

Political Bargaining and Democratic Transitions: A Comparison of Nicaragua and El Salvador*

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Abstract. This article examines the relationship between pact-making and democratic transitions in Nicaragua (1988–1997) and El Salvador (1990–1997). We argue that the process of elite bargaining about regime change affects the prospects for the consolidation of democracy. We emphasise three factors: (1) the choices key actors make as they bargain about bargaining, (2) their willingness to ‘under-utilise’ their power and (3) the influence of historical and structural contingencies upon the key choices made. Essential to our discussion of historical and structural contingencies is the interrelation of domestic and international actors and the importance of demilitarisation and institutional reform. We argue that these three factors favoured El Salvador more than Nicaragua, although neither nation has overcome the political polarisation characteristic of transitional regimes.

The March 1994 elections in El Salvador were hailed by some observers as the ‘elections of the century’, a phrase that drew attention both to the unprecedented conditions under which they were held and to their promise for advancing the country’s nascent democratisation. Although the expectations surrounding Nicaragua’s February 1990 elections were less exalted, it could be said that those elections, too, were unprecedented and critical to the country’s long transition from authoritarianism to democracy. In El Salvador all key political actors accepted the legitimacy of the elections and the constitutionality of the regime, parties across the political spectrum participated, and there was extensive international support for the process. In Nicaragua even the most bitter opponents of the Sandinistas agreed to participate in the elections, which were heavily monitored by international observers, and the results were respected when the losers transferred power peacefully to the victors. Electoral continuity has now been well established in both countries. Nicaraguans conducted national elections in November 1996, while Salvadoreans held legislative and municipal elections in March 1997.

Numerous authors have discussed these elections as important steps in

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each country's political transition.¹ In a recent article Richard Stahler-Sholk discussed the 1994 Salvadorean elections in relation to the commitments entailed in the Peace Accords and with reference to a broadly drawn conception of democratisation that emphasised popular participation.² Stahler-Sholk's approach mirrored that of Philip Williams whose 1990 article on Nicaragua highlighted the combination of popular and formal, or electoral, democracy in Nicaragua's transition.³

The present article focuses not on the elections, but on the pact-making that preceded them and on the post-election implementation of agreements reached in the pact-making process. This comparison of Nicaragua and El Salvador highlights 'liberal' elements of a democratic transition, other than elections. We intend to follow the lead of Terry Lynn Karl and others who have argued that researchers should look beyond elections *per se* to the often arduous and complicated process of elite bargaining about regime change that forms the context in which transition elections occur. In turn, this bargaining, or 'pact-making', process itself takes place within structural and conjunctural restraints that must be accounted for in any analysis of democratic transition.⁴ The central questions involve identifying what was agreed to, who participated and who was excluded, whether enforcement provisions were built in, and whether compliance and implementation were adequate.

In addition to pursuing these questions raised by Karl, the article also adapts a thesis put forward a generation ago by Eric Nordlinger and Leonard Binder.⁵ These writers argued that the order in which decisions

¹ See, for example, *Electoral Democracy Under International Pressure* (Pittsburgh: Latin American Studies Association, March, 1990); Lisa Haas and Gina Perez, 'Voting with their stomachs: "Las Elecciones del Siglo" in El Salvador', the *LASA Forum*, vol. XXV, no. 3 (Fall, 1994), pp. 3–6; Jack Spence, David R. Dye and George Vickers, *El Salvador: Elections of the Century* (Cambridge, Mass.: 1994); and Terry Lynn Karl, 'El Salvador's Negotiated Revolution', *Foreign Affairs*, vol. 71, no. 2 (Spring, 1992), pp. 147–64.

² Richard Stahler-Sholk, 'El Salvador's Negotiated Transition: From Low Intensity Conflict to Low Intensity Democracy', *Journal of Interamerican Studies and World Affairs*, vol. 36, no. 4 (Winter, 1994), pp. 1–61.

³ Philip J. Williams, 'Dual Transition from Authoritarian Rule: Popular and Electoral Democracy in Nicaragua', *Comparative Politics* (January, 1994), pp. 169–85.

⁴ Terry Lynn Karl, 'Dilemmas of Democratization in Latin America', *Comparative Politics*, vol. 23, no. 1 (October 1990), pp. 1–21; Terry Lynn Karl and Philippe C. Schmitter, 'Modes of Transition in Latin America, Southern and Eastern Europe', *International Social Science Journal*, vol. 128, no. 2 (May 1991), pp. 269–284; Karen L. Remmer, "'New Wine in Old Bottlenecks?'" The Study of Latin American Democracy', *Comparative Politics*, vol. 23, no. 4 (July 1991), pp. 479–495.

⁵ Eric Nordlinger, 'Political Development, Time Sequences and Rates of Change', in Jason L. Finkle and Robert W. Gable, (eds.), *Political Development and Social Change*, 2nd ed. (New York: John Wiley, 1971); Leonard Binder, et al., (eds.), *Crises and Sequences in Political Development* (Princeton, 1971).

are taken and events occur can bear strongly on whether democratic institutions are consolidated. This notion of 'timing and sequence' appears important in analysing the political transitions in El Salvador and Nicaragua. One issue deserving close attention is linkage between the transition election and the disarmament/demobilisation of the armed opposition. The article argues that the particular sequence of events, together with the choices made by elites, favoured democratic transition in El Salvador more than in Nicaragua. It then turns attention to the substance and process of bargaining over two critical issues confronting the political leaders of these countries: demilitarisation of society and institutionalisation of the separation of powers and rule of law.

According to Karl and Schmitter,⁶ the underutilisation of power by participating elites is essential to the effectiveness of foundational pacts as instruments of democratisation. Such restraint is especially necessary among groups whose political enmity has extended to armed conflict, as in both Nicaragua and El Salvador. Indeed, each country had endured at least a decade of internal war when the bargaining discussed here was undertaken, and the passions and grievances associated with those wars ran deep. It was therefore, a delicate and difficult task, to establish a climate of trust in which all participants could accept that the rules of the game were fair and impartial. In El Salvador there have been important achievements in this regard, as well as some worrisome failures or shortcomings, which are examined below. Nicaragua has been less successful for two reasons. First, throughout the bargaining process important actors consistently declined to underutilise their power. Second, vital external actors did not consistently bring pressure to bear on behalf of that goal, as was done in El Salvador. Instead, at crucial moments the most important external actor, the United States, pursued the opposite policy. It should be borne in mind that the Nicaraguan transition is unique in one respect. The country's political transition was begun by a popular revolution, a revolution that redistributed power within society well before the 1990 elections were held. Since the election, an important factor in Nicaraguan politics has been the struggle of elites not only to recover their lost properties but to reassert their power *vis-à-vis* popular groups.

The transition in El Salvador

Demilitarisation

The Chapultepec Accords, which were signed on 16 January 1992, were the culmination of three years of negotiations between the government of El Salvador and the Farabundo Martí National Liberation Front (FMLN).

⁶ Karl and Schmitter, 'Modes of Transition', p. 281.

The Accords ended a long war and their overarching goal was to create structural and legal conditions for incorporating the FMLN and its supporters into the nation's political process.⁷ The signing did not come easily because profound mistrust and sharply divergent political interests and goals separated the two sides. The armed forces, and the security forces under their command, were especially hostile to negotiations. After all, a peace accord threatened the military's institutional status and privileged claim on public resources. However, the military's capacity to resist the peace process was weakened by two factors: the skilful and determined efforts of UN Secretary General Javier Pérez de Cuéllar to bring the two sides together, and the changing position of the United States in favour of a negotiated settlement.⁸ By early 1990, the US state Department was already pressuring the Salvadorean High Command to remove officers associated with human rights abuses and signalling a decline in military aid, which had reached extremely high levels during the 1980s.⁹ Following the electoral defeat of Nicaragua's Sandinista government in February 1990, the US openly embraced negotiations in El Salvador.

There is no space here to examine the many factors that brought the warring parties to the bargaining table. However, one factor needs to be highlighted due to its centrality to the entire peace process. The FMLN's military offensive on San Salvador in late 1989 demonstrated that the war was stalemated. Coupled with declining US enthusiasm for military aid, this fact gave considerable pause to the Cristiani government. At the same time, the army's notorious murder of six prominent Jesuits, and the government's own awkward attempts to prevent investigation of those murders, intensified calls for reform within and outside of El Salvador.¹⁰ In this changing climate of opinion the government and the FMLN began intensive negotiations, which led to the first in a series of agreements to transform Salvadorean politics. Signed on 27 April 1991, the San José Agreement set the peace process in motion, producing a cease-fire, the legalisation of the FMLN, and sweeping constitutional reforms.¹¹ Specifically, it proposed creating a national police force independent of

⁷ Christopher C. Coleman, *The Salvadorean Peace Process: A Preliminary Inquiry* (Oslo, Norway: Norwegian Institute of International Affairs, 1993), p. 17.

⁸ Jack Child, *The Central American Peace Process, 1983–1991: Sheathing Swords, Building Confidence* (Boulder, CO: 1992), pp. 134–5.

⁹ Joseph S. Tulchin, (ed.), *Is There a Transition to Democracy in El Salvador?* (Boulder, CO, 1992), p. 38.

¹⁰ John A. Booth and Thomas W. Walker, *Understanding Central America*, 2nd ed., (Boulder, CO, 1993), pp. 103–4.

¹¹ Celeste Mackenzie, 'El Salvador: Peace Talks Produce Reform Plan', *Mesoamerica*, vol. 10, no. 5 (May 1991), pp. 3–4.

the military, abolishing existing security forces, reforming the judicial system, creating a new electoral tribunal, and establishing a Truth Commission to investigate human rights violations committed during the war.¹² In New York the following September the two sides agreed to set up an Ad Hoc Commission to review the human rights records of all top military officers. With the signing of the New York accord, the FMLN relinquished its demand for far-reaching social reforms as a condition of peace and pledged the complete demobilisation of its army. Thus, by September 1991 the war was over and a potentially far-reaching structural transformation of El Salvador's political system was under way. Perhaps the single most important target of that transformation was the profound militarisation of Salvadorean politics.

From the standpoint of demilitarisation, two critical challenges had to be met. First, for a democratic transition to be meaningful, the military's traditional impunity had to end. No longer could the armed forces be seen as above the law, nor free to disregard human rights in the name of national security. Second, it was important to coordinate FMLN demobilisation with the government's disbanding of the security forces, reforming the judicial system, providing land to ex-combatants, and deploying the new National Civil Police (PNC).¹³ Despite the clear provisions of the Accords, the Cristiani government was slow to comply. In response, UN Secretary General Pérez de Cuéllar intervened vigorously, as did the Bush administration, which sent General Colin Powell to San Salvador to pressure the armed forces to accept the results of the Ad Hoc Commission's investigation.¹⁴ Despite the pressures, however, demilitarisation was a contentious and protracted process.

The Chapultepec Accords called for dissolution of the Rapid Deployment Infantry Brigades (BIRIs), which had been set up to fight the counterinsurgency war, the dismantling of the security forces (National Guard and Treasury Police), the disbanding of the civil defence units, which had long been used to promote military control over rural society, and the removal of police intelligence functions from the military command structure.¹⁵ As part of the overall reduction in military forces,

¹² Gerardo L. Munck, 'Beyond Electoralism in El Salvador: Conflict Resolution through Negotiated Compromise', *Third World Quarterly*, vol. 14, no. 1 (1992), p. 86; Coleman, 1993, p. 21.

¹³ George Vickers and Jack Spence, *End game: A Progress Report on Implementation of the Salvadorean Peace Accords* (Cambridge, Mass., 1992), pp. 3–4.

¹⁴ Munck, 1993, p. 86.

¹⁵ For an insightful account of how the Salvadorean armed forces established and maintained control over the rural population, see Knut Walter and Philip J. Williams, 'The Military and Democratisation in El Salvador', *Journal of Interamerican Studies and World Affairs*, vol. 35, no. 1 (1993), pp. 39–88.

the dissolution of the BIRIs was the goal most readily achieved. In the other areas, resistance, circumvention and delay afflicted the process. While the Legislative Assembly formally abolished the Security Forces in June 1992, an unspecified number from their ranks were simply incorporated into the army. Even more troubling, some personnel from these abolished forces were placed in the one remaining security force, the National Police (which was disbanded in late 1994), while others were admitted to the training academy for the PNC, including the command-level training programmes. These actions were in direct violation of the peace accords.¹⁶ The point of abolishing the security forces and establishing the PNC was to demilitarise and depoliticise the police function, thus establishing a climate of impartiality with respect to law enforcement and enabling the FMLN to lay down its arms and reconstitute itself as a political party. The fact that the National Police was not demobilised on schedule (i.e. *before* the March 1994 elections), raised further concerns about the government's commitment to the accords. Finally, the government and military did not cooperate fully in providing for the success of the PNC. The military held on to institutional resources it did not need and which could have facilitated police training. The government has consistently underfunded the PNC, despite its relative success as a law enforcement body (particularly in displaying respect for human rights) when compared to the old security forces. In short, in this important area the Salvadorean government did not match the restraint and compliance shown by the FMLN, which relinquished its arms (with some embarrassing lapses) and demobilised its forces, albeit behind schedule.

The purpose of the Ad Hoc Commission was to stimulate a purification of the armed forces. At stake was not only the safety of the FMLN but of the whole civil society. If social groups were to be free to represent the diverse interests of society, it was essential to demonstrate that no group or institution was above the law. The three-member commission had only three months to complete its work, a serious limitation. Thus, the commission limited its investigation to the top 230 officers, eventually recommending dismissal or transfer of about half that number, including the most senior officers. President Cristiani delayed compliance, especially where it involved removal of officers in the High Command. The peace accords had required that the Ad Hoc Commission's recommendations be carried out before the Truth Commission released its report in March 1993. When the Truth Commission report appeared the purging of the armed forces was far from complete. However, the appearance of many of

¹⁶ Vickers and Spence, 1992, pp. 12–15.

those officers' names in the Truth Commission report, including that of the Minister of Defence, gave added weight to the Ad Hoc Commission's recommendations and forced Cristiani's hand.¹⁷

The Truth Commission's mandate was broader than that of the Ad Hoc Commission. It was empowered to investigate actions of the FMLN and civilians, as well as persons in government or the military. President Cristiani urged that names not be made public, and at one point suggested that, if they were, the government could not guarantee the safety of witnesses who had testified before the Commission.¹⁸ However, the accords explicitly called for the Truth Commission report to be published and the members of the Commission decided to proceed with a public accounting based on two key considerations. In their view the extent of corruption and partisanship in the justice system prevented any sort of public accounting in the courts. Furthermore, '[n]ot to name names would be to reinforce the very impunity to which the Parties instructed the Commission to put an end'.¹⁹ The report, entitled *From Madness to Hope*, examined 34 cases of major human rights violations, which ranged from assassinations to massacres, holding the armed forces responsible for more than 90 per cent of the violations. It called for immediate removal of those implicated, together with a genuine assertion of civilian control over the military, including promotions and the military's budget. Inasmuch as it underscored the Ad Hoc Commission's report, the first recommendation was soon met; however, the other two were not. The Commission also pointed a stern finger at the FMLN and urged that individuals named in the report be banned from holding public office. Finally, the Commission recommended the immediate resignation of all members of the Supreme Court, arguing that the judiciary had facilitated impunity for the armed forces and had sheltered death squads by refusing to investigate violations of human rights.

The Truth Commission report provoked intense reactions in El Salvador. While the FMLN and other opposition political parties embraced the report, ARENA and the right wing parties criticised it

¹⁷ Thomas Buergenthal, 'The United Nations Truth Commission for El Salvador', in Neil J. Kritz, (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. I (Washington, DC, 1995), p. 304. Buergenthal contends that the Ad Hoc Commission report gave added weight to the report of the Truth commission, suggesting that in fact the two commissions, though quite different in composition, reinforced one another in practice. If so, this would be one of the more positive results of the peace accords. Buergenthal also makes a pointed critique of the Cristiani government, stating that 'the government and the military only agreed to the establishment of the Ad Hoc Commission because they were convinced that it would not dare to discharge its responsibilities honestly (p. 304)'. To the government's surprise, it dared to do just that. ¹⁸ *Ibid.*, p. 307. ¹⁹ *Ibid.*, p. 308.

bitterly. Arena was particularly stung by the findings against its founder, Roberto D'Aubisson. The right wing press said the report was illegal and characterised it as an attempt by foreigners to undermine Salvadorean sovereignty. President Cristiani came under intense pressure from the right wing of his own party and was openly criticised by members of the military High Command for having agreed to the Commission in the first place. Leading figures on the left and the right were willing to consider an amnesty for persons named, but the left insisted there be a consensus about the terms of such an amnesty. The Legislative Assembly took up the issue immediately. Less than a week after the report appeared, right wing parties in the Assembly, using majorities they had won in elections that preceded the peace, passed an amnesty law over the strenuous objections of the opposition.

Thomas Buerghenthal, the US member of the Truth Commission, has argued that the amnesty did not technically violate the Commission's recommendations because the Commission did not recommend trials for persons it named. However, the amnesty did violate the spirit of the Accords, and in that sense was at odds with the democratic transition at which the Accords aimed.²⁰ Partisans of the amnesty contended that it was a necessary step to promote reconciliation. However one viewed that contention, the fact remains that the ARENA government did not take responsibility for the Truth Commission's findings. ARENA's posture pointed to a paradox in the Salvadorean transition: although the government had formally agreed to implement the Truth Commission's recommendations, its domestic mandate was for continuity, with the least number of changes possible to end the war and disarm the FMLN. Some of those implicated by the Truth Commission, notably former Defence Minister Ponce, were considered crucial to ensuring the success of the peace process. Thus, implementing the Truth Commission's recommendations was not on the agenda.²¹

On balance it is fair to say that the Ad Hoc and Truth Commission reports did have the effect of breaching the traditional wall of impunity that had surrounded the armed forces, and facilitated the systematic abuse of human rights in El Salvador. One clear effect was to reduce the military's dominant position in political life. In the end, a purge of the military was carried out, the security forces were disbanded, and thus a major obstacle to democratic transition was reduced if not eliminated. By the end of August 1993 UN Secretary-General Boutros Boutros-Ghali

²⁰ *Ibid.*, p. 320.

²¹ Margaret Popkin and Naomi Roht-Arriaza, 'Truth as Justice: Investigatory commissions in Latin America', in Kritz, (ed.), 1995, pp. 277–8.

confirmed that the government had complied with the Ad Hoc Commission recommendations, and that the FMLN had destroyed all unreported arms and dismantled its military structures. The armed forces had yielded to civil authority on matters of vital importance, and the FMLN had demobilised its army in order to become a political party committed to participation in electoral politics. The dark spot on this horizon was the long term effects of the amnesty. In a sense the military had been brought to heel, but no one had paid for their crimes. What kind of precedent was set by precluding legal prosecution for all human rights violators? The issue of impunity continues to bedevil Salvadorean politics, despite serious efforts to achieve judicial reform.

Post-election reform: the judicial system

Prior to constitutional reforms that were adopted in late 1991, the Salvadorean judiciary was severely underfunded and structurally dependent on the other branches of government. Within the judicial system, power was concentrated in the Supreme Court, which was itself a tool of the executive. These features assured a highly partisan administration of justice and militated against the protection of human rights. Government officials and the rich enjoyed immunity from punishment for committing crimes or abusing power. The criminal justice system made a mockery of the presumption of innocence, and its weight fell almost exclusively on the poor. The Truth Commission report singled out the judicial system for particularly harsh criticism, describing it as a 'contributing factor to the tragedy that the country has suffered'.²² The report went on to assert that 'El Salvador has no system for the administration of justice which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably'.²³

Initial reforms, enacted in December 1991, aimed at restructuring the Supreme Court to diminish its centralised power and partisan character. These reforms gave a greater role to the National Council of the Judiciary (CNJ), a body that was to be independent of the Court, in selecting, evaluating and training justices. The new law provided for election of Supreme Court justices to nine year terms by a two-thirds majority of the Legislative Assembly. It also diminished that Court's financial dependence by guaranteeing the judiciary six per cent of the national budget. These significant legal reforms had little practical effect on the justice system during the first two and one half years of implementation of the Peace Accords, primarily because the sitting Supreme Court refused its

²² Quoted in Buergenthal, 1995, pp. 317–18.

²³ *Ibid.*

cooperation. For example, the then-Chief Justice, Mauricio Gutiérrez Castro, ordered 'his' judges not to cooperate with the CNJ. The selection of a new Supreme Court, which was scheduled to follow the March 1994 election of a new Assembly, put reform to the test. In the event, election of the new Court provoked a brief crisis, demonstrating that achieving political consensus remained extremely difficult in post-war El Salvador. The country was without a Supreme Court for more than a month as the Legislature struggled to resolve partisan differences. Resolve them it did, however, and the new Court is widely regarded as nonpartisan in the sense that it is not beholden to the majority party, nor is it vulnerable to political manipulation by the executive. As the current Vice President of the Supreme Court put it, 'the process of selecting judges has now been invested with democratic guarantees'.²⁴ Members of the current Court and CNJ agree that relations between the two bodies are now harmonious and their functions complementary.²⁵

In this period of transition and consolidation the CNJ played an important role in judicial training and in the evaluation of judges. A major goal of evaluation is the purging of corrupt and incompetent judges. The 1991 reform put the Judicial Training School (ECJ) under the authority of the CNJ, rather than the Supreme Court, and authorised the ECJ to train prosecutors, public defenders and other justice system personnel. To date the ECJ has worked hard to raise the level of technical competence within the judiciary.²⁶ With regard to the politically more sensitive issue of purging judges, the CNJ has proceeded with extreme deliberation. In late 1994 ONUSAL had quietly presented the CNJ with a lengthy list of judges whose records might warrant disciplinary action. ONUSAL's report was consistent with the findings of the Truth Commission, which had asserted that a significant proportion of the judiciary was involved in obstructing justice and fostering impunity.²⁷ However, as of March 1995 the Supreme Court, on the advice of the CNJ, had removed or suspended only 11 of the country's 600 judges.²⁸ The justices themselves defended the slow pace of 'depuración' on the grounds that in a democracy it is necessary to proceed with due process. They also contend that the very process of evaluation has led most judges to improve their performance where necessary out of professional pride.²⁹ Because the process of

²⁴ Interview with Dr Rene Hernandez Valiente, San Salvador, 6 June 1995.

²⁵ Interview with Dr Enrique Argumedo, San Salvador, 9 June 1995.

²⁶ Interview with Dr José Albino Tinetti, San Salvador, 6 June 1995.

²⁷ Interview with Marta Valladares, President, Commission of Justice and Human Rights, Legislative Assembly, San Salvador, 12 June 1995.

²⁸ Reed Brody, 'The United Nations and Human Rights in El Salvador's "Negotiated Resolution"', 1995 (mimeo), p. 14.

²⁹ Interview with Dr Enrique Argumedo, San Salvador, 9 June 1995.

training and disciplining is in its early stages, it may be too soon to judge its success. A key point to watch for is how attentive judges are to human rights. Will they continue in the positivistic tradition of the past and simply apply the letter of the law, or will international norms of human rights and due process be incorporated into judicial decision-making?

Constitutional reform introduced one especially impressive new feature into the justice system, the Procurator for the Defence of Human Rights (PDDH), or Ombudsman, which is an independent office within the Public Ministry. Again, in the early stages the government did not offer strong support to the PDDH, but its legal mandate is broad: to investigate complaints of human rights violations, to provide assistance to victims, monitor prisoners, oversee judicial compliance with due process, and to educate the public concerning human rights.³⁰ However, the Ombudsman only has legal authority to make recommendations; the office lacks enforcement authority. For this reason, its effectiveness will depend on the moral authority it is able to generate among political actors and with the public at large. In that regard, a recent study has shown that 67 per cent of Salvadoreans viewed the work of the PDDH favourably, while only 9 per cent viewed it unfavourably. (By contrast, in the same survey 60 per cent of Salvadoreans said that judges are subject to political control and only 34.7 per cent said decisions of the Supreme Court are fair.)³¹

During the early implementation phase of the Peace Accords, the first Ombudsman, Carlos Molina Fonseca, did not move aggressively to establish the credibility and visibility of the office. Instead, ONUSAL carried out the task of monitoring human rights and pressuring the government during that period, up to late 1994. In March 1995 the Assembly elected Dr. Victoria Velásquez Marina de Avilés as the new Ombudsman. She sees the PDDH as one of the necessary instruments to build democratic institutions and norms in El Salvador. To that end, she has expressed determination to keep the Ombudsman autonomous from other state institutions.³² However, that goal is potentially undermined by the fact that the PDDH does not control its own budget and receives scant resources from the government. At present it is heavily dependent on the support of the United Nations Development Programme. In fact, the 1997 budget for the PDDH was reduced by ten per cent over the preceding

³⁰ Interview with Francisco Díaz Rodríguez, Center for the Study of Applied Law (CESPAD), San Salvador, 12 June 1995.

³¹ 'Los salvadoreños opinan sobre el sistema de justicia y los derechos humanos', Instituto Universitario de Opinión Pública, Boletín de Prensa. XI, 5 (21 de agosto de 1996), pp. 1–5.

³² Interview with Dr. Marina de Avilés, Procurator for the Defence of Human Rights, San Salvador, 14 June 1995.

year. For the immediate future, the impact of the PDDH will depend heavily on the political skill of the Ombudsman in winning the confidence of the public and the respect of public officials who 'still feel free to ignore the Ombudsman's non-binding recommendations'.³³

Let us conclude with a brief review of the criminal justice system, an area in which significant constitutional reforms were still pending in 1997. Reform was impossible under the old Supreme Court but the present Court has taken significant steps to chart a new course. In November 1994 the Court ruled that human rights treaties incorporated into the Salvadorean Constitution supersede national laws and used that ruling to restrict the practice of preventive detention, a staple of the Salvadorean justice system that had long been abused by police and courts.³⁴ The issue here, due process, was first addressed in the San José Agreement of April 1991. Specific practices needing reform included the use of extrajudicial confessions, administrative detention, and the right to legal counsel. The Truth Commission, for example, called for 'the total suppression of extrajudicial confessions as evidence', 'strict compliance with the maximum periods of police and judicial detention', and 'strengthening the exercise of the right of defence from the beginning of proceedings'.³⁵ Achieving legislative approval of these reforms proved exceedingly difficult. The Assembly did not ratify the reforms of Article 12 of the constitution (guaranteeing the right to defence counsel and prohibiting extrajudicial confessions) until mid-1996 and, as of the end of 1997, reforms of the Criminal Code, the Criminal Procedure Code, and the Penitentiary Law still had not received legislative approval.³⁶

Finally, there is the issue of criminal investigation, which is one of the weakest links in the Salvadorean justice system. In its final report ONUSAL noted that few reported crimes are actually investigated by the police and courts. When investigations occur, they usually rely on the testimony of witnesses or complainants. Little concrete evidence, of a forensic nature for example, is ever presented. If serious police investigation is infrequent, then who goes to jail? According to the president of the Assembly's Commission on Justice and Human Rights, 60–65 per cent of those in jail or prison were arrested for involvement in domestic conflict or violence. Of those arrested for theft, the majority involve sums of money less than 20 colones. At the same time, white collar

³³ Brody, 1995, p. 16.

³⁴ *Ibid.*, p. 14.

³⁵ Quoted in Margaret Popkin, George Vickers and Jack Spence, *Justice Impugned: The Salvadorean Peace Accords and the Problem of Impunity* (Cambridge, Mass., 1993), p. 11.

³⁶ 'The Situation in Central America: Procedures For the Establishment of a Firm and Lasting Peace and Progress in Fashioning a Region of Peace, Freedom, Democracy and Development', Report of the Secretary-General of the United Nations, A/51/693 (25 November 1996), p. 4.

crime and politically motivated crimes go unpunished. She and other critics lay blame on the failure of the Truth Commission to ‘name names’, and on the hasty amnesty which allowed so many rights violators to remain not only unpunished but anonymous.³⁷ According to this view, the tradition of impunity for middle and upper class persons was simply perpetuated. The criminal justice system, then, is for the poor, and the poor are handicapped in dealing with that system. Legal reform is needed, but a much greater commitment of resources to the Office of the Public Defender and to the PDDH would signal the government’s seriousness about reform in this area.

The Nicaraguan transition

Two conditions that are crucial to successful pact-making did not prevail in Nicaragua. First, the bargaining about bargaining stage did not develop according to a domestic political logic. Second, key participants in the bargaining process did not practice restraint. To make matters worse, there was discontinuity of negotiators during crucial stages of the bargaining process. Finally, when the bargaining faltered, no external actor played the role that ONUSAL played successfully in El Salvador. As a result, Nicaragua’s pacts were less definitive and key issues were not addressed adequately. The weak legitimacy of the resulting agreements has hampered Nicaragua’s transition. For example, in Nicaragua no discrete set of documents dealt specifically with human rights and reform of the police forces, establishing clear guidelines for compliance. Second, the long span of the negotiations (1988–1994) allowed Nicaragua’s opposition elites, as well as the United States, to group and regroup within the negotiating process. As a result, key negotiations that took place within the ‘National Dialogue’ (to establish the ground rules for participation in the 1990 elections), and at Sapoá (the initial attempt to set up the framework for *contra* demobilisation), were conducted in an atmosphere of potential delegitimation of the entire process. These characteristics of the Nicaraguan transition contrast notably with the situation in El Salvador, where the (1989) FMLN offensive and Jesuit murders marked a clear and decisive turning point in favour of negotiations.

During a crucial period of pact-making in Nicaragua (1988–1990), negotiations were not seen as the only viable solution by all key actors.

³⁷ Interview with Marta Valladares, San Salvador, 12 June 1995. Note, however, that Buergenthal stresses the importance of having identified publicly many of the worst human rights offenders, citing it as one of the main achievements of the Truth commission and thus of the peace process. See Buergenthal, 1995, cited above.

The United Nicaraguan Opposition (UNO), which became the major opposition coalition to the FSLN in the 1990 elections, walked away from the negotiating table on several occasions and threatened not to participate in the 1990 elections. The US position of keeping the *contras* as a viable alternative to negotiations strengthened UNO's resolve at those moments. Yet at the same time, neither the US nor the UNO coalition allowed the *contra* leaders an independent voice in the determination of their own future. As a result, demobilisation of the *contra* forces did not begin until **after** the February 1990 elections, and was not successfully concluded until the spring of 1996 with the death of two top leaders of the Northern Front 3-80.³⁸ In sum, although demobilisation of the rebel army was on the negotiating table for eight years, the threat of renewed fighting remained constant. In fact, violent conflict broke out repeatedly in rural areas.

Following the provisions of the Central American Peace Accords of August 1987, the FSLN opened talks with the *contras* in March 1988 at the village of Sapoá. These talks led to the signing of the Sapoá accord, which entailed: a 60 day cease-fire, the relocation of *contra* forces into mutually agreed zones, a general amnesty for political prisoners, and the right to participate in all future elections. Compliance with the agreement was to be monitored by a Verification Commission headed by Cardinal Obando y Bravo and Secretary General of the OAS, João Baena Soares, both of whom witnessed its signing.³⁹ While the Sapoá accord appeared to address important issues, it did not yield effective results.

The essential reason is that the *contras* were politically divided between their military and civilian leaders. From the moment of its initial organisation in late 1981, the *contra* leadership was dominated by former Somoza National Guardsmen. In 1982 the CIA organised a civilian directorate to lend an air of respectability to the *contra* operation, which was bitterly resented by the military commanders.⁴⁰ These divisions were still present, and just beneath the surface, at Sapoá. Even though the Sapoá accord was signed by civilian and military leaders of the National Resistance, the accords never had the support of the military leaders who were most influential. Senior officials in the Reagan administration were 'shocked by the accord', saying that 'if it had been left up to the Administration the *contras* would never have signed it'.⁴¹ Being opposed,

³⁸ *Envío*, vol. 15, no. 180 (July, 1996), p. 21.

³⁹ *Agreement between the Constitutional Government of Nicaragua and the Nicaraguan Resistance*, unofficial translation, Managua, 1988, Points 6–9, no publisher or page numbers.

⁴⁰ For a full discussion of the development of the National Resistance, see Peter Kornbluth, 'The Covert War', in Thomas W. Walker, (ed.), *Reagan Versus the Sandinistas, the Undeclared War on Nicaragua* (Boulder, CO, 1987), p. 26.

⁴¹ *New York Times* as quoted in *Central America Update*, vol. 7, no. 12 (29 April 1988), p. 3.

these officials set about to undermine the longer term provisions of the accord by exploiting the division between civilian and military leaders. When, with US help, the most intransigent faction led by Enrique Bermúdez won the internal power struggle, the negotiations called for in the Sapoá agreement stalled. New *contra* proposals were now offered that contradicted provisions of the accord that had already been accepted. Although some members of both delegations worked hard to reach agreements, and did in fact agree on many points, in the end the newly constituted *contra* leadership refused to sign any parts of the agreement. In early June 1988 the *contras* broke off negotiations with the Nicaraguan government. Meanwhile, in April Congress had voted to send an additional six months of non-lethal aid to the *contras*, thus effectively keeping them alive as a military force.⁴²

The breakdown of negotiations between the Nicaraguan government and the armed resistance had sharp repercussions within Nicaragua. The National Dialogue was thrown into disarray. Some of the 'loyal' opposition parties had splintered badly, largely over the issue of whether to participate in the process of political institutionalisation under government aegis. At the same time, the UNO coalition, benefitting from the political opening afforded by the Central American Peace Accords, initiated a sustained anti-government campaign using the media, most noticeably *La Prensa*. The dilemma for the opposition parties (leaving personal political ambitions aside) was whether to participate in the electoral process, and thereby legitimate the FSLN and the existing constitutional system (as the FMLN would later do in El Salvador), or to refrain from doing so as long as the *contras* remained a viable non-electoral alternative to the FSLN.

While grappling with this dilemma, opposition groups continued their efforts at domestic pact-making within the National Dialogue. In October 1988 the Assembly, controlled by a Sandinista majority, passed new laws governing the creation of political parties and the organisation of elections. Those laws accepted provisions put forth by the opposition to make it easier to register a political party. In February 1989 President Ortega agreed to move the 1990 elections ahead by nearly ten months, to February 1990, and to enter into dialogue with the opposition on reforms of the 1988 electoral law. By this time, observer teams from the OAS and UN, and from Venezuela and Costa Rica had arrived to observe the electoral process. The UN issued a favourable report on the juridical framework established for the elections. Bargaining continued throughout the spring and summer, with the Sandinistas making further concessions

⁴² Dennis Gilbert, *Sandinistas: The FSLN and the Party* (New York, 1988), p. 195.

to the opposition. In August all parties agreed to participate in the elections, signing an accord that called for the *contras* to be demobilised by 5 December 1989, the first day of the electoral campaign.⁴³

However these initial attempts to achieve peace through political bargaining and electoral pact-making were severely weakened because key elites refused to 'underutilise' their power. Under Bermúdez' leadership, the *contras* did not accord the bargaining process the legitimacy it needed. From their perspective, they had not been party to the August Accord which called for their own demobilisation by December of 1989. The result was a fragmented and unstable process that was consistently undermined by pressures from without and by conflicting ambitions from within. As a result, Nicaragua went into its 'elections of the century' with its armed resistance still mobilised as the August agreement was ignored by the *contras*. Moreover, despite its public statements, the United States clearly was not yet committed to an electoral solution to Nicaragua's civil war. And finally, no countervailing neutral power with broad legitimacy in all sectors had stepped forward to broker the peace process.

The Toncontín Accord and the Transition Protocol

The 25 February 1990 Nicaraguan elections resulted in a stunning upset victory by the UNO coalition, which garnered the presidency with 57 per cent of the vote. The Sandinistas pooled 41 per cent of the vote, and held the largest block of opposition seats in the National Assembly, as the FMLN would do, albeit by smaller margins, four years later in El Salvador. Because the UNO coalition was united principally by a desire to defeat the FSLN rather than by shared political principles, the coalition soon began to splinter. Post-election Nicaragua immediately faced the need for fresh pact-making to achieve elite consensus on the rules of the game. This time, under the Bush administration, the United States was not an 'absent partner' at the negotiating table, as it had been at Sapoá. International actors, such as the UN and the OAS, played more decisive roles in the negotiations than they had done when the Sandinistas were in power. These factors aided a peaceful transition of power. However, the primary focus of this initial set of negotiations was on maintaining peace in the wake of an unexpected UNO victory. Boding ill for the longer term future, key provisions of the Transition Protocol were ambiguous and even contradictory.

Two of the major issues addressed in the text of the Transition protocol were: (1) demobilisation of the *contra* forces, and (2) preservation of

⁴³ 'Electoral Democracy Under International Pressure', Report of the Latin American Studies Commission to Observe the 1990 Nicaraguan Elections (Pittsburgh: Latin American Studies Association), pp. 21–2.

the integrity of the armed forces.⁴⁴ In comparison with El Salvador's Chapultepec Accords, the Transition Protocol had to be worked out with extreme haste if its provisions were to be in place before Chamorro assumed office. The Protocol failed to resolve either of these issues. Indeed, they remained problematic throughout the ensuing presidency, thereby contributing to the legitimacy crisis that plagued the Chamorro government which impeded Nicaragua's consolidation of democracy. A unique feature of the Nicaraguan case is that parallel to the Transition Protocol another set of agreements was under negotiation between UNO and Resistance leaders, who were excluded from the Transition Protocol negotiations. These latter negotiations produced the Toncontín Accords. Let us now examine how these two sets of agreements relate to one another, highlighting the expected benefits to the various parties.

The two key agreements were formalized within days of each other: 'The Toncontín Accord for the Disarmament and Demobilisation of the Nicaraguan Resistance' was signed on 23 March 1990 and the 'Procedural Protocol for the Transfer of the Executive Power of the Republic of Nicaragua' or Transition Protocol, was signed on 27 March.

The Toncontín Accord recognised the Chamorro victory as an unprecedented event, which opened the possibility of a generalised demobilisation and bilateral cease-fire. The National Resistance requested the cooperation and support of three parties: the United Nations Observer Group in Central America (ONUCA), the International Commission of Support and Verification of the OAS (CIAV), and Nicaragua's Primate, Cardinal Miguel Obando y Bravo. The Chamorro government agreed to provide medical and rehabilitation programs for the former *contra* fighters and their families and agreed to create a government-*contra* Transition Commission to provide the Resistance with a voice in the transition process.⁴⁵ Two further meetings were held in April and May (again excluding the FSLN) in which the government authorised the *contras* to establish their own police forces within the relocation zones, and further agreed to seek technical assistance for police training from the United Nations. However, for several reasons, the Chamorro government lacked the political authority to carry out these promises. First, the Sandinista army, which was not party to the agreement, was deeply opposed, and was 'too powerful to allow it'.

⁴⁴ 'Observing Nicaragua's Elections, 1989–1990, The Carter Center, Special Report No. 1' (Atlanta, Georgia: the Carter Center of Emory University, 1990), pp. 31–5.

⁴⁵ The provisions mentioned in the text can be found in Emilio A. Montalvan, 'The Toncontín Accord for the Disarmament and Demobilization of the Nicaraguan Resistance', in Emilio A. Montalvan, *Las Fuerzas Armadas in Nicaragua, Sinopsis Histórica 1821–1994* (Managua, 1994), p. 124.

Secondly, political divisions within the *contra* leadership worked against resettlement of the rank and file. Moreover, these divisions were exacerbated by the policy of co-optation practised by the Chamorro government.⁴⁶ Thirdly, once having committed itself to neo-liberal economic policies, the Chamorro government did not have the resources to devote to what became a much larger project of relocation than was originally anticipated.⁴⁷

The first priority of the Transition Protocol was demobilisation of the *contra* forces and implementation of the Toncontín Accord. To facilitate this goal, the Sandinistas agreed that army and police forces would be reduced in size and subordinated to civil authority. General Humberto Ortega would remain as head of the armed forces, but would give up his position as Defence Minister to a civilian. The Protocol contained two other major provisions concerning property rights and state sector employment. First, it guaranteed 'peace of mind and legal security to those Nicaraguan families who have received the benefit of urban or rural property through State assignment before 25 February 1990'. These rights were to be reconciled with the 'legitimate legal property rights of other Nicaraguans... within the framework of the law' and adequate compensation was to be established.⁴⁸ How this reconciliation was to be implemented was not specified, and no timetable was agreed upon. Second, the Protocol guaranteed Sandinista mass organisations and labour unions constitutional protection and extended a guarantee of job stability to government office holders based on 'efficiency, administrative honesty and years of service'.⁴⁹ Again, this agreement set goals, but did not specify the means to achieve them. The subsequent failure of the Chamorro government to fulfil these goals was a source of great conflict between the administration and the FSLN. In concert with USAID, President Chamorro devised an Occupational Conversion Plan designed to reduce the state sector, but with severance pay and retraining provided to cashiered workers.⁵⁰ In practice the reductions were achieved, but the corresponding worker benefits were never provided at the promised levels.

⁴⁶ 'The Toncontín Accord for the Disarmament and Demobilization of the Nicaraguan Resistance', in Emilio A. Montalvan, *Las Fuerzas Armadas in Nicaragua, Sinopsis Histórica 1821-1994* (Managua, 1994), p. 116. The direct quote is from Dr Montalvan who also pointed out in an interview (11 January 1996) that the Transition Commission was unsuccessful due to a scarcity of funds, and political infighting among *contra* leaders.

⁴⁷ Ariel Armony, 'The Former Contras', in Thomas W. Walker (ed.), *Nicaragua without Illusions. Regime Transformation and Structural Adjustment in the 1990s* (Wilmington, DE, 1997), p. 207.

⁴⁸ 'El Protocolo de Transición', in Montalvan, 1994, pp. 117-19. ⁴⁹ *Ibid.*

⁵⁰ Interview with Dr Janet Ballentyne, USAID Project Director, Managua, 20 July 1991.

In the eyes of the Sandinistas, the Transition Protocol preserved essential elements of their socio-economic programme, especially involving property distribution. Retaining General Ortega as head of the armed forces was a buttress against the fact that *contra* demobilisation was proving to be such a protracted process. Perhaps most importantly, the armed forces had achieved a policy of reconciliation that included them, from the beginning of the Chamorro administration, as participants in decision-making. Within the UNO leadership, President-elect Chamorro and her chief adviser, Antonio Lacayo, saw the Transition Protocol as assuring that they could assume power, make the key appointments necessary, and undertake a modest restructuring of the central government, without fear of violence or instability on the part of the Sandinistas.

Did these original negotiations strengthen liberal democratic rules of the game, as the Chapultepec Accords did in El Salvador? From the perspective of pact-making, significant intra-elite consensus was achieved when incoming and outgoing administrations agreed to a policy of reconciliation. In a country such as Nicaragua, with virtually no tradition of coalition politics and parliamentary understanding of a 'loyal opposition', this agreement should not be minimised. The key participants underutilised their power to the degree that an immediate, peaceful transition of power was achieved. Arguably, a peaceful transition was to be expected in Nicaragua because of the democratic foundations that were established prior to 1990, including a functioning parliamentary system, clean elections in 1984, the establishment of a highly respected Supreme Electoral Council, and the adoption of a new constitution in 1987 with extensive popular consultation.⁵¹ In contrast to El Salvador in the 1980s, the elements of both popular and liberal democracy functioned in Nicaragua during the Sandinista years. Thus, what must be explained is why a post-1990 consolidation of liberal democratic institutions was so difficult to achieve in Nicaragua.

In part, the lack of democratic consolidation is explained by the relationship between the Toncontín Accord and the Transition Protocol, and by relations between those who negotiated these agreements. *Contra* leadership was present at Toncontín, but not at the Transition meetings. The Resistance did not agree to the retention of Humberto Ortega as armed forces chief; in fact, the larger issue of the reorganisation of the armed forces was not even on the bargaining table at Toncontín. Were the *contras* bound to uphold the Transition Protocol when they were excluded from the negotiations that produced it? Given the divisions within the

⁵¹ *Electoral Democracy* (March, 1990).

UNO coalition, was the UNO legislative bench bound to uphold the transition agreements when they, and even UNO Vice President-elect, Virgilio Godoy, were not party to the agreements? Unlike El Salvador, Nicaragua's key accords were not made by a constant set of negotiators who were empowered to bargain and compromise. In El Salvador the provisions of the accords were clear; what became contentious was keeping to the schedule set for compliance. In Nicaragua the problem of compliance was compounded because the 'foundational pacts' were little more than a series of informal political agreements that were not perceived as legitimate by key actors either at the mass or elite level.

El Salvador and Nicaragua can be compared on three other important points. First, El Salvador's foundational elections returned the ARENA party to power with majority control of the government, which facilitated passage of the constitutional reforms mandated by the Chapultepec Accords. No Truth Commission was established in Nicaragua, nor were major institutional and constitutional reforms (e.g. judicial reform, National Civilian Police) issues in the 1990 elections. Consequently, such matters were not addressed in the transition accords. During the two months before power was transferred, the primary goal of the Sandinista party was to preserve gains of the revolution as best they could. The most vivid example, laws 85–86, or '*la piñata*', allocated a large number of properties to FSLN leaders and rank and file supporters. With respect to the judiciary, the Sandinistas hastily passed a Law on Court Organisation, which was essentially a political move to prevent the Chamorro government from replacing the Sandinista members of the Supreme Court.⁵²

The second key difference was the intrusive role of the United States in Nicaragua, and the more limited role of such multi-national actors as the CIAV-OAS and ONUCA. We have already noted that the UNO coalition began to splinter soon after its sweeping electoral victory. As the divisions within the coalition became increasingly irreconcilable, the right wing elements joined influential conservatives in the US Congress who claimed that President Chamorro's tactic of 'co-governing' with the FSLN was the source of Nicaragua's social and economic problems. Writing in *The Washington Post*, for example, former UN ambassador, Jeanne Kirkpatrick, charged that the Sandinistas effectively still held power in Nicaragua and were misusing US aid.⁵³ Eventually, Senator Jesse Helms succeeded in stopping the flow of \$100 million in aid to the Chamorro government. After George Bush's defeat in the 1992 presidential election, half of the

⁵² Luis G. Solís and Richard J. Wilson, *Political Transition and the Administration of Justice in Nicaragua* (Miami, 1991), p. 13.

⁵³ 'Sandinista Power Plays', *The Washington Post*, 12 May 1992.

US aid was released; the remaining \$50 million was released at the beginning of the Clinton administration. During 1993–1994 US aid to Nicaragua was again threatened, this time by a movement in the Senate to make additional aid contingent on the resolution of property claims filed by US citizens of Nicaraguan origins.⁵⁴

The third important point was the difference between the *contra* role in the Nicaraguan democratic transition and that of the FMLN in El Salvador. In the latter case, the FMLN acted as a unified, legitimate political/military entity which always included in the negotiations its own political and security demands. In contrast, the *contra* forces were themselves divided internally and were denied their own autonomy and legitimacy by Nicaragua's pact-making elites. The *contras* were not an integral part of the UNO coalition. Despite their overwhelming electoral support for the UNO, they were not part of internal party debates and they never enjoyed the mantle of 'loyal opposition' respectability as did the UNO. The *contras* were used as a bargaining chip, by both the USA and the UNO, to maintain pressure upon the FSLN.⁵⁵ At the same time, they were an explosive problem to the incoming Chamorro administration and the enemy incarnate to the FSLN. Thus, the groups that consistently defended the interests of the *contra* forces were external actors, the CIAV-OAS and the UN, to which we now turn.

Demobilisation and the CIAV-OAS role

The CIAV-OAS and ONUCA were entrusted with the difficult task of demobilising and repatriating the soldiers of the Nicaraguan Resistance. The CIAV was established in August 1989 by the Secretaries-General of the OAS and the UN as part of the Central American Peace Plan. Its mission was to 'assist in the voluntary demobilisation, repatriation or resettlement in Nicaragua and third countries of the Nicaraguan Resistance (the *contras*) as well as to assist in the voluntary demobilisation of all persons involved in armed actions in all countries of the region'.⁵⁶ Due to a geographic division of labour, the UN was responsible for Honduras, and was to supply the actual peacekeepers to whom the *contras* would turn in their weapons. The CIAV-OAS assumed responsibility for *contra* fighters and family members when they re-crossed the border into Nicaragua.

In 1989 it was assumed by the Central American presidents that *contra* demobilisation would take place in Honduras, that the FSLN would win

⁵⁴ K. Storrs, Larry Sullivan and Maureen Taft-Morales, 'Nicaragua: Background and U.S. Policy Concerns', *CRS Report for Congress*, 23 May 1994, p. 5.

⁵⁵ Abelardo Morales, *Oficios de Paz y Posguerra en Centroamérica* (San Jose, Costa Rica, 1995), pp. 49–52.

⁵⁶ Child, 1992, p. 85.

the 1990 elections and that 10,000–12,000 *contra* forces would need repatriation aid in Nicaragua.⁵⁷ All of these assumptions turned out to be wrong and caused numerous problems and delays.

The initial repatriations began in January 1990, before the CIAV was fully organised to handle such a major responsibility: the demobilisation zones had not been established and the peacekeepers had not yet arrived. Also, as previously discussed, the repatriation effort caused internal conflict within the *contra* leadership itself as to whether these overtures should be accepted. By 25 April 1990, the day of Violeta Chamorro's inauguration, the Resistance had not disbanded and on 19 April another agreement was reached, to complete the demobilisation by 10 June. There were to be five demilitarisation zones inside Nicaragua, and the Sandinista army was to withdraw from these zones; ONUCA forces would monitor them, while the CIAV would be responsible for the distribution of humanitarian aid.⁵⁸ Demobilisation was impeded by delays in the delivery of AID funds, which were financing the repatriation, and by the inability of the *contra* leaders to disarm their troops.

To complicate matters even more, the CIAV-OAS had never undertaken a mission of this magnitude, and was understaffed as well as underfunded. They were totally unprepared to process 120,000 people.⁵⁹ Many of the repatriated were soon complaining that neither the CIAV-OAS nor the government was providing the aid they expected. The government claimed it lacked resources of its own to supplement the external funding. Even though demobilisation formally ended on 5 July 1990 (its major achievements being the surrender of an estimated 17,000 weapons, the demobilisation of 5000 soldiers, and the closing of the security zones),⁶⁰ the problems continued as the Resistance still needed start up funds, housing and potable water on the land they had received. Many did not remain in their assigned zones, but instead drifted to their home departments. Some took to demonstrating at government offices, while others took up the arms they had not surrendered. The army responded to this unlawful activity with force, but the government was unable to arrest the instability caused by these attacks.

This descent into violence was not just a legacy of the *contra* war, but was a reflection of the unwillingness and inability of the Chamorro government to provide services promised to its uprooted population of *contra* or Sandinista combatants. Their disillusion degenerated into the

⁵⁷ Cesar Sereseres, 'The Regional Peace Keeping Role of the Organization of American States, Nicaragua, 1990–1993', in Chester A. Crocker, Fen Osler Hampson and Pamela Aall, (eds.), *Managing Global Chaos: Sources of and Responses to International Conflict* (Washington, DC, 1997), pp. 551–562.

⁵⁸ Interview with Santiago Murray, CIAV Director, Managua, 23 July 1991.

⁵⁹ Caesar Sereseres, pp. 551–5.

⁶⁰ Child, pp. 103–6.

formation of armed bands, called *recontras*, or *recompas*, respectively, who organised to pressure the government to respond to their unmet demands. Eventually, the government negotiated new agreements or new weapons purchase programmes which further encouraged violence by others as a way to redress grievances.⁶¹ By 1992 there were over 20,000 rearmed combatants; in 1994 it was estimated that only 30 per cent of the members of Nicaragua's rural bands had been former combatants.⁶² This situation was exacerbated by a contracting economy, diminishing employment opportunities, and the limitations of the CIAV-OAS mandate itself.

In sharp contrast to El Salvador, demobilisation in Nicaragua was voluntary. No agency was empowered to compel *contra* demobilisation and the lack of steady funding made the work of the CIAV even more difficult. More importantly, the CIAV mandate to work only with the *contras* fatally weakened its reputation as an impartial actor. To the extent that the CIAV defended the rights of the *contras* to receive land and publicised the abuses of the *contras* at the hands of the army or the police, the perception grew within Nicaragua that the CIAV-OAS was not an objective international force. The CIAV mandate was not authoritative. For example, it could not determine who received land, because those decisions lay with the Nicaraguan government's Repatriation Institute. The CIAV role was facilitative. It was caught in the tensions of Nicaraguan domestic politics: when it succeeded in helping former *contras* to receive land, it appeared biased against former Sandinista fighters. When it could not deliver promised aid fast enough, it suffered the frustration of former *contras* (or *recontras*) who took matters into their own hands and engaged in land seizures, cattle rustling and mass protests. Moreover, if it did a poor job of repatriation it would suffer criticism from AID as well as from the OAS, which was ultimately responsible for the project.

As was suggested above, the CIAV's neutrality was compromised by its mandate to investigate human rights abuses against the former *contra* forces. When violations against the *contras* were reported to the Chamorro government, the government itself, the judiciary (which had been staffed by the Sandinistas) and the security forces were all implicated and angered by the CIAV allegations. Again, Nicaragua stands in contrast to El Salvador where the human rights division of ONUSAL was charged with monitoring the activities of all parties, including both the armed forces and civilians. It was not until July 1993, three years after Nicaragua's pivotal elections, that the CIAV mandate was extended to give them jurisdiction over all human rights abuses. By then its impartiality was

⁶¹ Morales, Abelardo, pp. 55–66.

⁶² Ariel Armony, p. 208.

suspect enough to discredit its findings. During this period, (1990–1993) two other longstanding human rights groups functioned in Nicaragua, the Nicaraguan Centre for Human Rights (CENIDH) and the Permanent Commission for Human Rights (CDPH), each of which represented a different constituency. The former was associated with the FSLN, while the latter had been highly critical first of the Somoza regime and then of the Sandinistas. While it was undeniable that Nicaragua's human rights record during the FSLN years was better than that of El Salvador during the same period, in a post-war setting the need for a truly independent and credible organisation to deal with human rights was widely recognised.⁶³ In the difficult task of reconciliation, perception was as important as reality.

By October 1992 Nicaragua's civil strife had become so acute that President Chamorro responded to legislative pressure and established a Tripartite Commission to investigate human rights abuses. The Commission was charged with investigating '...homicides of both former *contras* and other Nicaraguans involved in collective conflicts, as well as killings in which former Resistancia members were suspected as perpetrators'.⁶⁴ The Commission was made up of members of the Ministries of Government and Foreign Affairs, representatives from the CIAV, and from the Comisión de Verificación headed by Cardinal Obando y Bravo. The Commission has issued four reports, which reveal a 'detailed, troubling and complex' picture of the security concerns of both the former *contras* and of Sandinista supporters in the countryside.⁶⁵

From 1993 to 1995 the Tripartite commission selected 255 of the most controversial cases and investigated 125 of those deemed to be most lacking in justice. With the conclusion of the Fourth Report the commission had presented the Chamorro government with a total of 90 recommendations. In turn, a commission was established within the Interior Ministry whose charge was to implement these recommendations, the majority of which were aimed at the police or military.⁶⁶ Dr Winston Betanco, Cardinal Obando's representative, maintained that many of the recommendations were enacted, but that the police and the army resisted the exercise of civilian authority. In an attempt to make the police more accountable, eight cases were to be heard by the Supreme Court.

The original mandate of the Commission was to investigate and to recommend action to the President, who had created the Commission by

⁶³ *El Salvador's Decade of Terror: Human Rights Since the Assassination of Archbishop Romero* (New Haven, 1991).

⁶⁴ 'Nicaragua: Separating Fact from Fiction: The Work of the Tripartite Commission', *Human Rights Watch/Americas*, vol. 6, no. 13 (October 1994), p. 3.

⁶⁵ *Ibid.*, p. 4.

⁶⁶ Interview with Dr Winston Betanco, Managua, 12 January 1996.

executive order. However, the executive branch did not have sufficient political and moral authority to make its own recommendations binding on the police or the army. Given the policy of reconciliation to which Chamorro had committed herself during the transition, and due to the fact that the Sandinista army had not yet been reorganised, she found it impossible to enforce findings that affected the armed forces adversely. The National Assembly did not have oversight of the Commission, so they could not enforce the recommendations either. The judiciary was no help, and the ‘lack of means within the judicial system’ (also cited by the Commission) was a problem that the executive branch was not in a position to address. As a result, the Commission’s work did not have a significant impact in Nicaragua. Within the National Resistance Party, for example, the Commission’s work was especially disparaged, because it could not undertake a thorough investigation of the 1991 killing of former *contra* leader, Enrique Bermúdez, in which General Humberto Ortega had been implicated in an alleged cover-up. In fairness to the Commission, this crime was not within its jurisdiction. Still, the matter points up the dilemma faced by a government trying to institutionalise democracy in the absence of an authoritative force that could not only document but also bring to justice violators of human rights.

Demilitarisation

A serious obstacle to Nicaragua’s democratic consolidation was the reorganisation of the Sandinista armed forces, and the retirement of its most controversial figure, General Humberto Ortega. The *contras* were unwilling to demobilise so long as Ortega remained head of the army. The reduction of military forces was a part of the Transition Protocol, but an institutional reorganisation did not begin until 1992, when President Chamorro took action to reorganise the command structure of the Nicaraguan military. At that time Chamorro announced the resignation of Sandinista Chief of Police, Rene Vivas, and the forthcoming replacement of Humberto Ortega as head of the military, which was to occur in 1994.⁶⁷ In the event this process was not concluded until February 1995, when Major General Joaquín Cuadra succeeded Humberto Ortega as commander in chief. These decisions were taken under strong pressure from those members of the US Congress who opposed what they saw as Chamorro’s ‘co-governing’ with the FSLN. She also indicated that the Defence Intelligence Directorate (DID) would be removed from the military’s control and supervised in the Office of the Presidency. In October 1993 she replaced its Sandinista director, Lenín Cerna.⁶⁸ These

⁶⁷ ‘Nicaragua: Background and U.S. Policy Concerns’, *CRS Report for Congress* (23 May 1994), pp. 2–3.

⁶⁸ *The New York Times*, 16 July 1995, p. 10.

actions stemmed from: (1) pressure the Chamorro government received from the United States, which threatened during 1993–1995 to cut off foreign aid if substantial reforms were not enacted, (2) the failure of the military to investigate the 1991 death of Jean Paul Genie, (3) the work of the Tripartite Commission, which had criticised the military's human rights record, and (4) pressure from within the National Assembly.⁶⁹

Seizing the opportunity for further reform of the armed forces, the National Assembly voted overwhelmingly to approve a new military code on 23 August 1994. The new code aimed to reduce the armed forces' lack of accountability, and thus its potential for authoritarianism, while subjecting the military to direct civilian control. Although the military still proposes candidates for chief of the armed forces, the president may reject as many candidates as s/he deems necessary. Henceforth, the new commander-in chief will serve a five year term.⁷⁰ Soldiers who commit ordinary crimes are to be tried in civilian courts, and civilians are no longer to be tried by military tribunals. The strategic orientation of the military will be determined by the executive branch of government and in 1994 the name 'Popular Sandinista Army' was dropped in favour of the more nonpartisan 'Army of Nicaragua'.⁷¹ In February 1995 these changes, which established the professional, non-partisan status of the Armed Forces, were incorporated in the Nicaraguan Constitution.

The institutional crisis and the separation of powers

As Nicaragua's political and economic crises worsened in the early 1990s, the executive and legislative branches frequently challenged each other, in attempts to take authoritative control of policy rather than searching for ways to cooperate. Neither institution was able to govern or even to arbitrate with any sense of finality. From August 1993 to July 1995 the two branches engaged in a battle of wills in which the executive governed by decree and the Assembly, itself deeply divided, refused to legislate. In this context of near paralysis the judiciary lacked the objectivity or professionalism to resolve disputes arising between the other two branches. Indeed, the government was eventually driven to request the mediation of the Roman Catholic Church, in the person of Cardinal Obando in order to achieve a resolution of the crisis. To conclude the

⁶⁹ Jean Paul Genie was killed in October 1990 as he drove his car past a motorcade transporting Minister of Defence, Humberto Ortega. Ortega and his bodyguards have denied involvement in the shooting of the seventeen year old. A Nicaraguan military court, claiming insufficient evidence, threw the case out. The Nicaraguan Supreme Court refused to act on an appeal brought by the Genie family. In 1996, the family took the case to the Inter-American Court of Human Rights. The case was still undecided in 1997.

⁷⁰ *Weekly News Update on the Americas* 265 (16 February 1995).

⁷¹ *The New York Times*, 16 July 1995, p. 2.

analysis, however, it is possible to suggest that, in the long run, the solution that was hammered out in the summer of 1995 may give cause for optimism.

A group of centrist legislators began the discussion of constitutional reforms in August 1993 when violence erupted in a series of retaliatory kidnappings.⁷² After almost a year of internal debate the reforms were introduced into the National Assembly on 4 September 1994; by October they had passed the first round of voting. In January 1995 the National Assembly approved the reforms in the second round, as mandated by the 1987 Constitution. At this point the President should have promulgated the reforms, but the Chamorro administration was vehemently opposed to the clear diminution of executive power, implicit and explicit, in the reforms.⁷³ The original 67 amendments to the Constitution contained provisions that prohibited consecutive reelection of the president, imposed controls on corruption and nepotism, and gave the National Assembly the power to approve tax laws, shape budget preparation and execution, and sign agreements with international financing agencies.⁷⁴ When the president refused to enact these Constitutional reforms by officially publishing them, the legislature itself authorised their publication. To affirm the validity of their promulgation the Assembly appointed six new justices to the Supreme Court, which the Court initially refused to accept. Subsequently, a reconstituted Court ruled that while the reforms were legal, only the executive branch of government had the authority to promulgate them, not the legislative branch.⁷⁵ However, the executive resisted the Court's ruling because it opposed the loss of executive power entailed in the reforms.

To break this institutional deadlock the legislature drafted the 'Framework Law for the Implementation of the Constitutional Reforms', a guideline that modified some of the original reforms to address the executive's opposition. When the executive remained extremely cool towards this initiative, Cardinal Obando y Bravo was asked to mediate talks between the executive and legislative branches of the government. Under the Cardinal's influence, in June 1995 President Chamorro signed the 'Framework Law' even though it still contained provisions that she opposed, such as the restrictions which prohibit close relatives of the

⁷² 'Nicaragua: Separating Fact from Fiction: The Work of the Tripartite Commission', *Human Rights Watch/Americas* (October 1994), pp. 3–4.

⁷³ *The CEPAD Report*, May/June 1995, pp. 9–11.

⁷⁴ After months of delay, a compromise was reached that gave the Assembly the right to approve, by negotiation and consensus, future agreements. See the *Christian Science Monitor*, 20 June 1995, p. 6.

⁷⁵ *Contesting Everything, Winning Nothing: The Search for Consensus in Nicaragua, 1990–1995* (Cambridge, Mass., 1995), p. 33.

president from running for the presidency.⁷⁶ On the other hand it restored the executive's authority to sign international financial agreements, giving the Assembly powers of consultation. In January 1996 the National Assembly elected new leadership that was committed to the implementation of the reformed Constitution. Perhaps the best evidence that the two branches had achieved reconciliation was the acceptance by President Chamorro's son-in-law, Antonio Lacayo, of the CSE's ruling that under the reformed Constitution he was ineligible to run for the presidency.⁷⁷

Conclusion

This article has examined three factors associated with foundational pacts in a time of democratic transition: (1) the choices key actors make as they bargain about bargaining, (2) the willingness of these actors to 'underutilise' their power in order to promote trust, and (3) the contingency of these choices on historical and structural conditions. The focus has been on how the specifics of pact-making during transition may affect prospects for consolidation of a stable liberal democracy. Two cases have been compared, showing that the three factors favoured El Salvador more than Nicaragua, although neither country has fully overcome a tendency towards polarisation. In conclusion two themes can be underscored: the interrelation of domestic and international actors, and the importance of demilitarisation and institutional reform to achieving democratic success.

In Nicaragua no single actor played the continuous, proactive role that the UN played in El Salvador. Rather, the UN, the OAS and the Carter group played low key roles, and were concerned primarily with procedural matters rather than with the substance of the bargaining and compliance with agreements. They did not pressure Nicaraguan factions to withhold power. This permitted the USA, which did play a continuous role, to influence both sides, and especially to encourage the opposition, to make decisions that undermined confidence in the overall process. These roles were essentially reversed in the Salvadorean case. ONUSAL played an aggressive role, not only in facilitating negotiations but in working to assure compliance by all parties. The USA worked to complement ONUSAL rather than to undermine it, cutting back dramatically on its once dominant exercise of power. In this regard, perhaps the chief concern was how effectively the left and right would work together after ONUSAL's departure, and whether ARENA would continue to honour the spirit of the accords.

⁷⁶ *Central America Newspak*, vols. 10, 11, p. 10.

⁷⁷ *La Jornada*, 7 July 1996, p. 54, as quoted in *Central America Newspak*, vols. 11, 12, p. 11.

As to demilitarisation, the fact that the *contras* remained armed and mobilised throughout the entire transition period was a grave obstacle to democratic consolidation in Nicaragua. The fact that the Popular Sandinista Army remained at full strength during the elections and was seen as a partisan political force by the opposition also undermined the trust necessary for democratisation. Here, too, the US policy of keeping the *contras* armed as a trump card affected democratising efforts adversely. Not surprisingly, demilitarisation met with constant resistance in El Salvador, but the convergence of UN, USA and domestic political pressure (especially though the Ad Hoc and Truth Commission reports) led to a remarkably thorough demilitarisation, including the abolition of the notorious security forces. We should bear in mind that the Chapultepec Accords called for sweeping judicial reform to accompany the demobilisation of the FMLN. Judicial reform has been slow, but ongoing, since the FMLN laid down its arms and became a legal political party. In Nicaragua the judicial system was not able rise above the institutional crisis, but was itself caught within it.

In the wake of the transition elections the victorious party in both countries held the presidency and legislative majorities. In El Salvador ARENA's control of government has facilitated rapid implementation of reforms the party backed, but has also enabled it to thwart the FMLN's desire for more rapid and complete fulfilment of the remaining provisions of the Peace Accords. However, constitutional reform pursuant to the accords requires two thirds majorities on some important issues, such as the selection of Supreme Court justices, which protects the FMLN and other minority parties. The left has also gained important positions in the legislative leadership. Democratisation of the justice system and the introduction of the PDDH throughout the country to monitor human rights after the departure of ONUSAL is a most promising step. A critical turning point will be passage of the long delayed legislative package reforming the criminal justice system, which had not been approved by the end of 1997. In Nicaragua the governing party had more difficulty carrying out reforms and resolving political conflicts, not the least because of the ambiguity and low credibility of the pacts it forged over time.