedent reverberated throughout the human rights community, and emboldened many regime victims world-wide to seek extraterritorial justice and third-party extraditions. It also raised expectations for those victims and their allies in the non-governmental organizations (NGOs) that escaping their domestic contexts and activating universal jurisdiction elsewhere would empower them individually, collectively and symbolically as the standard-bearers of a new cosmopolitan liberal citizenship that would hold dictators accountable for their actions.¹⁵

The precedent set by the Law Lords in their decision rejecting Pinochet's claims to 'sovereign immunity' similarly pushed forward this aspect of the cosmopolitan normative model. By extension it rewarded the strategy adopted by the Chilean victims and their legal team to use *universal* international law to trump *particular* domestic law. First, the decision focused on what could legitimately be judged an 'act of state' and thus a mitigating circumstance for individual guilt. Taken out of the domestic context – where this question may have been closely tied up with political and ideological judgements of the necessity of the coup and of the repression that followed, and where the legal order itself was co-opted by the military regime – the issue then could become one of the consistency between the universal principles embodied in international treaties and the actions of any or every state signatory. As Lord Browne-Wilkinson stated in his written decision, the Torture Convention of 1988 'required all member states to ban and outlaw torture: Article 2. How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?...'.¹⁶

The transcendental status of international law also permitted the Law Lords to consider the similarly sensitive issue of the self-amnesty, again in universal terms, by questioning whether the 'sovereign immunity' argument amounted to an illegitimate and internationalized form of amnesty for former heads of state. Lord Browne-Wilkinson continued:

[Also] an essential feature of the international crime of torture is that it must be committed 'by or with the acquiescence of a public official or other person acting in an official capacity'. As a result all defendants in torture cases will be state officials. Yet if the former head of state has immunity, the man most responsible will escape liability while his inferiors ... who carried out his orders will be liable. I find it impossible to accept that this was the intention.¹⁷

Without passing judgement directly on the morality, let alone legality, of the domestic amnesty, the Law Lords reasoned universally that sovereign immunity for crimes against humanity would be tantamount to impunity. This, in turn, would gravely undermine the moral as well as the legal foundations of international humanitarian law, which was designed to protect the victims of state-sponsored violence, not its perpetrators. Again, separating themselves from the domestic context allowed the Chilean litigants to reinvent themselves as universal legal persons and to redefine Pinochet as an individual subject to the laws of humanity rather than the untouchable embodiment of the Chilean state.

In that sense, for the Chilean litigants the pursuit of individual accountability went beyond these key universal arguments to a more

particular application: shattering the sovereignty of Pinochet himself. Throughout his time in power, Pinochet shrewdly made use of legalization to legitimate, consolidate and, eventually, perpetuate his authority, even after he had technically left the presidency in 1990. His ability to make the 1980 constitution (with much-circumscribed reform) and the 1978 amnesty the price of transition ensured Pinochet continued visibility, and the ability to threaten the new democracy with military action should any of the safeguards that protected him be removed. The 'rule of law' was his insurance policy. He followed his own legal strictures both when he stepped down after the 'no' vote won the 1988 plebescite, and a decade later when he resigned as head of the armed forces to take his place as a senator-for-life with immunity from prosecution. While other high-ranking military leaders did find themselves in the dock, and, in the case of Manuel Contreras, in prison for their actions during the dictatorship,¹⁸ Pinochet retained not only legal immunity, but also political and symbolic power to shape the transition to protect his 'legacy' and his very person. Because Pinochet was able to remain above the law – a law he himself made in the fashion of Thomas Hobbes's (1588–1679) legislating sovereign – there was an extra level of meaning for his victims to hold this *particular* individual accountable for his actions.

Moreover, an *external* venue was necessary for this to happen not only because of the inability of the new democratic government to upend the legal framework, but because of the way Pinochet's individual presence constrained the reshaping of a social contract among democratic Chileans. What he did, and what he stood for, was not simply not a crime, or not punishable, for in some quarters, it remained heroic. For his opponents, his continued presence at liberty, particularly his participation in the legislature – theoretically an institution of popular sovereignty and democratic governance – reinforced the notion that his version of history and of morality had triumphed. In contrast his presence in another country's court of law to answer criminal charges brought on behalf of humanity would call that victory into question, and open the Pandora's box that had been tightly sealed in the transition regarding the past. Removed from the domestic context, Pinochet would be an individual facing universal charges. And with Pinochet abroad and held up for judgement there, Chilean society would not escape his influence, but rather would be forced to confront it more directly and to struggle with the question of what it meant to be Chilean in the context of a reconstituted *demos*.

Moral Critique of the Pact

The vigorous campaign launched by the Chilean government for the return of Pinochet from London may have been predicated upon a defence of

sovereignty in the classic sense of non-intervention and self-determination. But the predicament highlighted instead post-transition Chile's difficulties in measuring up to cosmopolitan liberal standards of sovereignty as contingent and deserved. Nearly a decade after the first 'founding' elections of the new democracy, Chile had moved proudly from 'transition' to 'consolidation'.¹⁹ Overcoming the fatal polarization of the past, the opposition to the dictatorship came together to run and then govern in coalition, and that centre-left coalition went on to earn a basic level of confidence from the conservative business community at home and investors abroad. After some early tensions and inappropriate shows of military power, democracy had become – as the theorists had predicted – the 'only game in town'. Elections were contested without violence, and exiles returned to their homeland. And yet Chilean citizens found it necessary to seek justice outside the nation's borders. This implied that – like the former Yugoslavia and Rwanda, where special international tribunals were established in the absence of a functional domestic legal order – their political and judicial system had been either unwilling or unable to prosecute state criminals. Spain was not usurping Chile's sovereign prerogative; rather, Chile had failed to exercise it and thus forfeited it to the jurisdiction of the international community.

Though such a comparison may seem unfair, it is exactly that disjunction between external image and internal reality that made the Pinochet arrest so deeply embarrassing to Chilean government officials, many of whom had once risked their lives to oppose the dictatorship. They had accepted the continuity of the legal order as a necessary, short-term constraint, the price charged by Pinochet and the right for entrance into democracy. All three of the main pacting 'moments' of the transition were based upon an acceptance of Pinochet's hand-crafted 1980 constitution as a legitimate and legally binding framework for political regime change. These moments were, first, the 'partial elite settlement' between the centre and left parties on the one hand, and the civilian right, on the other, to respect the results of the 1988 plebiscite. This was followed by the second settlement that formed the Concertación coalition that united the centre-left and left parties in the 1990 presidential elections and beyond. Finally there was the pre-election explicit pact on the constitutional reforms and the post-election implicit pact between the newly-elected government and Pinochet, trading 'good behaviour' for military restraint.²⁰ Government-sponsored trials were technically illegal given the standing 1978 Amnesty Law, and citizen-sponsored litigation was hamstrung by the presence on the bench of justices named by Pinochet who strictly upheld the legality of the amnesty. Moreover, the legalistic culture of the Chilean judiciary, based on a civil law system in which judges acted purely as administrators of the law, and on its

specific historic institutional prestige drawn from technical disengagement from judging the content of the laws, further entrenched the legal protections against prosecution.²¹ Equally shrewdly, Pinochet had made the independence – and institutional power – of the Supreme Court sacrosanct, and in return for being left alone, that court enforced his law, like all law, as ‘written reason’.²² Thus, it was not only the raw coercive power that the military could effect, but also the cage of legal legitimacy, that constrained the Concertación government.

But if the ‘rule of law’ means that the society lives by democratic rules except when the rules of the military are invoked, and if the military is protected by the law in ways that other citizens are not, how can there be anything like a ‘social contract’ – except as a bare minimum agreement that is more Hobbesian than in the sense meant by Jean-Jacques Rousseau (1712–78) or, even, John Locke (1632–1704)? On the one hand, all are not equally bound to submit to what Rousseau called the general will: that is defined as stability, and the military is not equally bound, as it reserves the right to intervene in politics and thus to upset the mere administrative balance that is consecrated in the social contract. On the other hand, the very equation of the general will with stability and circumscribed democracy reflects the judgement – made in good faith by the elite pacters – that this is ‘what is best for Chile’ – the country and its people. While contemporary analysts of civil–military relations such as Stepan and Agüero warn of the practical long-term problems of military enclaves for the consolidation of democracy,²³ there are also deeper philosophical questions connected with the determination of the common good – for instance its relationship to justice, and the moral valence of its utilitarian calculus. As Michael Walzer has argued, justice is based fundamentally on the concept of equality, which is then defined as freedom from domination. It follows, then, that in a just society, ‘no social good can serve as a means of domination’.²⁴ However, the Chilean pact valued political stability as the highest social good, and yet it dominated the few – the victims of the dictatorship – in the name of the many, and condoned the domination of the process of regime transition and consolidation by the military, its leader and its laws. Chile’s democracy, from this perspective, was not only not free, it was not just.

The legal arguments and manoeuvres of the Pinochet extradition case sent a forceful message to the Chilean government and the Chilean people that their pact had normative flaws from the point of view of cosmopolitan liberal justice. First came the determination that the Chilean amnesty had no legal standing in Spanish courts. Technically, this was based upon the fact that, contrary to the limitation in Article 23 of the Organic Law of the Judicial Branch, Pinochet had not been ‘acquitted, pardoned, or punished abroad’, since amnesty was tantamount to making Pinochet’s actions not a

crime at all.²⁵ Second, the Rettig report – the final report of Chile's Truth and Reconciliation Commission – went from providing a mere symbol to providing legally-admissible evidence for Garzón's investigation.²⁶ Outside of Chile, the limits on 'naming names' or connecting military officers or divisions with specific crimes placed formally by the amnesty and informally by the stability pact were no longer in place. If anything, the goal of the investigation was to be as specific as possible, so as to build a legal edifice in the tradition of international human rights litigation. It would be based upon detailed and meticulously documented evidence that would overwhelm the political arguments made by Pinochet, his lawyers and the Chilean diplomatic effort.

Finally, Garzón's innovative legal argument that forced disappearance constitutes an ongoing crime underscored the ongoing and unfinished process of bringing justice into Chile's new democracy.²⁷ For decades, the subject of the disappeared was taboo, and the military denied knowledge of any of the cases of disappearance, preferring to claim that those individuals had left the country or had been killed 'in battle'. The 'ongoing crime' argument, however, rejected those attempts to give finality to the crime, and thus bring it under the legal and moral rubric of the amnesty. Rather, disappearance is a crime committed against the detained – *and against those who search for them* and are purposefully given no information by the authorities.²⁸ Moreover, in order to include cases of forced disappearance in the charges of torture and conspiracy to torture, Garzón's expanded definition implicated Chilean government intelligence and security agencies (such as the DINA and the CNI), and official state practices, such as Operation Condor, as constituting a 'criminal enterprise' involved in such a conspiracy.²⁹ Interpreted more broadly, this also implicated the Chilean military *after* transition, the legal framework that continued to protect its members and its leaders, and the society that had all but accepted official denial as the response to 'ongoing' criminal behaviour.

Affective Citizenship

In a revelatory study of the 'expressive politics of transition' in Chile, Alexander Wilde viewed the detention of Pinochet in London as 'perhaps the most evocative' of a series of 'irruptions of memory'. These are defined as public events that had periodically emerged to remind a reluctant nation of the way the past still divided them, and which had not been adequately addressed by a political elite imbued with the equation of democracy with the maintenance of consensus.³⁰ Chile was, technically, a pioneer in the use of the now-near obligatory (but then alternative) form of 'transitional justice' called the 'truth and reconciliation commission'.³¹ Indeed, this

initiative and its result, known as the Rettig Commission Report, have earned praise as a solid, objective contribution to the documentation and understanding of recent Chilean history, and as a concretized symbol of the Aylwin government's commitment to the open treatment of historical memory.³² Unfortunately, given the strictures of legal continuity – because of the amnesty and other legal protections, victims would not see their torturers' names in print – 'truth' was circumscribed and 'reconciliation' never quite materialized. As other societies have also learned through experience, the finite nature of these formalized structures can serve as false symbols of closure, either sealing off the past and re-freezing the national conversation, or riling up old passions with nowhere to take them. Thus, Wilde's ultimate point is to focus attention on the long-term role played by governments *beyond* such gestures of transition in continuing national dialogue and creating opportunities – in public and with official sanction – for the society to face the past, express its pain and reconstitute the nation for the future.

Specifically, Wilde argued that the Pinochet case offered Chile's pacting elite just such an opportunity to refound the 'moral legitimacy' of Chilean democracy on a more inclusive view of both human rights and historical memory. The former would be universal and the latter the exclusive province of no one side of the conflict that had divided the nation in 1973. He is critical that

... 'human rights' became an issue identified exclusively with its most serious victims, rather than a guiding principle on which to found a new national politics ... The issues of human rights – and the country's historical memory – concern the whole nation, and not only the family and left-linked organizations that have remained of the historic human rights movement. What Chile as a whole experienced during the dictatorship – and indeed, during the longer period of deep national divisions before 1973 – is the subject of that historical memory.³³

This analysis, however, overemphasizes *universalization* as the means of reconciling a divided Chile. It bypasses the moral evaluation of whether some citizens have been hurt by (or have benefited from) the authoritarian regime more than others, and thereby have been excluded from (or included in) 'the nation' as it is defined juridically and emotionally. The effort to bring Pinochet to justice *outside of Chile* was about more than applying universal human rights standards in order to re-humanize those victims who were dehumanized by an authoritarian regime. It was also about the particular drama of reinventing national identity on the level of what might be called 'affective citizenship' for those who sought to belong to their country in a more integral way. As Walzer has argued, 'men and women do

indeed have rights beyond life and liberty, but these do not follow from our common humanity. Instead they follow from shared conceptions of social goods; they are local and particular in character'³⁴ Sharing a history, even one that is pluralistic as Wilde suggests, is only part of the equation. The other part is a matter of reinvigorating community values and connections that were torn asunder in the era of polarization and have been set aside as beyond the narrow margins of the new, pragmatic social contract. The 'space' opened by the Pinochet case that Wilde describes was opened not passively by osmosis, but purposefully and symbolically by the efforts of those who sought legal recourse abroad. The choice of external venue speaks to the sense of disconnection and alienation from their country and fellow citizens, and the legal arguments and strategies of the case reflect their desire to see their own values and memories incorporated and respected within the shared conceptions of community within Chile.

The act of giving testimony was perhaps the most evocative of the symbolic means of re-claiming a place in a shared community. Although testimony was taken by the Rettig Commission, there is something fundamentally different about participating in the legal process of a trial. Carlos Santiago Nino, the late Argentine jurist and legal scholar who advised the Alfonsín government, ultimately argued against trials, but eloquently expressed their fundamental social value for a society in transition.³⁵ Trials, he explained, offer the opportunity for 'social deliberation' and 'the collective examination of the moral values underpinning public institutions', with an emphasis on the public nature of discussion and the expansion of who determines what standards of morality define the 'general will'.³⁶ Under authoritarianism, both the military and the left engaged in what he called 'epistemic moral elitism', claiming for their side alone the right to act in the moral interest of all society. Trials, by contrast, open up the discussion of society by society, leading to a 'value-searching deliberation' which may risk destroying civic friendship anew, but is society's best chance for an honest reconstruction upon a foundation of shared values. It is the process – the dramatic, public, and immediate nature of the courtroom practices of investigation and testimony – as well as its content that contribute to building a moral society that could embrace political democracy.³⁷

Without access to this kind of public, government-sponsored trial in Chile, regime victims filed suits individually and collectively in Chilean courts. When these became bogged down, the victims embraced the external prosecution route because they recognized that the key to redefining a democratic 'general will' was not necessarily the direct re-legitimation of the democratic state, but rather the forced confrontation of society with its past. The investigation abroad would establish an objective, externally-validated

record of criminal behaviour not skewed by the 'epistemic moral elitism' that infused the legal order – and underlay the lack of societal reconciliation – at home. As Wilson reports, the Spanish legal team advised back in 1996 that the possibility of actually prosecuting Pinochet in Spain was remote at best. But they still forged ahead because of the litigants' conviction that the investigation had value in and of itself as 'a unique and historically unprecedented opportunity to *tell their stories* to the world'³⁸ However, the value of the investigation and testimony went beyond this universalizing notion of escaping the confines of Chilean justice and reclaiming their humanity and human rights as members of global civil society. Judge Garzón relates an interchange between himself and a woman giving testimony in his courtroom:

One said to me, 'Thank you for investigating'. I replied, 'You don't have to thank me, it's my job'. To that she replied, 'You don't understand: for us [victims of official repression] it is crucial (*fundamental*) for us to walk into a court of law, and for the judge to listen to us as victims, not as the authors of crimes [against the nation].'³⁹

This identity switch is more than semantic, as it represents a fundamental moral recasting of citizenship and national identity in the new democracy that is incompatible with legal continuity with the dictatorship. Impunity implies that the victims are not victims at all, since no crime has ostensibly been committed. Moreover, it perpetuates the myth that regime opponents did something to deserve the way they were treated, when in fact they were treated in a way that cannot be excused or explained away by the ideology of national security or any other 'national moral imperative'. The act of giving testimony establishes an important moral re-equilibration, placing victims together with the rest of 'the nation' rather than separating them out as somehow deviant and dispensable. Again, though it ultimately did not prosper legally, Garzón's attempt to extradite Pinochet to stand trial for genocide underscored the unity of the Chilean nation and the crime committed against the nation by those claiming to be its saviours.⁴⁰

This symbolic reinsertion into the nation through testimony outside of the nation also mirrors the yearning for 'home' experienced by Chilean exiles both in their foreign residencies and upon their return after the transition. It is possible that this yearning is inevitably infinite, as an exile longs for both a beloved place in general *and that place at a particular time* that will never return. Even so, great expectations were raised in the early years of the Concertación government for an emotional homecoming for the exile community. Indeed, it was widely believed that public ceremonies, an official 'return' agency, and other gestures by the state would bring them

naturally back into the embrace of the fatherland. For many returnees, however, this rosy picture contrasted starkly with reality, as they found their native land both transformed by the dictatorship and yet frozen in the past. Reading the interviews compiled by Wright and Oñate in a recent oral history of Chilean exile and return, what is most striking is the observation by the returnees that Chilean society no longer felt like 'home'. There had been a transformation from extreme political engagement in the early 1970s to extreme social – and economic – atomization now.⁴¹ Granted that many returning exiles were socialists and had associated their Chilean roots with the solidarity they had experienced as part of Allende's Unidad Popular movement, even those who had moved towards the centre in their political views while in exile⁴² now expressed shock and dismay. They disapproved of the disinterest, and even hostility, that their re-integration into Chilean society generated, and at the Hobbesian undertones of daily life in a society that had been radically depoliticized and marketized. For example, a journalist who returned after 14 years in Montreal observed,

those of us who dreamed of a different Chile suffered great disillusionment. In general, people are concerned with consumerism and their personal problems. Twenty-five years ago, the price of public transportation went up and people took to the streets to protest. Today, the pollution kills children and old people during the winter months. Public transportation has become a jungle where the survival of the fittest rules and the pedestrian is the one who suffers. The work week is fifty hours a week. Faced with these – which are some of the most dramatic situations – Chileans don't react. Everything is normal. This is very difficult for me to accept.⁴³

These critiques go beyond holding the political elite morally responsible for pacting and accepting legal continuity. Rather they imply that the whole society has adopted a pragmatic philosophy that is conflict-averse and, while highly individualistic, undermines the construction of a democratic community that also feels like a homeland. Trapped in what they perceive as a collective conspiracy of silence, returning exiles have experienced a distancing from the heart of the nation. So, it comes as little surprise that their strategy would be to break that conspiracy, as many have by joining the legal actions against Pinochet and the dictatorship. Voice and legal personhood, international law and an external legal venue: these have been the tools chosen to break the silence, the weapons to fight for the universally-guaranteed right to live in one's homeland,⁴⁴ and the particular desire to *belong* there as well.

Affective citizenship is, at base, this reciprocal emotional connection between state and society, and it also has a special role to play in the

legitimation of a new, post-authoritarian democracy. The 'pacting' school, on the one hand, views the essential connection being one through which citizens value the democratic form of government first and foremost. Practice offers the fulcrum to create bonds of trust between the public and its new institutions that eventually spill over into bonds of trust among citizens. The experience of Chile, however, calls into question the ability of institutionalized practice alone to generate and maintain these essential connections. Rather, as Bruce James Smith notes, in a republic, the mere creation of public space may ultimately fail to create the 'true and lasting passions' for public life that are essential in order to work against the naturally disintegrating forces of individualism.⁴⁵ This work, he argues, is done by a specific form of collective remembrance which links the visceral passion that in the nineteenth century Alexis de Tocqueville (in *Democracy in America*) calls 'instinctive patriotism' with a more reflective conjuring of the 'higher purposes' that the nation aspires to through the political engagement of the citizenry. Tocqueville recognized that a traumatic experience of national civil breakdown (he cites France's failed revolution but could easily mean Chile's Unidad Popular) could engender fear of *public passions* (apart from the specific ideological passions that characterized the conflict). Yet he also maintained that it is the dearth or suppression of those passions that is the greater threat to democracy.⁴⁶ Without access to the passions that animated political life in the past, and without a connection between building democracy and rebuilding the nation in emotional and symbolic terms that rekindles passions for public life in the present, the argument for a citizenship-through-praxis essentially breaks down. Why focus on institutions as a means of channelling these passions if they are extinguished in the process? The demand for Pinochet's prosecution abroad was, in this sense, an expression of outrage at the deficit of public passion in Chile's new democracy, and a demand for affective citizenship in the nation beyond the narrow, technically and emotionally circumscribed social contract.

Forced to Be Free: Coercive Cosmopolitanism, Policy Transfer and the Repatriation of the Pinochet Case

Public passions – or at least passions expressed publicly – were, indeed, unleashed the moment word got back to the Chilean capital, Santiago, of Pinochet's arrest in London. Contrary to the carefully-cultivated domestic and international images of Chile as a country which had overcome its polarized past, this cathartic spasm revealed the deep, unreconstructed schisms that still divided the Chilean people. Not least among these vocal responses were official government statements challenging the legal

grounds and political propriety of the arrest. These statements, couched in the traditional language of 'national interest', sounded two broad themes. First, the right to prosecute Pinochet was exclusive to Chile, and second, an international prosecution was tantamount to putting Chile on trial. What these arguments encountered, however, was the manifestation of what Chayes and Chayes have called 'the new sovereignty': an international consensus on norms – in this case, cosmopolitan liberal norms of universal jurisdiction for prosecuting crimes against humanity under international law – which is then enforced by states both individually and collectively threatening to distance the offending state from 'the community of nations'.⁴⁷ As Martha Finnemore has argued in more theoretical terms, incentives for a state to change its behaviour come from shared understandings of what is appropriate as well as individual calculations of what will advance its interests.⁴⁸ By continuing a neo-liberal economic model after transition, Chile had already accepted the constraints on its sovereignty implied by the 'appropriate' policy choices demanded by foreign investors and capital markets.⁴⁹ With the Pinochet extradition, it faced the other side of coercive cosmopolitanism which demanded 'appropriate' behaviour – prosecution at home – and in the absence of that behaviour, acceptance of universal jurisdiction as the consequence of lack of compliance with universal norms.

Traditional diplomacy and state prerogative – in the form of British home secretary Jack Straw's decision in March 2000 to repatriate Pinochet to Chile for health reasons – ultimately brought an end to the Madrid–London extradition episode. Safe again inside the sovereign jurisdictional embrace of the nation-state, Pinochet appeared set for a quiet retirement, and the chances of facing prosecution in Chile remained next to nil. And yet, within weeks of his return, all of this was to change. By May 2000 his senatorial immunity had been rescinded (*desafuero*), and by August, the Chilean Supreme Court itself had upheld that decision, bringing the once-untouchable Pinochet far closer to prosecution than anyone thought possible, least of all in Chile.⁵⁰ The universal imperative to prosecute individuals for crimes against humanity appeared to overrule the particular domestic imperative of impunity. This raises the following question: is it possible that coercive cosmopolitanism failed at the international level (in the London–Madrid extradition gambit), but ultimately succeeded at the domestic level (within Chilean courts)? And if so, how?

One possible mechanism for such 'norm diffusion' is 'policy transfer', a concept developed to explain 'transnational learning' seen in the adoption of what are viewed as 'successful' policies across nations.⁵¹ As Dolowitz and Marsh explain, policy transfer can best be conceptualized as a

continuum, spanning the voluntary ('lesson drawing') to the coercive ('conditionality'), with most cases falling at some point in between. Judicial decisions *per se* are not ordinarily categorized as 'policy decisions', that is, grouped with the adoption of macroeconomic strategies such as privatization or the administration of a social welfare system. Moreover, in Chile's strictly technical civil law tradition, judges are defined as administrative rather than active interpreters of the laws and thus do not ordinarily assume an 'activist', quasi-policy-making role as they may in common law countries.⁵² Still, it could be argued that the decision to strip Pinochet of his immunity was tantamount to a policy decision, in that it reshaped the contours of the official, legally-legitimated policy on transitional justice. Without technically transgressing the bounds of the pact and its legalized protective framework, three sets of Chilean judges drew upon newly-developed jurisprudence to set international law above domestic law, reflecting 'globalized' norms of how to deal with the criminal responsibility of a previous authoritarian regime.

Viewed through this analytical lens, the advancement of globalized norms of transitional justice within the Chilean context can be taken apart into its 'voluntary' and 'coercive' dimensions. In the realm of transitional justice policy transfer, it was clearly a hybrid case. It was neither a primarily 'voluntary' learning experience, as was the choice of eastern European countries to shun state trials in order to avoid Argentina's divisive experience, nor was it purely 'coercive,' as is the explicit conditioning of American economic aid to Yugoslavia upon the extradition of Slobodan Milosevic to the war crimes tribunals in the Hague. A more subtle intertwining of internal choice and external standards was involved. But the point here is that the coercive dimension appears dominant, itself operating on two levels simultaneously: first, via universal norms advanced in the Spanish and British legal systems and their cosmopolitan legitimacy; and second, via particular norms advanced by the Chilean litigants and their own cosmopolitan legitimacy. Both levels expressed the same coercive cosmopolitan message, forcing Chile to be free: 'reject impunity or be judged undemocratic'.

There is relatively strong evidence to support the contention – made most vociferously by Chilean government officials – that the *desafuero* is first and foremost the culmination of a long, home-grown process, and that international law served mainly as an additional tool for judges already deep into this next phase of transitional justice. From this point of view, the extradition attempt was a national crisis to be overcome, and Judge Garzón committed an injustice against Chile and its sovereign jurisdiction, rather than advancing justice.⁵³ Moreover, Garzón's legal theatrics overshadowed the fact that Chilean judges had already begun investigating a number of

pending cases against Pinochet.⁵⁴ Rather than facing 'blockage' at home, victims of the regime were, in fact, able to file suits that led to investigations, and what Wilde calls 'a continuing stream of human rights cases' brought by both the state and private citizens characterized the 1990s.⁵⁵ As William Prillaman notes, from the start of the President Aylwin government in March 1990, Chile's new democracy embarked on an ambitious reform of the courts that has emphasized access and efficiency as well as independence and accountability. These reforms have repositioned the judiciary as a node of trust-building between citizens and the state.⁵⁶ Because of this, he goes on, citizens are more likely to tolerate partial success in human rights cases. The ability of the government to break the power of the Supreme Court over lower courts also allowed a small but significant percentage of cases to prosper, thus creating a positive synergy between the enactment of *democratic* law by the courts and the instantiation of regime legitimacy.⁵⁷ Moreover, during the Frei government (1994–2000), through deaths, retirements, and some controversial corruption scandals, the composition of the Supreme Court shifted towards judges appointed by the new democratic executive. By the end of the 1990s its criminal bench came out strongly in defence of investigations into individual responsibility for human rights violations, ruling three times between September 1998 and January 1999 that amnesty for such crimes was incompatible with Chile's international treaty obligations.⁵⁸

For the new democratic judiciary, in need of refurbishing its tarnished reputation and to re-establish its role as the enforcer of rule of law, the 'lessons' of the Pinochet case for them were likely to be adopted voluntarily. Here – in the form of the 'ongoing crime' argument and its basis in the incorporation of international treaties into domestic law – were some new tools to use in their deliberations that could be compatible with Chile's legal framework. It is also likely that, as a new generation of judges rises on the bench (judges educated in universities under democracy and globalization), and seeks professional recognition with colleagues in Europe and beyond, developing cosmopolitan liberal orientations will reinforce what Correa Sutil calls 'the corporate spirit' of the Chilean judiciary to generate a 'new judicial culture' – one dedicated to enforcing the *liberal* rule of law.⁵⁹

A less triumphalist view of Chile's courts – and a less benign view of the cosmopolitan-liberal consensus – reveal that the Pinochet extradition was suffused with coercive imagery targeted at Chile's government, its courts and its population. The government's early framing of the extradition attempt as a 'threat' to the nation and its sovereignty expressed an arguably accurate perception that Pinochet's detention reflected a supposition that Chile did not meet the standards of democracy from the cosmopolitan

liberal perspective and thus its sovereignty was not 'deserved'. Its later insistence that Pinochet should be repatriated to face justice at home was equally designed to bolster Chile's international image as a full democracy, an image damaged by the stark revelation that Pinochet's atrocities were deemed criminal outside of Chile, but not inside. His return through an extrajudicial back door might have appeared to offer an escape from this coercive environment, but it turned out to open two new coercive dimensions. First was the quasi-commitment to prosecute implied by the Chilean government's own arguments for repatriation, and second, the numerous, well-advanced cases against Pinochet that remained open in Spain's *Audencia Nacional*, if Chile's courts declined to prosecute. On the first dimension, the government had to exercise scrupulous support for the independence of the judicial system, which would naturally entail parallel delicate dealings and possibly risky confrontations with an already-agitated armed forces. On the second, if the domestic situation led to an inability to prosecute, the obligation then would be to agree to an order of extradition, either to Spain or, if was 'up and running', the International Criminal Court – possibly a worse outcome in terms of stoking conflict with the armed forces.

Chile's judges were also implicitly on notice, since the jurisprudence was available in the form of the legal arguments made by Garzón and by the British Law Lords, and their collective reputation as rule-of-law jurists – always of great importance to that institution – and as democrats – of great importance at this particular national and world-historical juncture – was in the global spotlight. Like the executive and the legislature, this branch of government was subject to conditionality: investigate crimes under international law, or face isolation, diminished prestige and shame. These may seem like overly human emotions or concerns to impute to institutions, but any discussion of democratic legitimacy in today's world implies that those who seek to govern do so seeking not only the approval of citizens, but also of the 'cosmopolitan liberal community'. At the same time, certain traditional rationales persist in a world still divided into sovereign states. States still seek to advance their reputations among their friends as much as they do among their rivals.

That the Pinochet extradition attempt has had a dramatic impact on Chilean society has been widely recognized.⁶⁰ Potent public symbols of this 'ferment' have include the 'Mesa de Diálogo' (Roundtable) – bringing together representatives of the armed forces and human rights organizations to negotiate information-gathering about the disappeared. Also there was the 'Liturgia del Perdón' in November 2000 – an emotionally-charged mass led by Chile's archbishop, and attended by top government officials and even some military leaders, which symbolically confronted institutional as

well as societal responsibility for the violence of the authoritarian era.⁶¹ And while the military openly registered its opposition to the investigation and detention of Pinochet in Chile, most directly in its insistence that President Lagos convene the National Security Council in early January 2001, the president's equally firm insistence on judicial independence has given the military's sabre-rattling the sheen of a defensive, rear-guard action against a new societal climate questioning its prerogatives.

But such voluntarist talk of 'emboldening' and 'opening space' in Chilean society must not lose sight of the coercive dimension of the externally-imposed standard. Simply stated, coercion forces another to do what he or she would not ordinarily do. In international relations, this usually refers to an external actor or configuration changing the incentive structure via a threat that renders the old behaviour costly or self-destructive. Without this external stimulus, the target state is almost certain to maintain its present course. But depending upon the magnitude and credibility of the threat, coercion often succeeds in getting that state to redefine its national interest in line with the need to survive under the new rules of the game. In policy transfer, coercive lesson-drawing – conditionality – externally imposes costs if a state does not adopt a series of policy reforms. The argument in this article is that there are possible costs to society as well, and that societies may conform to the 'new rules of the game' – and the incentives to burnish democratic credentials for external approval – much in the same way that governments do. As much as governments are faced with new externally-imposed incentives to be perceived as democratic, so, too, are societies.

Following Tocqueville's two-step process, for a republic to thrive, the opening of public space – in this case, forced open by external events – must be met with a passion for public life – and this is where the externally-imposed standards of the cosmopolitan liberal consensus may be active. The invigoration of human rights groups and victims' litigation, while the most visible forms of societal public passion, are not necessarily what interest me here. They are arguably more voluntary than coerced on the spectrum of policy transfer, as these groups draw upon the cosmopolitan liberal consensus on human rights and have been handed an additional tool to use to advance those values at home. Instead we should accept that coercive cosmopolitanism has been effective in changing the perceptions and, on some level, the behaviour of a less-visible segment of Chilean society that supports democracy but had previously been resigned to impunity as the price of transition. This segment comprises the apolitical, even apathetic and atomized that the exiles identified as the majority, but as future research is likely to reveal, it has not been necessary to mobilize this large group. Rather, all that was needed was for a small percentage to change their

perceptions of the political landscape and its relationship to national identity, and to open a small space that would then be expanded by the work of more active, mobilized groups. The election of Chile's first socialist president since Allende is instructive. There were enough 'swing' voters who trusted Lagos's candidacy, not because they agreed with a left-wing platform that Lagos himself hardly advanced, but because they no longer associated his party label with national breakdown.

The Pinochet extradition attempt spoke to these voters – and to some who did not vote – with a clear message: what kind of country forces its citizens to go abroad to seek justice? This, in turn, opened the question of what Chileans want their country, and their democracy, to mean/stand for. It means a subtle shift towards a less insular, more cosmopolitan liberal understanding of what is expected globally of democracies has been enough to start a small space opening for the public – and passionate – discussion of national values and their relationship to transitional justice issues such as impunity. Without the 'wake-up call' from abroad, and without its coercive message threatening the pride of Chile and its place among civilized nations, it is likely that a quiescent minority would have remained quiescent. The public space would then have remained a thin strip of territory policed by politicians fearful of shifting the boundaries imposed by the pacted social contract.

Conclusion: The Universal – and Particular – Lessons of the Pinochet Case

The first part of this article began by asking what kinds of lessons newly democratized countries could draw from the Pinochet case, given that it appeared first to condemn and later to exonerate the pacted transition model. This last part has presented three broad lessons. One concerns how both the 'conditioners' and the 'conditionees' should understand the coercive power of the cosmopolitan consensus. A second concerns the dynamic rather than static nature of transition pacts. And a third lesson indicates that place still matters even as justice becomes displaced through universal jurisdiction and transnational legal procedures.

Lesson One: Cosmopolitanism may have to be Coerced

'Cosmopolitanism' implies that there are universal values that transcend national boundaries and are embraced by all human beings as part of being human. If this is true, then the idea of coercive cosmopolitanism would be a contradiction in terms. For if we all hold these values, then why would we need to be coerced to act upon them? In reality, however, our political orders have not necessarily reflected or acted upon values that are widely claimed

to be universal, such as human rights. Other values – order, wealth, glory, ethnic superiority, capitalist profit, worker liberation, divine providence – have characterized domestic orders, and the international norm of sovereignty has allowed these particular choices to override any ‘cosmopolitan’ identification of ourselves individually and legally as ‘citizens of the world’. Moreover, ‘cosmopolitanism’ itself has often been a hegemonic claim for a particular formulation of universality, and various universal ‘goods’ – the ‘white man’s burden’ comes to mind – have later been recognized as false universals. This explains the backlash against today’s ‘liberal’ formulation of cosmopolitanism from those who reject individualism as the primary human value that overrides others, such as community, solidarity or tradition.⁶²

The above analysis has argued that the cosmopolitan liberal consensus on transitional justice offered a series of lessons to the Chilean government, its judiciary and society that were in part voluntary and in part coercive. The coercive lessons threatened to exclude Chile from the community of ‘real’ democracies, placing the elevation of international law over domestic law as a condition for its place in that community. This consensus is ‘cosmopolitan’ not in that it is globally accepted, but in that it claims universality. It is coercive in that it uses international law and threats of exclusion as its means of enforcing its values. The relevant analogy is between this consensus and the ‘Washington consensus’ on neo-liberal economic reform. Objectively more robust (the IMF and the World Bank, along with individual and institutional investors, are backed up by the political-military power of the United States, while neither the International Criminal Court nor the Pinochet extradition attempt enjoyed this backup), the neo-liberal consensus is coercive using conditionality that invokes material costs for failure to comply with externally-imposed standards. Similarly the cosmopolitan liberal consensus invokes what might be called moral costs, or reputation costs, for failure to comply with its externally-imposed standards. This analogy may make some progressives and human rights activists uncomfortable. After all, the International Monetary Fund and World Bank are often criticized by these same movements for their insensitive imposition of ‘universal’ policies that do not adequately understand the needs of particular environments and thus end up doing more harm than good. However, if sovereignty still stands guard against the intrusion of human rights norms into domestic jurisdictions, then taking a coercive page from the successful ‘playbook’ of the ‘other side’ seems a necessary evil. A good example would be the effective use of economic sanctions against the apartheid regime in South Africa. By doing so, however, these same coalitions might need to examine carefully what such a moral calculus implies, and whether they might need to rethink their

defence of traditional norms of sovereignty as a valid argument against neo-liberalism.

Since we still live in a world governed primarily via sovereign jurisdictions, the most effective way to institutionalize the cosmopolitan liberal consensus has been through the incorporation of its norms into domestic law and policy. This has certainly been true for the neo-liberal consensus. In fact, it is less the 'global rules' of the World Trade Organization than the domestic free-market policies and laws protecting private property rights of foreigners on a par with nationals that have 'enforced' this economic model across borders. As the Spanish and British arenas of the Pinochet case have demonstrated, national courts can and do rule according to international law and treaty commitments when they are effectively rendered legal in the nation's own laws. The message to Chile was that it could not have it both ways. It could not claim democratic or cosmopolitan liberal legitimation by signing international covenants and incorporating them into domestic law, and then reject its own or anyone else's competence to try its human rights violators. Just as some governments see their bond ratings plummet when they adopt policies that protect domestic industries or increase government spending, so people who place the particular needs of their transitional pacts above the universal norms of transitional justice face similar punishment, in the form of 'undeserved' sovereignty and loss of sole jurisdiction.

At the same time, if such a country, like Chile, truly aspires to form a part of the cosmopolitan liberal consensus, then the coercive nature of the consensus can actually work in its favour. This would be the analogue of the 'tying hands' strategy employed by numerous countries implementing neo-liberal policies. That is, signing international agreements commits the country to 'good behaviour', and thus allows government officials to claim that their 'hands are tied' and thus they cannot offer relief to domestic groups who face adjustment to international norms without risking external retaliation or punishment. Might not government officials faced with military unrest, or judges facing government pressure, use a similar tool to shape the domestic arena? Might not the invocation of international law and solemn, legal commitments depoliticize prosecutions, heightening the sense of external exposure of those who would stand against them, while only circumventing the pact without formally breaking it? Might not this invocation also activate external allies of such domestic choices to reinforce the message that lack of compliance will lead to negative consequences? Forced to be free of its entrenched domestic legal constraints, such a government could then be liberated from the excruciating choice between justice and peace.

Lesson Two: Pacts are not Forever

While it is true that choices made at difficult initial moments of the transition may place limits on policy-makers well beyond the transition *per se*, it would be a mistake to confuse structural constraints with historical inevitability. The pacting literature focuses so heavily on constraints because of the highly uncertain nature of the transition 'game', in which it is essential to prohibit disloyal or semi-loyal 'moves' in order to guarantee the survival of democracy into the future. As uncertainty is mitigated by a pact-induced stability, the major challenge of transition is faced, leading to the challenges of consolidation, which are then of a different, more substantive order. What the Pinochet case underscores is the uncomfortable fact that even 'successful' transition pacts sometimes have to be renegotiated or amended – and not necessarily for the reasons predicted by the literature (namely, to reassure the semi-loyal that their loyalty is still deserved and that democracy will not threaten their status or autonomy). It also demonstrates how the impetus for such a revisiting of domestic agreements can come from outside the national jurisdiction, further complicating what is undoubtedly a highly complex and even potentially violent milieu.

The 'time factor' also comes into play. When is 'transition' officially 'over', and does 'consolidation' have a set beginning, middle and end as well? Or do these linear measures represent not an objective but rather a *normative* scale that obscures the messy reality that regime transition represents? These questions came to the fore when commentators suggested that the Pinochet arrest and extradition attempt 'reopened the transition', implying that Chile had somehow slid 'backward' or that its 'graduation' was premature. Such normative judgements helped to activate the coercive aspects of the cosmopolitan consensus. Chilean government officials and citizens alike cared whether their country was perceived as somehow failing to meet standards. At the same time, pacts that function well domestically appear wanting internationally at different world-historical times due to shifts in the predominant or hegemonic ideology of the time. The Pinochet extradition attempt was not purely a 'post-Cold War' phenomenon, but more specifically one of the cosmopolitan liberal hegemony that has developed over the past decade. 'Globalization' – fueled by the free-market world economy and the social and political empowerment of the individual – is a game of speed and an ideology of linear progress. Few exceptions are made to accommodate the complexity of regime change in general, the intricate social dynamics particular to a given domestic environment, or even diverse paths that lead to the same result, albeit more slowly or more indirectly. Advocates for a different approach to transitional justice have

been operating inside and outside of Chile for decades, but they became successful only when the external environment provided them with a means of coercion that enabled them to force the reconsideration of the pacts at home.

It is also possible to learn from the evolution of the Pinochet case from external to internal venues that transitional justice may operate on a different timetable from other dimensions of transition. The choice to forego state-sponsored trials or to accept illiberal limits on truth commissions may not, and possibly should not, mean an acquiescence to impunity for all time. First, an independent, democratically-accountable judiciary may offer another venue for transitional justice, one that has the dual virtues of demonstrating the separation of powers and liberating elected officials from the act of passing judgement on those who could unseat them by force. Unlike 'independence' as practiced by the Chilean Supreme Court under dictatorship – meaning effective isolation and moral abdication – independence and accountability must be balanced. The post-transition judiciary can also enhance its democratic credentials and prestige by being aware of and open to developments in international law and in the treatment of similar cases in other domestic contexts. This path is not without its own pitfalls, as demonstrated by the criticisms within Chile of Judge Juan Guzmán Tapia and his possible Garzonesque political or ego-driven reasons to pursue the prosecution. However, it is far easier to replace a single discredited judge than to recover from the delegitimation of the *state* that can occur through what Linz has called 'ressentiment' policies.⁶³ Similarly, newly-liberated lower courts can handle individual cases of individual perpetrators, whereby they contribute to justice through investigations as well as actual prosecutions.

Prillaman may be right that Chileans' willingness to accept piecemeal prosecutions reflects a deeper commitment to the long haul of democracy, and the Pinochet case's repatriation may be valued as much for the process as for the outcome (especially as, in the final analysis Pinochet was released from legal prosecution in Chile, on grounds of poor health). In certain domestic contexts, at *particular times*, the entire edifice of impunity may need to be dismantled one brick at a time, rather than by wholesale knocking down of walls. However, under international pressure, this gradual approach can maintain legitimacy only if it is understood that incrementalism is not simply a synonym for infinite impunity. Claiming that the country is 'not ready yet' opens the door to demands from outside the country, as well as attempts at extra-territorializing jurisdiction, both of which symbolize the cosmopolitan consensus that those who will not do for themselves are not deserving of full sovereignty.

Lesson Three: There's no Place like Home

Cosmopolitan liberalism does aim to 'free' us from our national contexts. The entrepreneur considers his 'market', or his 'shareholders', not his nation, as his primary point of reference. The human rights activist is not bound by national citizenship but rather inspired by moral responsibility to humanity. The Pinochet case also appears to buttress this new form of 'identity politics' for the twenty-first century: in such a narrative, Chilean victims are transformed into global citizens, and Judge Garzón into a hero who dared to transcend the evil barriers of traditional sovereignty. However, the Pinochet case can also be read, and should be read, as a reminder of the deep and abiding meaning of place and of belonging to that place that persist despite the centrifugal forces of modern 'globalized' life.

For crimes against humanity, there is always a sense that a trial abroad is 'second best' even when that trial is arguably more transparent, and the legal system more likely to yield convictions and sentences that will be carried out. Rwanda battled furiously against the international tribunal established in Tanzania, and Yugoslavia's Kostunica was loath to extradite the former leader Milosevic. In both cases, domestic 'justice' was likely to be partial or constrained, but it was considered essential to take the crucial task of public morality away from external powers (for domestic or foreign policy reasons). Likewise, Chilean victims of the Pinochet regime 'escaped' their domestic context only as a second-best strategy, and to put pressure on their home country to rethink its approach to transitional justice. Their actions were intended not only to underscore the gravity of Pinochet's crimes – to tell the world that these were crimes against humanity, and beyond the pale of any legitimate state action against its own citizens – but also to force Chileans to confront what their nation stood for, both at home and abroad. They were required to face the fact that Pinochet was in fact protected by Chilean law and thus could not be condemned by it.

Democratic transition is about identities and identification, citizenship and nation-making, and this includes a strong desire on the part of those excluded from the nation – ideologically, politically, and also geographically via exile – to belong once again. This may not lead to the mythical 'reconciliation' so often spoken of in transitional justice circles. However it may lead beyond a rigid pact-enforced stability towards a new – if still circumscribed – national space in which affective citizenship can be rejuvenated and passion can enter the political vocabulary without raising the spectre of breakdown and the abyss.

Ironically, such a new national space may depend upon the externalization of Chilean identity. In Spain democratic consolidation in the early-to-mid 1980s and after owed a great deal to the strategy of linking a

new democratic identity to participation in European integration. At that time, the bar for democratic transition was arguably lower – nobody questioned whether Spain's amnesty- and *olvido*-based approach to transitional justice would stand in the way of Spanish membership in the European Community. But Spain's aspirations were not driven solely by the *specific* requirements – they were driven by the desire to belong, to be at the heart of Europe and not just at its periphery. They were also driven by the emotions nurtured by the pact: embracing the future as a way of bringing the nation together in a common effort.

Chile, in its own way and at its own time, is experiencing its own transformation of identity linked to its externally-oriented economic strategy and its pacted transition. True, the requirements praised by foreign investors in the 'age of globalization' have focused on 'rule of law' and on stability more than on any notion of justice or 'full' democracy. Even the new democracy requirements to be written into a Free Trade Area of the Americas may not be backed up by a willingness to alienate Chile for the illiberal compromises of its pacted transition when lucrative trade is at stake. However, that is not to say that the post-authoritarian 'project' – nurtured by the future-oriented pact – of reinventing Chile as a dynamic, competitive and modern nation is aiming simply to meet bare minimum requirements. The Pinochet extradition attempt served as shock-therapy from the other side of the cosmopolitan liberal consensus, while its repatriation offered a chance at redemption, at belonging near the heart of the democratic club, rather than dangling at its periphery. Reopening the past has become part and parcel of guaranteeing the future – an ironic twist, but also a rare, if delicate, opportunity to reshape what that future will mean, and who will be included fully in it.

Epilogue

The abrupt and somewhat anticlimactic suspension in July 2001 of the repatriation phase of the Pinochet case represent yet another surprising twist in this most unpredictable of international legal adventures.⁶⁴ The above analysis that highlights the coercive dimension of judicial policy transfer leading to the once-unthinkable advancement of the case in Chile to the point where the once untouchable general was fingerprinted and held under arrest on Chilean soil. At the same time, his escape from prosecution under the rubric of mental incompetence following a polemical medical examination can be read as a reassertion of the pact and its particular imperatives of stability. It thereby challenges the notion that the Chilean courts had become vulnerable to coercive cosmopolitanism.

Two observations can be made at this juncture. First, while the decision

may have come down to the specific judges in question (and more research needs to be done to understand the factions and ideological cleavages within the Chilean judiciary), the Appeals Court's resistance to the pressure of the cosmopolitan consensus does not necessarily mean that this pressure has evaporated. It was not only Pinochet who escaped prosecution, but also President Lagos's government that escaped from the overt and covert domestic conflict that had accompanied the case. However, there may now be added pressure on the government to 'prove' that this was not a true reversal of democratic consolidation. The pressure will come particularly from global and local human rights activists angered by the decision, distrustful of the judicial system, and alert to the possibilities of focusing the media spotlight if the government or the army appear to assume that the retrospective justice process that was begun can now be blocked.

Second, and related to this, it is argued here that this sudden end of the case will turn out to be the judicial equivalent of shutting the 'stable door after the horse has bolted'. This was also true of the failure of Garzón's extradition request. For the attempt and the legal reasoning behind it still set a precedent that continues to be studied by legal scholars, cited by other judges, and employed by plaintiffs around the globe seeking justice beyond their nation's borders. Similarly, the repatriation of the Pinochet case marked a 'before' and 'after' for Chile and its struggle to reconcile retrospective justice with prospective democratic consolidation. Pinochet himself may not go on trial. But through the process of losing his senate seat and his legal immunity, being charged and arrested, and ultimately being publicly declared mentally unfit to stand trial, he has also lost his place at the centre of national political life. He is no longer akin to a sword of Damocles perpetually threatening Chile's democracy.⁶⁵ Instead, Chileans must now face the arduous long-term task of constructing a democratic society *free of his polarizing figure*, and without the short-term exorcism of a criminal trial. In that sense, the end of the trial may have forced Chile to be free of Pinochet in this unanticipated way. And while it is not clear how that freedom will be translated politically and socially, it may yet transform Chile from a society that lives in fear of itself to one rightfully proud of its collective courage.

NOTES

1. The Chilean newspaper, *La Tercera* has compiled a chronology of Pinochet's 503 days of detention in London. See <<http://www.tercera.cl/casos/pinochet2/index.html>>, accessed 13 June 2001.
2. For an historical and legal-theoretical treatment of the post-Nuremberg development of the principle and 'human rights doctrine' via treaties and conventions, see Andreas Bianchi, 'Individual Accountability for Crimes against Humanity: Reckoning with the Past, Thinking

- of the Future', *SAIS Review*, Vol.19, No.2 (1999), pp.97–131, esp. pp.100–105; 111–15. A critical assessment of the legacy of Nuremberg and its limitations as an iconic symbol or justifying precedent for international justice is found in Jeremy Rabkin, 'Nuremberg Misremembered', *SAIS Review*, Vol.19, No.2 (1999), pp.81–96. An examination of the arguments against the prosecution of individuals for crimes against humanity is undertaken in Mark J. Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity', *Human Rights Quarterly*, Vol.22, No.1 (2000), pp.118–47.
3. Jack Donnelly, 'State Sovereignty and International Intervention: The Case of Human Rights', in Gene M. Lyons and Michael Mastanduno (eds), *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore, MD and London: Johns Hopkins University Press, 1995), p.121.
 4. See Marc Weller, 'On the Hazards of Foreign Travel for Dictators and Other International Criminals', *International Affairs*, Vol.75, No.3 (1999), pp.599–617, esp. pp.603–9; Anne-Marie Slaughter, 'Government Networks: The Heart of the Liberal Democratic Order', in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000), pp.204–20, and Bianchi, pp.100–105.
 5. A detailed 'insider' account of this process is found in Richard J. Wilson, 'Prosecuting Pinochet: International Crimes in Spanish Domestic Law', *Human Rights Quarterly*, Vol.21, No.4 (1999): 927–79.
 6. *Ibid.*, pp.931; 934.
 7. Wilson calls this 'perhaps the most significant single aspect of the Audencia's appellate review'. *Ibid.*, p.950.
 8. The most detailed, and yet controversial, source on Garzón's life and the events in question is his recent authorized biography written by a journalist: Pilar Urbano, *Garzón: El hombre que veía amanecer*, 2nd edition (Madrid: Plaza & Janés, 2000). Replete with excerpts from his journal, quotes of extensive interviews given to its author, fictionalized reconstructions of actual events, and even family photographs, it also contains sensitive information regarding the role of prosecutor Eduardo Fugairiño – who opposed the Pinochet extradition – in passing information to the Chilean military via the Spanish secret service (CESID) and other details of ongoing cases that led to a since-dismissed disciplinary charge against Garzón.
 9. On the GAL investigation, see David White, 'Spain's "Dirty War" Casts Ex-Minister in Spotlight', *Financial Times* (25 May 1998), p.2; EFE News Service, 'Garzón Seeks to Indict Former Spanish Prime Minister', *Financial Times Information/Global News Wire* (20 November 1999), n.p.; Paul Preston, 'How Spain Fought the Bad Fight', *The Irish Times* (26 May 2001), p.71. These articles were downloaded from Lexis-Nexis Academic Universe, accessed 13 June 2001. See also Urbano, pp.175–247.
 10. The first case to reach the Audencia Nacional was brought on behalf of victims of the Argentine junta by Carlos Castresana, a state prosecutor who acted in his private capacity on behalf of Association of Progressive Prosecutors of Spain (Unión Progresista de Fiscales), on 24 March 1996; the case against Pinochet and the Chilean junta was brought by Joan Garcés, the victims' legal counsel acting through the Salvador Allende Foundation, on 1 July 1996. See Wilson, pp.933–4; Urbano, pp.484–6.
 11. Not surprisingly, Garzón insisted to Pilar Urbano: 'I did not go looking for it. It landed on my desk, just one case more on my docket. There are those who believe that I go around tracking down cases (*cazando casos*) ... [but the truth of the matter is that] a judge has to take what comes to him' (Urbano, p.434). He then elaborated the ten or so high-profile cases that he was already investigating, including the economic structure of ETA–KAS, corruption charges against Italian magnate and politician Silvio Berlusconi, and the multinational drug-trafficking and money laundering scandal known as Operation Caviar (Urbano, pp.483–4). Wilson does not weigh in on this matter, but a recent profile in *The Economist* emphasizes his polemical role in the judiciary and his 'fervour' for self-promotion, and suggests that Garcés sought Garzón out and that Garzón responded to that pressure. See 'Charlemagne: Baltasar Garzón', *The Economist* (2 June 2001), p.54. Garzón's reputation preceded him, according to Urbano's reconstructed (and perhaps apocryphal) account of the arrest of Pinochet in London: upon hearing the warrant, the General is said to have blasphemed, 'Garzón, that communist!' (Urbano, p.522). His reputation has also led, at least indirectly, to

- a 'pact' between the Popular Party and the Socialist Workers' Party (PSOE) for a judicial reform designed, in part, to make it more difficult for 'star judges' to emerge. See 'Zapatero asegura que tras el Pacto de la Justicia se intentará "corregir" el fenómeno de los "jueces estrella"', *El País*, 30 May 2001. <http://www.elpais.es/articulo.html?d_date=20010530&xref=200010530elpepinac_10&type=Tes&anchor=elpepinac>, accessed 30 May 2001.
12. Urbano, pp.506–8, 509–13; Wilson., pp.948–9; 969–73.
 13. For a Hollywood rendition of the drama surrounding the issuing of the arrest warrant, see Urbano, pp.515–23. After the first arrest warrant was issued, García-Castrellón ceded his control of the entire Chile docket to Garzón (Urbano, pp.525–6).
 14. This followed a conversation with John Dew, of the British Embassy in Madrid (Urbano, p.521).
 15. For example, human rights and victims' groups succeeded in having the former Chadian leader Hasseni Habré indicted in a court in Senegal, while Nobel Laureate Rigoberta Menchú filed suit in the Audiencia Nacional in March 2000 against the military leaders of Guatemala for genocide. See 'Ex-Chad Ruler Is Charged By Senegal With Torture', *New York Times* (4 February 2000), p.A3, from Lexis-Nexis Academic Universe, accessed 13 June 2001, and Julio M. Lázaro, 'La Audiencia Nacional acepta la querrela de Menchú por genocidio en Guatemala', *El País* 28 March 2000, <<http://www.elpais.es/p/d/20000328/portada/portada.htm>>, accessed 30 March 2000. While both of these suits proved unsuccessful in later stages, they add to the precedents set for extraterritorial justice. Similarly, the pending extradition of Ricardo Miguel Cavallo, a former Argentine military officer accused of torture, from Mexico to Spain, as well as the arrest of former Argentine general Jorge Oliveras in an Italian airport on charges of the disappearance of a French citizen, point to the expanding notion of universal jurisdiction. See J.J. Aznárez, 'México sienta un precedente y entrega a España al torturador argentino Cavallo; El ex-capitán podrá ser juzgado por los delitos de genocidio, tortura, y terrorismo', *El País* (4 February 2001), p.2, from Lexis-Nexis Academic Universe, accessed 13 June 2001; and Lola Galán, 'Detenido en Roma un ex militar argentino acusado de la desaparición de una francesa', *El País*, 8 August 2000, p.4. See also Anthony Faiola, 'Pinochet Effect Spreading; Case Opens Way to Other Prosecutions', *The Washington Post* (5 August 2000), p.A1, from Lexis-Nexis Academic Universe, accessed 13 June 2001.
 16. Opinions of the Lords of Appeals, 24 March 1999, posted on <<http://www.elpais.es/p/d/especial/autolord/auto1.htm>>, accessed 11 November 1999.
 17. Ibid.
 18. As Geoffrey Weeks argues, these high-profile trials also served a strategic purpose for the civilian government: prosecuting individuals meant publicly assigning criminal responsibility to those individuals, rather than confronting the institutional responsibility of the armed forces or the dictatorship itself. This strategy, however, backfired. Contreras refused to surrender himself and took refuge in various military installations, and the episode only ended with the personal intervention of Pinochet and informal deal-making between him and President Frei. See Geoffrey Weeks, 'The Long Road to Civilian Supremacy over the Military: Chile, 1990–1998', *Studies in Comparative International Development*, Vol.35, No.2 (2000), pp.74–7.
 19. On the controversy surrounding the transition-consolidation sequence and its distinguishing features, see Andreas Schedler, 'What is Democratic Consolidation?' *Journal of Democracy*, Vol.9, No.2 (1998), pp.91–107, esp. p.107 on Chile.
 20. See Marcelo Cavarozzi, 'Patterns of Elite Negotiation and Confrontation in Argentina and Chile', in John Higley and Richard Gunther (eds), *Elites and Democratic Consolidation in Latin America and Southern Europe* (Cambridge: Cambridge University Press, 1992), pp.224–5. The constitutional reforms are outlined succinctly by Alicia Frohmann, 'Chile: External Actors and the Transition to Democracy', in Tom Farer (ed.), *Beyond Sovereignty: Collectively Defending Democracy in the Americas* (Baltimore, MD and London: Johns Hopkins University Press, 1996), p.243.
 21. On the Chilean judiciary, its historic tradition, and its role in upholding the 'rule of law' under dictatorship see Pamela Constable and Arturo Valenzuela, *A Nation of Enemies: Chile*

- under Pinochet* (New York: W.W. Norton, 1991), ch.5, pp.115–39; and Jorge Correa Sutil, 'The Judiciary and the Political System in Chile: The Dilemmas of Judicial Independence During the Transition to Democracy', in Irwin P. Stotzky (ed.), *Transition to Democracy in Latin America: The Role of the Judiciary* (Boulder, CO: Westview Press, 1993), pp.89–106, esp. pp.93–101.
22. On the Supreme Court's power over lower courts, see Correa Sutil, p.100; on the near-religious devotion to civil law's traditional view that 'law is written reason' as must be enforced as such, see Correa Sutil, pp.93–9.
 23. Alfred Stepan, *Rethinking Military Politics: Brazil and the Southern Cone* (Princeton, NJ: Princeton University Press, 1988), esp. ch.7, pp.93–127; Felipe Agüero, 'Legacies of Transitions: Institutionalization, the Military, and Democracy in South America', *Mershon International Studies Review*, Vol.42 (1998), pp.383–404. For a contrary view that favours settling the 'punishment dilemma' as a key to successful democratization, see Daniel Sutter, 'Settling Old Scores: Potholes along the Transition from Authoritarian Rule', *Journal of Conflict Resolution*, Vol.39, No.1 (1995), pp.110–28, esp. pp.111–12.
 24. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), p.xiv.
 25. Quoted in Wilson, p.954.
 26. See Chile, Comisión Nacional de Verdad y Reconciliación, *Informe Rettig: Informe de la Comisión Nacional de Verdad y Reconciliación*, 2 vol. (Santiago: La Nación/Ediciones Ornitorrinco, 1991).
 27. This argument was developed by Garzón after the Law Lords limited the scope of the crimes for which Pinochet could be extradited to those occurring after 1988, when England, Spain and Chile were all signatories of the UN Convention against Torture. See Wilson, pp.978–9.
 28. Remarks of Baltasar Garzón, Abraham Lincoln Brigade Archives Annual Lecture, New York University, (New York, April 28, 2000), n.p.
 29. Wilson, p.979.
 30. Alexander Wilde, 'Interruptions of Memory: Expressive Politics in Chile's Transition to Democracy', *Journal of Latin American Studies*, Vol.31, Part 2 (1999), pp.473–500; on the Pinochet case, see *ibid.*, pp.489–91. The deep roots of conflict over historical memory and their overt and repressed manifestations in today's Chile can be seen literally and visually in Patricio Guzmán's television documentary, *Chile: Obstinate Memory* (1997).
 31. On truth commissions as an increasingly attractive option for transitional justice, see Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), pp.77–92 [AU?]; Priscilla B. Haymer, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York and London: Routledge, 2000), Alex Boraine, Janet Levy and Ronel Scheffer (eds), *Dealing with the Past: Truth and Reconciliation in South Africa* (Cape Town: IDASA, 1994). For an optimistic view of the Chilean experience, see Alexandra Barahona de Brito, *Human Rights and Democratization in Latin America: Uruguay and Chile* (Oxford: Oxford University Press, 1997), esp. 155–67.
 32. Wilde, p.482; Barahona de Brito, pp.210–11.
 33. Wilde, p.496.
 34. Walzer, p.xv.
 35. Carlos Santiago Nino, *Radical Evil on Trial* (New Haven, CT: Yale University Press, 1996). See, esp., the section 'Should Democrats Punish or Pardon?' pp.127–34.
 36. Nino, pp.131, 134.
 37. The idea of 'rule of law in action' and its political effects are developed in Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1986), cited in Nino, p.145–6.
 38. Wilson, p.933.
 39. Garzón, 'Remarks', n.p.
 40. Garzón first made the argument in the Argentine case that the targeting of the left for 'elimination' constituted genocide as defined by the United Nations Convention for the Prevention and Sanction of Genocide (1948), and later applied that reasoning to Chile. See 'Auto del pleno de la Sala de lo Penal de la Audiencia Nacional [On the competence of Spanish courts to pursue crimes of genocide in Chile]', (5 November 1998),

- <<http://www.elpais.es/p/d/especial/auto/chile.htm>>, accessed 10 September 1999; 'Auto de solicitud de extradición de Pinochet' [Official Request for Extradition of Pinochet] (3 November 1998), <<http://www.elpais.es/p/d/especial/auto/auto1a.htm>>, accessed 10 September 1999. In turn, the Audiencia Nacional, responding to prosecutorial objections to Spanish jurisdiction, claimed that 'genocide' under Spanish law was defined as the systematic attempt to eliminate an entire 'national group', which includes groups of national citizens targeted for their political beliefs or their perception by the regime as not fitting the mould of the new society. See 'Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena' [Ruling of the Audiencia Nacional on Jurisdiction of Spanish Courts to Pursue Crimes of Genocide and Terrorism in Chile] (5 October 1998), cited in Wilson, pp.959–61.
41. Thomas C. Wright and Rody Oñate (comps), *Flight from Chile: Voices of Exile*, trans. Irene B. Hodgson (Albuquerque: University of New Mexico Press, 1998), esp. ch.9, 'Return to a New Exile, 1988–1994', pp.171–225.
 42. On the transformation of ideological and political identity among leaders of the left during the dictatorship, see Katherine Hite, 'The Formation and Transformation of Political Identity: Leaders of the Chilean Left, 1968–1990', *Journal of Latin American Studies*, Vol.28, No.2 (1996), 299–328.
 43. Interview with 'Julio Pérez' (anonymous), 16 May 1995, in Wright and Oñate, p.222.
 44. Universal Declaration of Human Rights, section 11, quoted in Wright and Oñate, p.173.
 45. Bruce James Smith, *Politics and Remembrance: Republican Themes in Machiavelli, Burke, and Tocqueville* (Princeton, NJ: Princeton University Press, 1985), pp.265–6. See esp. ch.4, 'Alexis de Tocqueville and the Politics of Affection', pp.155–250.
 46. Smith, pp.238–9.
 47. Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995), esp. ch.1, 'A Theory of Compliance', pp.1–28. As they argue, 'for all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life' (p.27).
 48. Martha Finnemore, *National Interests in International Society* (Ithaca, NY and London: Cornell University Press, 1998), esp. pp.22–4 on norms as social structures.
 49. There is a vast literature exploring the relationship between neo-liberalism and democratization in Chile. Some authors identify the continuity of the free market policies implemented under Pinochet as an 'authoritarian legacy' while others credit economic stability with stabilizing politics. For a comprehensive overview, see Gerardo L. Munck, 'Authoritarianism, Modernization, and Democracy in Chile', *Latin American Research Review*, Vol.29, No.2 (1994), pp.188–211. Critics of this aspect of the transition have also connected neo-liberalism with the imposition of 'obligatory amnesia', claiming that 'whitewashing' the past was part and parcel of creating 'the New Chile' for foreign consumption which required forgetting that neo-liberalism was a continuation of *pinochetismo*. See Tomás Moulián, 'A Time of Forgetting: The Myths of the Chilean Transition', *NACLA Report on the Americas*, Vol.32, No.2 (1998), pp.16–23, esp. pp.18 and 22. See also the discussion of the continuity of authoritarianism via 'the neo-liberal state' in Chile in Jon Beasley-Murray, 'The Constitution of Society: Pinochet, Postdictatorship, and the Multitude', *Radical Philosophy*, Vol.105 (2001), pp.17–18. For an examination of the ideational and political ways in which the neo-liberal model was 'democratized' and 'socialized' after transition, see Jeanne Kinney Giraldo, 'Development and Democracy in Chile: Finance Minister Alejandro Foxley and the Concertación's Project for the 1990s', in Jorge I. Domínguez (ed.), *Technopols: Freeing Politics and Markets in Latin America in the 1990s* (University Park, PA: Penn State University Press, 1997), pp.229–75.
 50. See Clifford Krauss, 'Chile Strips Pinochet of Immunity, Lifting One Barrier to Trial', *New York Times* (25 May 2000), <<http://www.nytimes.com/library/world/americas/052500chile-pinochet.html>>, accessed 25 May 2000. The full text of the Court of Appeals ruling is found in three parts on the *La Tercera* website: <<http://www.tercera.cl/casos/pinochet/>

- documentos/desafuero.html>, accessed 15 June 2000. This site also has an analysis of the arguments made by the plaintiffs and the defense (<desafuero13.html>), and the position of the armed forces (<desafuero03.html>). On the Supreme Court decision, see Manuel Délano, 'El Supremo de Chile retira la inmunidad a Pinochet por un estrecho margen de votos: Once jueces contra nueve deciden procesar al exdictador por la "caravana de la muerte"', *El País* (2 August 2000), <<http://www.elpais.es/p/d/temas/pinoch2/8pin2a.htm>>, accessed 8 September 2000. Two weeks later, Pinochet officially lost his senate vote and the legal protection that came with it. See Manuel Délano, 'La Cámara alta suspende a Pinochet como senador y le retira la protección jurídica', *El País* (15 August 2000), <<http://www.elpais.es/p/d/temas/pinoch2/8pin15.htm>>, accessed 8 September 2000.
51. See, for example, David P. Dolowitz and David Marsh, 'Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making', *Governance* Vol.13, No.1 (2000): 5–24, esp. pp.13–17.
 52. On the contrast between the role of judges in civil versus common law systems, see John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd edition (Stanford, CA: Stanford University Press, 1985), ch.6, 'Judges', pp.34–8.
 53. In an interview with the Spanish daily *El País*, Chile's interior minister, José Miguel Insulza, rejected the notion that his country should thank Garzón: 'If I am attacked, and I react well, I do not need to thank the attacker, even if I am proud of how I reacted'. See 'No creo que los militares vayan a involucrarse en el proceso' [interview with José Miguel Insulza] *El País* (10 August 2000), p.3.
 54. See Concha Monserrat, 'J. Guzmán, Juez: "Nosotros empezamos el proceso a Pinochet antes que Garzón"', *El País* (26 April 2001), <http://www.elpais.es/articulo.html?xref=20010426elpepiint_3&anchor=elpepiint&type=Tes&d_date=20010426>, accessed 14 June 2001.
 55. Wilde, p.488.
 56. William C. Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Westport, CT and London: Praeger, 2000), ch.6, 'Chile's Coherent Approach to Judicial Reform', pp.137–61.
 57. *Ibid.*, pp.146–7.
 58. Wilde, pp.488–9.
 59. Writing in the early 1990s, Correa Sutil argues for the need of a 'new judicial culture' in Chile but does not foresee this particular 'universalizing' mechanism of developing it. See Correa Sutil, p.97.
 60. For example, international human rights specialist and Chilean law professor Felipe González noted that the success of the Chilean litigants abroad 'emboldened' other victims at home to file suits and pursue justice. Even Juan Gabriel Valdés, Chile's current ambassador to the United Nations, reluctantly conceded that the ferment in Chilean society and the reopening of the question of impunity in transitional justice would have been impossible without the impetus of Pinochet's London detention. See remarks of Felipe González, Annual Friedmann Conference, 'Challenges Facing the Human Rights Agenda in the 21st Century', Columbia University School of Law (New York, 2 March 2000); and Juan Gabriel Valdés, 'Globalization and Democracy: The Case of Chile', Bildner Center for Western Hemisphere Studies, Graduate Center of the City University of New York (New York, 22 February 2001). Professor González teaches international law at the Universidad Diego Portales in Chile.
 61. For the official website, see <<http://www.mesadedialogo.cl>>, accessed 18 June 2001. The Chilean newspaper *La Tercera* also maintains an excellent reference site on the Mesa de Diálogo: <<http://www.tercera.cl/casos/mesa/index.html>>, accessed 13 June 2001. The 'Liturgia del perdón' was held in Santiago's Metropolitan Cathedral on 24 November 2000, officiated by the Archbishop of Santiago, Monsignor Francisco Javier Errázuriz. See 'Iglesia dice que reconciliación no puede esperar', *La Tercera* (25 November 2000) <<http://www.tercera.cl/diario/2000/11/25/t-25.03.3a.POL.OBISPOS.html>>, accessed 13 June 2001. On the support of public ceremonies of reconciliation by branches of the military, see 'Carabineros y Armada destacan trascendencia de "Misa del Perdón"', *La Tercera* (23

November 2000). <<http://www.tercera.cl/diario/2000/11/23/extras/t-23.17.3a.EXT.MISA.html>>, accessed 13 June 2001. Pinochet himself released a statement coinciding with the mass, echoing words from an open letter to the country he had sent during his London detention, in which he 'assumes responsibility' for actions of the armed forces during his rule. It is interesting to note that his taped statement was broadcast at a birthday dinner for him attended by 1,400 invitees, and that he used this venue to speak of the 'pain' he had suffered in London. See 'Pinochet: "asumo todo lo cometido por el Ejército"', *La Tercera* (25 November 2000). <<http://www.tercera.cl/diario/2000/11/25/t-24.10.3a.POL.PIN.html>>, accessed 13 June 2001.

62. Geographer David Harvey notes that cosmopolitanism may be based upon values other than individualism, though he is not inherently critical of universality *per se*; in contrast, Susan Koshy takes the human rights regime to task for being dominated by Western notions of 'universal' civil political rights that sideline economic and social rights, and that do not respect cultural differences. See David Harvey, 'Cosmopolitanism and the Banality of Geographical Evils', *Public Culture*, Vol.12, No.2 (2000), pp.529–64, esp. 564; Susan Koshy, 'From Cold War to Trade War: Neocolonialism and Human Rights', *Social Text*, Vol.17, No.2 (1999): 1–32.
63. Linz defines 'ressentiment' after the work of Max Scheler, who, in turn, draws from Nietzsche regarding the negative environment created when feelings of hatred, revenge, and envy are not able to be released. Linz, however, seems to be referring to former authoritarians who are subjected to vengeful policies and are impotent to react. Instead, this breeds semi-loyalty and even disloyalty in their ranks, leaving open a breach in legitimacy that can one day overwhelm a fragile democracy. See Juan J. Linz, *The Breakdown of Democratic Regimes: Crisis, Breakdown, Reequilibration* (Baltimore, MD and London: Johns Hopkins University Press, 1978), pp.34, 42 and nb.5, p.113.
64. The Sixth Part of the Chilean Court of Appeals ruled 2–1 on 9 July 2001 that Pinochet was mentally unfit to stand trial due to 'light to moderate' senile dementia reported by doctors who examined him for a court-ordered medical examination earlier in the year. For a summary of the 'sobreseimiento', or setting aside of the indictment, see 'Pinochet queda fuera del caso Caravana de la Muerte', *La Tercera Digital*, Casos: Sobreseimiento, at <<http://www.tercera.cl/casos/pinochet/sobreseimiento/sobreseimiento02.html>>, accessed 28 September 2001. The complete text of the decision is posted in Spanish at <http://www.elmostrador.cl/casos/c_pais/sobreseimiento.htm>, accessed 28 September 2001.
65. On this, and other contributing factors diminishing Pinochet's influence on Chilean politics, see 'La irreversible pérdida de poder', *La Tercera Digital*, Casos: Sobreseimiento, at <<http://www.tercera.cl/casos/pinochet/sobreseimiento/sobreseimiento04.html>>, accessed 28 September 2001.

